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Anti-Terrorism Control Orders: A Human Rights Analysis

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A thesis submitted in partial fulfilment of the requirements of Sheffield Hallam University for the degree of Master of Philosophy.

November 2014

Acknowledgements

To my supervisors, Kevin, Miro and Phil for their guidance, encouragement and understanding; and to my wife, Katie, and my parents, for their love, patience and support.

Abstract

This thesis explores the UK government's use of anti-terrorism control orders under the Prevention of Terrorism Act (PTA) 2005 between March 2005 and December 2011. Control orders, a form of preventive civil order, were used to impose a range of often stringent 'obligations' on individuals who were suspected of involvement in terrorism-related activity but who, for either legal or practical reasons, could not be prosecuted or deported. The study examines the central features of the PTA's statutory scheme and provides a detailed analysis of the control order regime's conformity, in principle and in practice, with the rights enshrined in the European Convention on Human Rights and incorporated into UK law through the Human Rights Act 1998. In addition to critiquing the operation of the regime from a human rights perspective, a consequentialist analysis is employed in order to evaluate the practical efficacy of control orders as a mechanism for 'protecting members of the public from a risk of terrorism'.[1]

Following the change of government in 2010, control orders were replaced by the new, although in many ways similar, Terrorism Prevention and Investigation Measures (TPIMs) under the Terrorism Prevention and Investigation Measures Act 2011. Whether the transition from control orders to TPIMs can, from a human rights and/or security point of view, be deemed a positive development is considered. In addition, the current and prospective future utility of TPIMs as a component of the United Kingdom's legal response to the threat of terrorism is assessed.

[1] Prevention of Terrorism Act 2005, s 1(1).

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List of Abbreviations

ATCSA	Anti-terrorism, Crime and Security Act 2001
CORG	Control Order Review Group
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
CTA 2008	Counter-Terrorism Act 2008
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
ETPIM	Enhanced Terrorism Prevention and Investigation Measures
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights 1966
JCHR	Joint Committee on Human Rights
NGO	Non-Governmental Organisation
PTA	Prevention of Terrorism Act 2005
RIPA	Regulation of Investigatory Powers Act 2000
TA 2000	Terrorism Act 2000
TA 2006	Terrorism Act 2006
TPIM	Terrorism Prevention and Investigation Measures
TPIMA	Terrorism Prevention and Investigation Measures Act 2011
UNSCR	United Nations Security Council Resolution

Note

The law is as stated on the 17th November 2014.

Chapter 1

Introduction

> [W[e must act against [terrorism] with all the powers we have. Of course that might involve measures which restrict civil liberty in a way which may otherwise be repugnant. However, if we go beyond what is necessary to combat terrorism effectively, if we cravenly accept that any Act introduced by the Government and entitled "Prevention of Terrorism Act" must be supported in its entirety without question ... we do not strengthen the fight against terrorism: we weaken it.[1]
>
> (Tony Blair, 1993)

> '[O]n 11 September ... terrorists rewrote their rule book. We therefore need to do the same.'[2]
>
> (Lord Rooker, 2001)

The human rights dimension of democratic states' responses to terrorism comprises some of the most complex and important matters encountered within contemporary legal discourse.[3] Whilst the tension between anti-terrorism law and human rights long predates the cataclysmic events of September 11, 2001,[4] the nature and unprecedented scale of these attacks 'changed the landscape of terrorism forever',[5] and gave rise to 'a new set of security concerns affecting all civilized nations.'[6] Although many countries had experienced terrorism

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[1] HC Deb 10 March 1993, vol 220, col 976 (Tony Blair). This comment was made by Blair, who was at the time Shadow Home Secretary, during the debates on the draft Prevention of Terrorism (Temporary Provisions) Act 1989 (Continuance Order) 1993.

[2] HL Deb 27 November, vol 629, col 143. Following the attacks of 7 July 2005 in the UK, it was similarly stated by Prime Minister Tony Blair, 'let no-one be in any doubt ... the rules of the game have changed': 'Prime Minister's Press Conference' (London, 5 August 2005) <http://webarchive.national archives.gov.uk/20060715135117/number10.gov.uk/page8041> accessed 13 October 2014.

[3] See Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604; Helena Kennedy, *Just Law* (Vintage 2005) 31-66; Lord Falconer, 'Human Rights and Terrorism' (Royal United Services Institute, London, 14 February 2007) <www.rusi.org/events/ref:E45740BC85792E/info:public/infoID:E45D3093433F92/#.VGI018IIQ5g> accessed 1 October 2014.

[4] As Leigh and Masterman note, 'it is an easily overlooked point that, for the United Kingdom, human rights concerns over anti-terrorist powers did not begin with the response to the attacks of 9/11': Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing 2008) 201.

[5] Lord Goldsmith (Attorney General, 2001-2007), 'UK Terrorism Legislation in an International Context' (RUSI International Homeland Security Conference, London, 10 May 2006) <www.rusi.org/events/www.rusi.org/events/ref:E446B4C0722082/info:public/infoID:E446B4DD1CCDEC/#.VGL9VcIIQ5g> accessed 1 October 2014.

[6] Yonah Alexander (ed), *Combating Terrorism: Strategies of Ten Countries* (University of Michigan Press 2002) 2. As Chomsky states, 'the horrifying atrocities of September 11 [were] something quite new in world affairs: Noam Chomsky, *9-11* (Seven Stories Press 2001) 11.

prior to 9/11, since the atrocities of that day, the prevention of terrorist violence has become a critical challenge for domestic governments[7] and for the international community as a whole.[8]

I. UK Anti-Terrorism Legislation

The United Kingdom has a long history of combating a threat of terrorism originating from a variety of different groups and sources.[9] Over the course of the preceding century, an array of legal measures were introduced to address threats both at home, particularly those spawned by 'the Troubles' in Northern Ireland,[10] and also abroad, in Britain's former colonial empire.[11] In consequence, as Walker observes, 'special laws against terrorism have provided a constant feature of political and legal life within the UK for many years.'[12]

The UK's core anti-terrorism statute,[13] the Terrorism Act 2000, section 1 of which contains the legal definition of 'terrorism',[14] came into force on 19 February 2001.[15] Despite it being

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[7] The state's duty to protect its citizenry from the threat of terrorism is examined in chapter 2 of this thesis (pp 18-23).

[8] See International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) v; Kent Roach and others, 'Introduction' in Victor V Ramraj and others, *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 1; Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (3rd edn, Routledge 2011) 1.

[9] See Andrew Staniforth, *The Routledge Companion to Counter-Terrorism* (Routledge 2013).

[10] See Laura K Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom: 1922-2000* (Irish Academic Press 2001); Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press 1989); David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate 2007) 69-101. See chapter 2 (pp 41-45) of this thesis.

[11] See AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention of Human Rights* (OUP 2001); Bonner, *Executive Measures* (n 10) 135-200.

[12] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd edn, OUP 2009) 23.

[13] As Walker notes, the TA 2000, 'remains the [UK's] foremost code': ibid 24.

[14] TA 2000, s 1, as amended by TA 2006, s 34, and CTA 2008, s 75(1) provides:

> (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,

asserted at the time that this Act would provide the powers necessary to deal with terrorism 'for the foreseeable future',[16] the advent of 9/11 - involving coordinated suicide attacks by Al-Qaeda-affiliated Islamist terrorists[17] which resulted in the deaths of 2,973 people[18] - provoked the Government to hastily re-evaluate its claim.[19] The immediate aftermath of September 11 witnessed the UK align itself with the US in a 'war on terror',[20] the first legislative manifestation of which was the controversial Anti-terrorism, Crime and Security

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(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.

Whilst it is acknowledged that this definition is 'striking ... in its breadth' (*R v F* [2007] EWCA Crim 243 [27] (Sir Igor Judge)), and that formulating a satisfactory legal definition constitutes an important, yet notoriously difficult, task, detailed discussion of the legal definition of terrorism falls outside the scope of this thesis. For further discussion of the TA 2000, s 1 definition see: Lord Carlile, *The Definition of Terrorism* (Cm 7052, 2005); David Anderson, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014) paras 4.1-4.23, 10.1-10.70; Clive Walker, *Terrorism and the Law* (OUP 2011) 34-47. On the difficulties associated with defining terrorism for political and legal purposes, see: Alex P Schmid and Albert J Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, & Literature* (Transaction Publishers 2006) 1-38; Ben Saul, *Defining Terrorism in International Law* (OUP 2006).

[15] The TA 2000 received the Royal Assent on 20 July 2000, and came into force on 19 February 2001.

[16] HC Deb 15 March 2000, vol 346, col 363 (Charles Clarke).

[17] On the morning of September 11, 2001, four commercial airliners were hijacked by 19 terrorists. Two of the planes were flown into the Twin Towers of the World Trade Center in New York. The third plane was flown into the Pentagon building in Virginia. The fourth, United Airlines Flight 93, which was believed to be on route to the White House, crashed in an empty field in Shanksville, Pennsylvania. See National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Norton 2004).

[18] ibid 552 (footnote 188). This figure excludes terrorist deaths. 67 of those killed were British.

[19] The Explanatory Notes to the Anti-terrorism, Crime and Security Act 2001, for example, stated that the purpose of the Act was to 'build on legislation in a number of areas to ensure that the Government, in light of the new situation arising from the September 11 terrorist attacks ... have the necessary powers to counter the threat to the UK' (para 3).

[20] See HC Deb 4 October 2001, vol 372, cols 673-675 (Tony Blair, Prime Minister). In his statement to the nation on 11 September 2001, Blair stated, 'we ... here in Britain stand shoulder to shoulder with our American friends in this hour of tragedy and we like them will not rest until this evil is driven from our world': Tony Blair, 'Statement to the Nation' (London, September 11 2001) <http://news.bbc.co.uk/1/hi/uk_politics/1538551.stm> accessed 1 October 2014.

Act 2001,[21] Part 4 of which permitted the indefinite detention without trial of suspected international terrorists.[22] Although Blair's Labour government[23] was initially afforded substantial latitude due to the perceived necessity of responding to the 'new'[24] and 'more lethal'[25] threat of international terrorism, the draconian character of this legislation led to the questioning of the veracity of the UK's commitment to the protection of human rights.[26] Indeed, as is discussed in chapter 3,[27] it was ultimately the House of Lords' ruling that the Part 4 detention scheme was incompatible with Articles 5 and 14 of the ECHR in the landmark case of *A and Others* v *Secretary of State for the Home Department*[28] that precipitated the introduction of the Prevention of Terrorism Act 2005.

Whilst the central foci of this thesis are the system of control orders contained in the PTA, which operated from March 2005 until December 2011 (see chapters 3 and 4), and the TPIMs regime, which was introduced by the Coalition government under the Terrorism

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[21] See chapter 3 (pp 46-48) of this thesis.
[22] ATCSA, ss 21-23.
[23] Tony Blair was Prime Minister of the 'New Labour' government from 2 May 1997 to 27 June 2007, when he was replaced by Gordon Brown, who was Prime Minister from 27 June 2007 to 11 May 2010.
[24] Tony Blair, 'Speech to Sedgefield Constituency' (Sedgefield, 5 March 2004) <www.theguardian.com/politics/2004/mar/05/iraq.iraq> accessed 1 October 2014; Gordon Brown, 'Foreword' to Home Office, *Pursue, Prevent, Protect, Prepare; The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) 4; Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (Cm 6147, 2004) para 5. See also Johnny Burnett and Dave White, 'Embedded Expertise and the New Terrorism' (2005) 1(4) Journal for Crime, Conflict and the Media 1; Peter Neumann, *Old and New Terrorism* (Polity Press 2009); Steven Greer, 'Human Rights and the Struggle Against Terrorism in the United Kingdom' (2008) 2 European Human Rights Law Review 163. Whether post-9/11 terrorism warrants the 'new' appellation has been vigorously contested by some, see: Isabelle Duyvesteyn, 'How New is the New Terrorism?' (2004) 27 Studies in Conflict and Terrorism 439; Alexander Spencer, 'Questioning the Concept of the "New Terrorism"' (2006) 8 Peace, Conflict and Development 1; Richard Ashby Wilson ,'Human Rights in the 'War on Terror' in Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press 2005) 31.
[25] Wilkinson (n 8) 184. As Sir David Omand explains, 'the characteristics of jihadist terrorism with its vaulting ambitions, strident ideology and disregard for civilian casualties – indeed for all human life, with adherents prepared to give their lives in their attacks – represented very new challenges for Parliament and public, government and law enforcement alike: Sir David Omand, 'Foreword' in Staniforth (n 9) xxi. See also: Bruce Hoffman, *Inside Terrorism* (Columbia University Press 2006) 88; Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' [2004] Criminal Law Review 311, 314.
[26] See, for example, JCHR, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4* (2003-04, HL 38, HC 381); Amnesty International, *Justice Perverted Under the Anti-terrorism, Crime and Security Act 2001* (2003); Council of Europe, Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom 4-12th November 2004* (CommDH, 2005) paras 5-8.
[27] See pp 47-50.
[28] [2004] UKHL 56. See pp 47-48 of this thesis.

Prevention and Investigation Measures Act 2011 (see chapter 5), there have been a number of other significant additions to the UK's inventory of counter-terrorism laws since 2001. Following the terrorist attacks of 7 July 2005 - which involved coordinated suicide bombings carried out by four 'home-grown jihadis'[29] on the London transport network[30] - the Terrorism Act 2006 was enacted in order to create offences 'to penalize conduct which [fell] outside existing statutes and the common law.'[31] The final major piece of anti-terrorism legislation produced by New Labour's 'hyperactive law making'[32] was the Counter-Terrorism Act 2008, which extended police powers to gather and share information, including documents, fingerprints and DNA samples,[33] and also provided for the post-charge questioning of terrorist suspects.[34]

i. Preventive Counter-Terrorism Measures

Whilst the 'official mantra'[35] proclaims that prosecution is the government's preferred approach for dealing with terrorist suspects,[36] as discussed in chapter 2, preventive[37]

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[29] Clive Walker and Javaid Rehman, '"Prevent" Responses to Jihadi Extremism' in Kent Roach and others, 'Introduction' in Victor V Ramraj and others, *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 245. The suicide bombers, who were killed in the attack, were Mohammed Siddeque Khan, Hasib Hussein, Shazad Tanweer, who were British nationals of Pakistani origin, and Jermaine Lindsay, who was a British national of West Indian origin. See Intelligence and Security Committee, *Report into the London Terrorist Attacks on July 7 2005* (Cm 6785, 2006); Home Office, *Report of the Official Account of the Bombings in London on 7 July 2005* (HC 2005-06, 1097); Intelligence and Security Committee, *Could 7/7 Have Been Prevented?: Review of the Intelligence on London Terrorist Attacks on July 7 2005* (Cm 7617, 2009).

[30] The terrorists detonated home-made organic-peroxide-based explosives, which had been packed into rucksacks, on the Circle and Piccadilly lines of the London Underground, and on the upper deck of a London bus in Tavistock Square. The attacks resulted in the deaths of 52 people, with hundreds more being injured.

[31] Alun Jones QC, Rupert Bowers and Hugo Lodge, *Blackstone's Guide to the Terrorism Act 2006* (OUP, 2006) 1. See chapter 2 (p 31) of this thesis.

[32] Chris Huhne, the Liberal Democrat Shadow Home Secretary, stated in a letter to the Labour Justice Secretary, Jack Straw, that 'the legacy of Labour is hyperactive law making that has spread confusion among police officers, judges and every other [affected] professional': BBC News, 'Jack Straw Rejects Calls to Repeal 'Trivial Laws'' (22 January 2010) <http://news.bbc.co.uk/1/hi/uk_politics/8473763.stm> accessed 1 October 2014.

[33] CTA 2008, Part 1. See Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (n 12) 32.

[34] CTA 2008, Part 2. Other notable anti-terrorism statutes passed since 2001 include the Terrorism (Northern Ireland) Act 2006, the Justice and Security (Northern Ireland) Act 2007, and the Terrorism Asset-Freezing etc Act 2010.

[35] David Bonner, 'Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience' (2013) 19(1) European Public Law 97, 98.

[36] See chapter 2 (pp 30-34) of this thesis.

executive measures have long been a feature of the UK's 'variable mixed economy of responses'[38] to the threat of terrorism.[39] Belonging to this lineage of 'preventative'[40] measures, control orders were a form of 'civil'[41] order which were intended to protect members of the public from a risk of terrorism by imposing a range of restrictive 'obligations'[42] on individuals who were suspected of involvement in terrorism-related activity.

In the context of an operative liberal democracy, it may legitimately be contended that 'any proposal for civil orders restricting liberty can only be justified as a specific ... response to a particular situation that cannot be addressed in any other appropriate way.'[43] Pursuant to this, chapter 2 of this thesis examines the rationale for the use of control orders, and considers the validity of the contention that preventive measures constitute a 'necessary alternative'[44] for dealing with a specific class of terrorist suspects in respect of whom the government is unable to pursue its 'first option'[45] of prosecution.[46]

Within the parameters established by law, whether a particular measure, preventive or otherwise, can be regarded as justified substantially depends upon the nature of the problem

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[37] In this context, the terms 'preventive' and 'preventative' may be used interchangeably. Unless appearing in a quotation, the term 'preventive' is used for the purposes of this thesis.
[38] Bonner (n 35) 97.
[39] See chapter 2 (pp 41-45) of this thesis. For discussion of other states' use of 'preventive mechanisms' - including 'control orders' and other similar measures - for combating terrorism post-9/11, see International Commission of Jurists, *Assessing Damage, Urging Action* (n 8) 91-122; David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) para 2.14-2.19; Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer 2014).
[40] Home Office, *Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (Cm 7797, 2010) para 2. It was explained by Charles Clarke at the time of the Prevention of Terrorism Bill's introduction in the House of Commons that the purpose of the orders was 'to *prevent* an individual from continuing to carry out terrorist-related activities': HC Deb 22 February 2005, vol 431, col 153. As Walker notes, TPIMs also 'remain firmly situated in the genus' of 'preventative' executive interventions: Clive Walker, 'Terrorist on Trial: An Open or Closed Case?' in David Cole, Federico Fabbrini and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing 2013) 211. See also Lucia Zedner, 'Preventive Justice or Pre-punishment? The Case of Control Orders ' (2007) 60 Current Legal Problems 174.
[41] On the 'civil' designation of control orders, see chapter 4 (pp 145-147) of this thesis.
[42] PTA, s 1(4). See chapter 3 (pp 56-58) of this thesis.
[43] Roger Smith, 'Global Threat?' (2005) 149(5) Solicitors Journal 128, 128.
[44] Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 40.
[45] HC Deb 22 February 2005, vol 431, col 151 (Charles Clarke).
[46] See chapter 2 (pp 33-41) of this thesis.

to which it is the intended solution. Indeed, as discussed in chapters 3 and 4 of this thesis, the issue of 'proportionality' constitutes a crucial determinate of the legality of a state's counter-terrorism activities. Consequently, for a state's response to terrorism to be deemed proportionate, it must be seen to embody an apposite 'balance' between protecting individual rights and liberties and safeguarding security.[47] The thesis's aim of assessing whether control orders were, and TPIMs are, an 'effective' and 'proportionate' means of protecting the public, thus requires consideration to be given to the type of terrorist suspect, and the nature of the terrorism-related activity, these measures are used to 'control'.[48]

II. Thesis Aims and Objectives

The principal aims and objectives of this thesis are:

- To conduct a detailed legal analysis of the Prevention of Terrorism Act 2005 and examine the UK government's use of control orders between March 2005 and December 2011.

- To undertake a human rights audit of the PTA and assess the control order regime's conformity, in principle and in practice, with the rights enshrined in the European Convention on Human Rights and 'incorporated' into UK law through the Human Rights Act 1998.[49]

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[47] The contention that, in countering terrorism, it is necessary for states to balance 'liberty' and 'security' is discussed is chapter 2 (pp 23-29).
[48] See chapter 6 (pp 188-190) of this thesis.
[49] The HRA, which came into force on 2 October 2000, gives 'further effect' to certain of the rights and freedoms guaranteed under the ECHR. The ECHR rights 'incorporated' into UK law by the Act are Articles 2 to 12 and 14 of the Convention; Articles 1 to 3 of the First Protocol; and Article 1 of the Thirteenth Protocol (HRA, s 1(1), sch 1). For discussion of the background to, and scheme of rights protection under, the HRA, see: Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997); Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (Longman 2000) 1-59; Steve Foster, *Human Rights and Civil Liberties* (3rd edn, Longman 2011) 116-179; John Wadham and others, *Blackstone's Guide to the Human Rights Act 1998* (6th edn, OUP 2011)

- To utilise a consequentialist analysis in order to evaluate the effectiveness of control orders as mechanism for 'protecting members of the public from a risk of terrorism'.[50]

- To critically reflect upon the lessons that can be gleaned from the operation of the control order scheme, and apply any pertinent conclusions to an evaluation of the current and prospective future utility of TPIMs as a component of the UK's legal response to the threat of terrorism.

III. Research Methodology

The study of terrorism, and of states' responses to the threat of terrorist violence, represents a relatively new academic discipline.[51] The comparative novelty of the discipline manifests itself in a number of ways which can be considered significant from a research perspective. Firstly, there is the vexed, and, as yet unresolved, problem of formulating a definition of 'terrorism' capable of attracting international consensus. Second, as Wilkinson observes, 'there is no universally accepted general social scientific theory of terrorism, or of counter-terrorism.'[52] Furthermore, the dramatic increase in interest in issues relating to terrorism following the attacks of September 11, 2001, has meant that the field of study has been flooded with contributions from scholars from a diverse range of disciplines. This, in turn, has meant that not only has there been an exponential growth in the literature on the topic,[53] but also that the study of terrorism has evolved a truly multidisciplinary character.[54] Indeed, as

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[50] PTA, s 1(1).

[51] Indeed, Lacquer suggests that, 'the discipline ... goes back no further than the early 1970s': Walter Lacquer, *No End to War: Terrorism in the Twenty-First Century* (Continuum 2003) 138. See also Schmid and Jongman (n 14) 177.

[52] Paul Wilkinson, 'Introduction' in Paul Wilkinson (ed), *Homeland Security in the UK: Future Preparedness for Terrorist Attack Since 9/11* (Routledge 2007) 8.

[53] According to research by Silke, between September 2001 and June 2008, 2,281 non-fiction books on terrorism were published, in comparison to 1,310 in total prior to September 2001: Andrew Silke, 'Contemporary Terrorism Studies: Issues in Research' in Richard Jackson, Marie Breen-Smyth and Jeroen Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (Routledge 2009) 34. See also Richard Jackson, 'The Study of Terrorism after 11 September 2001: Problems, Challenges and Future Developments' (2009) 7 Political Studies Review 171, 171; Frank Furedi, *Invitation to Terror: The Expanding Empire of the Unknown* (Continuum 2007) xix.

[54] Silke, for example, identifies that important contributions have come from 'researchers from fields such as political science, criminology, psychology, sociology, history, law, military and communication sciences'. 'Preface' in Andrew Silke (ed) *Terrorists, Victims and Society: Psychological Perspectives*

Roach observes, 'one of the great challenges of studying counter-terrorism laws and policies is that they cross traditional boundaries within academe and even within law.'[55]

Whilst the profusion of publications in recent years has resulted in a vast literature on both terrorists and counter-terrorism,[56] it is nonetheless the case that, in some respects, terrorism remains 'an unusually difficult subject for academic research.'[57] Aside from the clandestine nature of terrorism itself, and the consequent challenges associated with obtaining reliable, empirically verifiable information about terrorists and their activities, the field of counter-terrorism is one which is also generally characterised by secrecy. Due to this, much of the information germane to the analysis of the current terrorist threat, and governmental responses to contemporary sub-state terrorism, is classified, and therefore not accessible to academic researchers.[58] Indeed, secrecy, and the extensive use of closed evidence derived from intelligence, were prominent features of the control order regime from its inception.[59] However, although a substantial amount of the material concerning the controlees is contained in closed sources, there remains a sufficient range of open source documents to permit a detailed assessment of the operation of the PTA and the UK government's use of control orders.

The inherently political nature of terrorism, and of state responses to it, inevitably means that this is an area where dispassionate and even-handed analysis is sometimes lacking, and the reliability of sources occasionally questionable. Indeed, as Schmid highlights in his 2011

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on Terrorism and its Consequences (Wiley-Blackwell 2003) xvi. See also Schmid and Jongman, (n 14) 177-178.

[55] Roach goes on to state that, 'to begin to understand the global response to 9/11, it is necessary to understand how international law, constitutional law, military and war law, criminal law and procedure, evidence law, immigration law, and various forms of administrative law ... have been used to combat terrorism': Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 6.

[56] The 'Bibliography of Terrorism' compiled by Duncan and Schmid in 2011, for example, contains details of 4,600 publications. Gillian Duncan and Alex P Schmid, 'Bibliography of Terrorism' in Alex P Schmid (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011).

[57] Ariel Merari, 'Academic Research and Government Policy on Terrorism', in Clark McCauley (ed), *Terrorism Research and Public Policy* (Frank Cass 1991) 89.

[58] See ibid 88-89; Jeroen Gunning, 'The Case for Critical Terrorism Studies?' (2007) 42(3) *Government and Opposition* 363, 369.

[59] See chapter 4 of this thesis.

review of the literature, for researchers working with open sources, 'disinformation and distortions from both the terrorists and their opponents are an additional problem'.[60] When using and assessing material on this emotive and politically loaded topic, it is therefore necessary to be conscious of its provenance, and cognizant of the potential for subjectivity and partisan agendas to colour reporting, discourse and commentary. Thus, as Silke counsels, 'in the interests of arriving at correct and reliable insights ... a degree of healthy reservation is a good trait in any attempt to read research on terrorism and terrorists.'[61]

In terms of methodology, this thesis uses doctrinal legal analysis.[62] In conducting this study, use is made of a wide variety of sources, including domestic legislation and other relevant legal instruments, case law emanating from the UK courts and the Special Immigration Appeals Commission, pertinent European Court of Human Rights' jurisprudence, parliamentary debates, official reports and review documents. This is accompanied by reference to the burgeoning academic literature on terrorism, reports published by NGOs, internet sources, news reports and other print media.

Since its enactment, the 2005 Act has become the subject of a substantial body of academic commentary. The most thorough and frequently referenced works on the subject are those produced by Bonner[63] and Walker,[64] both published in 2007. In addition, a number of insightful articles on control orders and the extensive body of case law to which they have

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[60] Alex P Schmid, 'The Literature on Terrorism' in Schmid, *Handbook of Terrorism Research* (n 56) 460.

[61] Andre Silke, 'An Introduction to Terrorism Research' in Andrew Silke (ed), *Research on Terrorism: Trends, Achievements and Failures* (Frank Cass 2004) 19. A similarly critical approach is advocated by Ranstrop in his review of terrorism research post-9/11: Magnus Ranstrop, 'Mapping Terrorism Studies After 9/11: An Academic Field of Old Problems and New Prospects' in Richard Jackson, Marie-Breen Smyth and Jeroen Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (Routledge 2009).

[62] Doctrinal legal research is often also referred to as the 'black-letter' or 'expository' approach. See Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122(Oct) *Law Quarterly Review* 632, 632-635; Mike McConville and Wing H Chui, 'Introduction and Overview in Mike McConville and Wing H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 3-4; Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 18-32.

[63] Bonner, *Executive Measures* (n 10).

[64] Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395. See also *Blackstone's Guide to the Anti-Terrorism Legislation* (n 12); *Terrorism and the Law* (n 14) 301-340.

given rise have been published, including those by Bates,[65] Fenwick,[66] Foster,[67] McGoldrick,[68] Middleton,[69] and Zedner.[70]

This study therefore seeks to build upon the existing academic corpus in order to produce a detailed legal analysis of the operation of the control order regime from its introduction in March 2005, to the repeal of the PTA in December 2011.[71] Using primary and secondary sources, the PTA's legislative scheme is examined and explained, and the operation of the control order regime is analysed from a human rights perspective. In conducting a human rights audit[72] of control orders, the applicable ECHR rights are elucidated, and the regime's compliance, in principle and in practice, with the relevant principles and standards is critically assessed.[73] The effectiveness of control orders as a means of restricting or preventing involvement in terrorism-related activity, and thereby enhancing national security, is then evaluated, and a number of conclusions are formed regarding the use of preventive legislative measures as a response to the contemporary terrorist threat.

IV. Assessing Effectiveness: A Consequentialist Analysis

Central to assessing whether a particular policy or measure can be deemed appropriate for countering the threat that terrorism poses to a state's national security is the issue of

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[65] Ed Bates, 'Anti-terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29(1) Legal Studies 99.
[66] See, amongst others, Helen Fenwick 'Proactive Counter-terrorist Strategies in Conflict with Human Rights' (2008) 22(3) International Review of Law, Computers and Technology 259; 'Recalibrating ECHR Rights and the Role of the Human Rights Act post 9/11: Reasserting International Human Rights Norms in the "War on Terror"? (2010) 63 Current Legal Problems 153.
[67] Steve Foster, 'The Fight Against Terrorism, Detention Without Trial and Human Rights' (2009) 14(1) Coventry Law Journal 4; 'Control Orders, Human Rights and the House of Lords' (2007) 12(2) Coventry Law Journal 27.
[68] Dominic McGoldrick, 'Security Detention: United Kingdom Practice' (2008) 40(3) Case Western Reserve Journal of International Law 507.
[69] See, amongst others: Ben Middleton, 'Control Orders: Out of Control? (2007) 173 Criminal Lawyer 3; Ben Middleton, 'Control Order Hearings: Compliance with Article 6 ECHR' (2009) 73(1) Journal of Criminal Law 21; 'Drawing a (Not-so-bright) Line Under Control Order Liberty Challenges' (2010) 74(5) Journal of Criminal Law 405.
[70] See Zedner, 'Preventive Justice or Pre-punishment?' (n 40).
[71] The PTA was repealed by s 1 of TPIMA. See chapter 5 (p 162) of this thesis.
[72] Jonathan H Marks, '9/11 + 3/11 + 7/7 =? What Counts in Counterterrorism?' 37 Columbia Human Rights Law Review 559, 612-613.
[73] See Chapter 4: The Control Order Regime and Human Rights.

effectiveness. Indeed, as the Privy Counsellors Review Committee asserted in their 2004 review of the ATCSA:

> Extensions to the powers of the state in securing the safety of its people should always be tested rigorously for both necessity (which encompasses proportionality) and *effectiveness*.[74]

However, despite the cogency of the proposition that effectiveness is crucial to justifying the existence of counter-terror measures,[75] which are often coercive and rights-abridging in nature, there are a number of inherent difficulties in determining whether such measures can be adjudged effective.

Logically, the first step in appraising any measure's effectiveness lies in identifying the purpose for which it was introduced. The primary rationale for the introduction of most anti-terrorism laws is that they are considered necessary by the government in order to improve the state's ability to protect itself against terrorist violence and to deter engagement in associated activities.[76] The fundamental aim of the UK government's counter-terrorism strategy, is, accordingly, 'to reduce the risk from international terrorism, so that people can go about their daily lives freely and with confidence.'[77] Pursuant to this objective, the PTA was enacted:

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[74] Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (HC 2003-04, 100) para 89 (emphasis added).

[75] Harcourt, for example, posits that in relation to security measures, the issue of effectiveness should be regarded as a '*threshold* question', arguing that 'if measures are not credibly effective, there is nothing further to discuss': Bernard Harcourt, 'Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counter-terrorist Measure and Does it Violate the Right to be Free From Discrimination?' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 76.

[76] Berthold Meyer, 'Fighting Terrorism by Tightening Laws: A Tightrope Walk Between Protecting Security and Losing Liberty', in Samuel Peleg and Wilhelm Kempf (eds), *Fighting Terrorism in the Liberal State: An Integrated Model of Research,* NATO Security Through Science Series, E: Human and Societal Dynamics - Vol.9: Intelligence and International Law (IOS Press, 2006) 88.

[77] Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) para 1.2. See also Home Office, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, 2006) para 5; Home Office, *Pursue, Prevent, Protect, Prepare; The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) 8; Home Office, *Pursue, Prevent, Protect, Prepare; The United Kingdom's Strategy for Countering International Terrorism: Annual Report* (Cm 7833, 2010) 4.

> [T]o provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity.[78]

Whilst the Act's *raison d'être* is therefore clear, the question of whether control orders, or any other such counter-terrorism measures, can be said to be effective in fulfilling their purpose, is an issue that is fraught with complexity.[79]

Within the literature, a number of eminent commentators have propounded various methods for evaluating the efficacy of counter-terror measures. Walker, in examining the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974-1989, suggests that one, admittedly crude, method for determining effectiveness, 'would be to search for any increase or decrease in terrorist activity.'[80] This quantitative approach is largely consonant with that proposed by Alexander, who, however, recommends that the success of states' counter-terrorism policies be measured against a more extensive range of criteria, comprising:

- reduction in the number of terrorist incidents;
- reduction in the number of casualties in terrorist incidents;
- reduction in the monetary cost inflicted by terrorist incidents;
- reduction in the size of terrorist groups operating in a country;
- number of terrorist killed, captured, and/or convicted;
- protection of national infrastructure.[81]

In addition, Alexander submits that the assessment should involve establishing a measure's impact in relation to the 'preservation of basic national structures and policies (e.g. the rule of law, democracy, and civil rights and liberties).'[82] This relatively expansive criterion stresses that measures should not only be assessed with reference to numerical indicators,

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[78] Long title to the PTA.

[79] On the difficulties associated with measuring the effectiveness of counter-terrorism measures, see: Daniel Byman, 'Measuring the War on Terrorism: A First Appraisal' (2003) 102(668) Current History 411; C Lum, LW Kennedy and A Sherley, 'Are Counter-Terrorism Strategies Effective? The Results of the Campbell Systematic Review on Counter-Terrorism Evaluation Research' (2006) 2 Journal of Experimental Criminology 489; Raphael Perl, *Combating Terrorism: The Challenge of Measuring Effectiveness*, CRS Report for Congress (2007); Alexander Spencer, 'The Problems of Evaluating Counter-Terrorism' (2006) 12 UNISCI Discussion Paper 179 *<www.ucm.es/info/unisci/revistas/UNISCI Spencer12.pdf>* accessed 30 December 2012.

[80] Clive Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) 244.

[81] Yonah Alexander, 'Introduction' in Yonah Alexander (ed), '*Counterterrorism Strategies: Successes and Failures of Six Nations* (Potomac Books 2006) 7-8.

[82] ibid.

but that it is also crucial that qualitative factors are taken into account. The 'conservative'[83] and 'effectiveness' tests advanced by Ignatieff[84] are also emphatically qualitative in orientation.[85] Ignatieff urges that the effectiveness of counter-terror measures should be gauged not only in terms of short-term gains in security, but also on the basis of their long-term political implications, and whether they damage a nation's institutional inheritance by, for example, necessitating the indefinite suspension of *habeas corpus.*[86]

Drawing upon the approaches advocated by Walker, Alexander and Ignatieff, it is submitted that an assessment of effectiveness should principally be premised upon a consequentialist inquiry into whether a given counter-terror measure produces a diminution in the terrorist threat and correlative increase in national security. Whether terrorist activity has escalated or declined following a particular measure's introduction may, to some extent, be established by reference to open source statistical data relating to the frequency and scale[87] of terrorist violence encountered by the relevant nation. However, for a number of reasons this information, in isolation, is regarded as providing an unacceptably incomplete picture in relation to assessing the efficacy of counter-terror measures.[88]

Firstly, whilst failures in the field of counter-terrorism are highly visible, as starkly manifest by catastrophic attacks such as 9/11, Madrid,[89] and the London 7/7 bombings, successes are frequently much less evident. Indeed, unless details of a thwarted plot are publicised, which they are often not, for fear of endangering sources or prejudicing ongoing operations, examples of effectiveness remain known only to those directly involved in front-line

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[83] Which involves asking the question, 'are departures from existing due process standards really necessary?': Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press 2004) 24.

[84] Ignatieff also suggests that, coercive measures should be subjected to tests of 'dignity' and 'last resort', the former involving the question 'do [the measures] violate individual dignity?', whilst the latter requires analysis of whether 'less coercive measures have been tried and failed': ibid 23-24.

[85] ibid 24.

[86] ibid. Central to this test is whether a given anti-terror measure will strengthen or weaken political support for the state undertaking them.

[87] 'Scale' being determined by reference to the number of deaths and injuries, and the quantum of economic loss, caused by an attack.

[88] Alexander Spencer, 'The Problems of Evaluating Counter-Terrorism' (2006) 12 UNISCI Discussion Paper 179 <*www.ucm.es/info/unisci/revistas/UNISCISpencer12.pdf*> accessed 30 December 2011.

[89] 11 March 2004.

operations.[90] Second, counter-terror measures are often intended to have a deterrent effect, whereby the sanction attached to the proscribed act operates as sufficient disincentive to deter the prospective terrorist from committing the contemplated offence.[91] Thus, the aim of much anti-terrorism law is to produce inaction, which, unlike action, is not readily amenable to empirical measurement. By extension, it is also clearly difficult to attribute deterrence resulting in inaction to one particular anti-terror measure rather than another, or to the regular criminal law, with which anti-terrorism law overlaps substantially in certain areas, or, for that matter, to other exogenous factors.[92]

The impact that a specific measure has upon the citizenry's sense of security, fear levels regarding the threat of terrorism,[93] public support for the government responsible for its introduction and implementation,[94] the measure's impact on human rights and civil liberties, along with any collateral consequences, such as the potentially radicalizing effect of certain measures, all constitute issues which are crucial to a holistic evaluation of effectiveness. None of these factors, however, are susceptible to easy or precise measurement.

In relation to control orders, the difficulty of assessing their effectiveness is further compounded by the fact that they were preventive in nature, being designed to diminish an

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[90] See the comments of Dame Eliza Manningham-Buller, Director General of the UK Security Service, 'Global terrorism: are we meeting the challenge?' (James Smart Lecture at City of London Police Headquarters, 16 October 2003) <www.mi5.gov.uk/home/about-us/who-we-are/staff-and-management/director-general/speeches-by-the-director-general.html> accessed 5 January 2012. See also C Lum, LW Kennedy and A Sherley, 'Are Counter-Terrorism Strategies Effective? The Results of the Campbell Systematic Review on Counter-Terrorism Evaluation Research' (2006) 2 Journal of Experimental Criminology 489, 511.

[91] For discussion of the concept of deterrence see Andrew Ashworth, *Principles of Criminal Law* (7th edn, OUP 2011) 17.

[92] See Andrew Silke, 'The Psychology of Counter-terrorism: Critical Issues and Challenges' in Andrew Silke (ed), *The Psychology of Counter-Terrorism* (Routledge 2011) 11; Eric van Um and Daniela Pisoiu, 'Effective Counterterrorism: What Have We Learned So Far?' Economics of Security Working Paper 25 (2011) 12 <www.diw.de/documents/publikationen/73/diw_01.c.386651.de/diweconsec0055.pdf> accessed 5 January 2012.

[93] See Alexander Spencer, 'The Problems of Evaluating Counter-Terrorism' (2006) 12 UNISCI Discussion Paper 179, 188-196 <*www.ucm.es/info/unisci/revistas/UNISCISpencer12.pdf*> accessed 30 December 2011.

[94] Teun van Dongen, for instance, describes public support, both domestic and international, as the '*sine qua non* of success' in relation to counterterrorism: Teun van Dongen, 'Breaking it Down: An Alternative Approach to Measuring Effectiveness in Counterterrorism' Economics of Security Working Paper 23 (2009), 6 <www.diw.de/documents/publikationen/73/diw_01.c.354161.de/diw_econsec0023.pdf> accessed 5 December 2011. Political support is also a key component of Igantieff's 'effectiveness test': Ignatieff (n 83) 24.

individual's ability to engage in terrorism-related activity. Indeed, as underscored by the Home Office in its 2010 *Memorandum to the Home Affairs Committee*:

> The key test of the effectiveness of the 2005 Act is whether control orders prevent or restrict controlled individuals from involvement in terrorism-related activity.[95]

Establishing the effectiveness of prophylactic measures such as control orders is therefore especially difficult, as it requires proof of an omission. In addition, there is also an unavoidably speculative element involved in assessing the effect of preventive measures as it is clearly impossible to predict with any degree of exactitude what type of terrorism-related activity the controlled individual may have engaged in had they not been subject to a control order.

Despite these challenges, and mindful that a degree of controversy attaches to such an undertaking,[96] this thesis seeks to assess the effectiveness of control orders as a means of 'protecting members of the public from a risk of terrorism.'[97] Utilising a primarily consequentialist analysis, focus will be placed upon 'impact effectiveness'[98] by examining whether, and if so, to what extent, control orders can be deemed to have been effective in restricting or preventing involvement in terrorism-related activity by controlled individuals between 2005 and 2011.

In evaluating the regime, key issues such as the human rights implications of control orders, the nature and severity of the obligations imposed on controlees, and their impact upon both

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[95] Home Office, *Memorandum to Home Affairs Committee, Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (Cm 7797, 2010) para 54.

[96] Lazarus, for example, suggests that, 'There is always the danger that by accepting that effectiveness matters, we might be forced to concede that some new security measures that undermine rights ... actually work and cannot therefore be resisted': Liora Lazarus and Benjamin J Goold, 'Security and Human Rights: The Search for a Language of Reconciliation', in Goold and Lazarus (n 75) 11.

[97] PTA, s 1(1).

[98] 'Impact effectiveness', according to van Um and Pisoui's exposition of the concept, 'depends on the behaviour of the targeted audience alone in relation to the long-term objective of the [counter-terrorism] policy, namely that of reducing or stopping terrorism': Eric van Um and Daniella Pisoiu, 'Effective Counterterrorism: What Have We Learned So Far?' Economics of Security Working Paper 25 2011, 3 <www.diw.de/documents/publikationen/73/diw_01.c.386651.de/diw_econsec0055. pdf> accessed 5 January 2012.

the controlled person and their immediate family, will be examined. In addition, information regarding the type of terrorism-related activities those individuals who have been made subject to control orders have been suspected of, details concerning absconds and the frequency and seriousness of lesser breaches, and any evidence relating to continued engagement in terrorism-related activity whilst under a control order, will also be considered in assessing the overall effectiveness and proportionality of the regime.

Chapter 2

State Responses to Terrorism

I. The State's Duty to Protect

One of the state's principal functions, indeed, a crucial aspect of its *raison d'être*, is to guarantee the nation's security and safeguard its citizenry against internal and external threats.[1] Within a modern liberal democracy such as the UK, primary responsibility for ensuring public safety is vested in the country's elected government. That securing the safety of the nation and its public is 'The First priority of any Government',[2] is explicitly acknowledged in the counter-terrorism and national security strategies of both the Labour[3] and Coalition[4] governments, and has also been reiterated by successive Home Secretaries.[5] Threats to a nation's security may emanate from a range of diverse sources, including international conflicts, failed states, weapons of mass destruction, trans-national crime, economic instability, and civil emergencies, such as pandemics and flooding.[6] Prominent

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[1] Bianchi and Keller, for example, assert that, 'security is thought to be at the core of the social compact that lies at the basis of modern states': Andrea Bianchi and Alexis Keller, 'Preface' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008) vii. See also Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press 2007); David Omand, *Securing the State* (Hurst and Company 2010) 9-20; Schlomit Wallerstein, 'The State's Duty of Self-defence: Justifying the Expansion of Criminal Law' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007).

[2] Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7457, 2009) 6.

[3] Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Cm 7291, 2008) para 1.1: 'Providing security for the nation and for its citizens remains the most important responsibility of the government.' See also, Cabinet Office, *The National Security Strategy of the United Kingdom: Update 2009: Security for the Next Generation* (Cm 7590, 2009) 3.

[4] Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010) 9; Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) 7.

[5] Jack Straw (Home Secretary: May 1997-June 2001), Hansard HC Deb 13 March 2001, vol 364, cols 945-946; David Blunkett (Home Secretary: June 2001-December 2004), HC Deb 15 October 2001, vol 372, col 923; Charles Clarke (Home Secretary: December 2004-May 2006), HC Deb 16 December 2004, col 428, col 151WS; John Reid (May 2006-June 2007), HC Deb 7 June 2007, vol 461, cols 421-423; Jacqui Smith (June 2007-June 2009), Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7457, 2009) 7; Alan Johnson (Home Secretary: June 2009-May 2010), Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism: Annual Update* (Cm 7833, 2010) 4: Theresa May (Home Secretary: May 2010 -), HC Deb 13 July 2010, vol 513, col 797.

[6] Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Cm 7291, 2008) paras 1.3, 3.1-3.56; Cabinet Office, *The National Security Strategy of the United Kingdom: Update 2009: Security for the Next Generation* (Cm 7590, 2009) paras 5, 2.20-2.38;

among the security challenges facing many states today, including the UK,[7] is the real and sustained threat from terrorism.[8]

It is now widely accepted that an important facet of a democratic state's responsibility for safeguarding security is the duty to protect its citizens from terrorist violence. The International Commission on Jurists, in their extensive survey of post-9/11 counter-terrorism measures, for example, observe that, 'States have a positive obligation to protect people under their jurisdiction against terrorist acts',[9] a view which is echoed by both the former,[10] and current,[11] UN Special Rapporteurs on Counter-terrorism and Human Rights. This obligation has also been recognised by the ECtHR, as in *Murray v United Kingdom*,[12] where the Court noted that it is the 'responsibility of an elected government in a democratic society to protect its citizens and institutions against the threats posed by organised terrorism.'[13] With specific reference to the UK, in *R v F*[14] the need to protect the public from threats such as those posed by terrorism was described by Sir Igor Judge as 'one of the first great responsibilities of government',[15] whilst in *A v Secretary of State for the Home Department*,[16] Baroness Hale declared that, 'Protecting the life of the nation is one of the first tasks of a Government in a world of nation states.'[17] The UK government's duty to protect security through taking steps to address the threat of terrorism has also been emphasised by the

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Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010) 27.

[7] Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Cm 7291, 2008) paras 1.3, 3.2-3.9; Cabinet Office, *The National Security Strategy of the United Kingdom: Update 2009: Security for the Next Generation* (Cm 7590, 2009) paras 2.21-2.24; Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010) paras 1.2, 3.19-3.26.

[8] International Commission of Jurists, *Assessing Damage, Urging Action*: *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) v.

[9] ibid 16.

[10] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (A/HRC/16/51, 2010) para 12.

[11] Ben Emmerson, *Promotion and protection of human rights and fundamental freedoms while countering terrorism* (A/66/310, 2011) para 20.

[12] (1994) 19 EHRR 193.

[13] ibid para 91.

[14] [2007] EWCA Crim 243.

[15] ibid [7].

[16] [2004] UKHL 56.

[17] ibid [226]. See also Lord Nicholls [79]; Lord Hoffmann [95]; Lord Hope [99].

Independent Reviewer of terrorism legislation,[18] and consistently acknowledged by the JCHR[19] and key human rights NGOs.[20]

The state's paramount duty to protect its citizenry is, as Bindman identifies, 'rooted in ancient principle and modern convention alike',[21] and is encapsulated by the Latin maxim *salus populi suprema lex* (the good of the people is the supreme law).[22] In relation to the UK, the obligation to take measures to counter terrorism is imposed by various international and European legal instruments. The United Nations has adopted a number of conventions,[23] and issued an array of resolutions, urging states to combat international terrorism.[24] In addition, the UN Security Council has imposed a range of obligations upon states requiring them to take action against terrorism.[25] Of particular importance is Resolution 1373,[26] enacted in the immediate aftermath of 9/11, which requires states to 'Take the necessary

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[18] Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) para 24; David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) para 6.36. See also Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (2004-04 HC 100) paras 81-83; Lord Lloyd, *Inquiry into Legislation Against Terrorism* (Cm 3420, 1996) para 30.

[19] JCHR, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (2005-06, HL 240, HC 1576) para 15; *Counter-Terrorism and Human Rights: Annual Renewal of Control Orders Legislation 2008* (2007-08, HL 57, HC 356) para 13; *Counter-Terrorism and Human Rights: Annual Renewal of Control Orders Legislation 2009* (2008-09, HL 37, HC 282) para 9; *Counter-Terrorism and Human Rights: Annual Renewal of Control Orders Legislation 2010* (2009-10, HL 64, HC 395) para 7; *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (2009-10, HL 86, HC 111) para 5.

[20] See, for example, Amnesty International, *United Kingdom: Human Rights: A Broken Promise* (2006) 7; Human Rights Watch, *Hearts and Minds: Putting Human Rights at the Center of United Kingdom Counterterrorism Policy* (2007); Liberty, *From War to Law: Liberty's Response to the Coalition Government's Review of Counter-terrorism and Security Powers* (2010) 3.

[21] Geoffrey Bindman, 'Civil Liberties and the 'War on Terror' (2004) Open Democracy <www.opendemocracy.net/node/1888> accessed 14 June 2012.

[22] ibid. See also Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) European Journal of International Law 513.

[23] See International Convention for the Suppression of Terrorist Bombing adopted on 15 December 1997; International Convention for the Suppression of Financing of Terrorism adopted on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism adopted on 13 April 2005.

[24] See United Nations General Assembly Resolutions A/Res/31/102 of 17 December 1976; A/Res/40/61 of 9 December 1985; A/Res/49/60 of 17 February 1995; A/Res/56/88 of 24 January 2002. The full list of General Assembly Resolutions can be accessed at <www.un.org/terrorism/resolutions.shtml> accessed 14 June 2012.

[25] UNSCR 1269 of 19 October 1999; UNSCR 1368 of 12 September 2001. See Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview' (2004) 4 Journal of International Criminal Justice 1044.

[26] UNSCR of 28 September 2001 (UNSCR 2001). See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2001) 31-51.

steps to prevent the commission of terrorist acts',[27] and ensure that, 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'[28]

That states have an 'imperative duty ... to protect their populations against terrorist acts',[29] and must take measures 'to protect the fundamental rights of everyone within their jurisdiction'[30] against terrorism, is unequivocally affirmed in the Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism. The European Union Counter-Terrorism Strategy, meanwhile, requires member states to combat terrorism so as to enable their citizens to 'live in an area of freedom, security and justice',[31] whilst the European Union Council Framework Decision on Combating Terrorism provides that states must ensure that terrorist acts are proscribed under their domestic law.[32] In addition, another significant source of the state's duty to protect its citizens from terrorist acts is human rights law. Indeed, as is forcefully asserted by Wilkinson, 'If liberal democracies failed to act firmly and courageously against terrorists who are explicitly committed to the mass killing of civilians they would be guilty of failing to uphold the most basic right of all, the right to life.'[33]

The right to life, which is enshrined under Article 2 of the ECHR,[34] represents the most fundamental of human rights, being one upon which all other rights and liberties are

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[27] UNSCR 2001, para 2(b).
[28] ibid para 2(e).
[29] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism* (Council of Europe, 2002) 1.
[30] ibid Guideline I (p 2).
[31] European Union, Counter Terrorism Strategy, 30 November 2005 (14469/4/05) 3. See Ian Turner, 'The Prevention of Terrorism: In Support of Control Orders, and Beyond' (2004) 62(3) Northern Ireland Legal Quarterly 335, 335.
[32] European Union, Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, Article 1(1). See also Council Common Position 2001/930/CFSP on Combating Terror; Maria O'Neill, 'A Critical Analysis of the EU Legal Provisions on Terrorism' (2008) 20 Terrorism and Political Violence 26.
[33] Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (3rd edn, Routledge 2011) ix.
[34] The right to life is also protected under Article 3 of the Universal Declaration of Human Rights 1948, which provides that 'Everyone has the right to life, liberty and security of person', and under Article 6(1) of International Covenant on Civil and Political Rights 1966, which states, 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

contingent.[35] Article 2, which is part of UK law under the HRA 1998,[36] provides that, 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'[37] This provision imposes both a negative obligation upon the state, entailing 'the duty, by its agents, to refrain from killing',[38] and a positive obligation to protect life.[39] Thus, as the ECtHR elucidated in *LCB v United Kingdom*,[40] 'Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also take appropriate steps to safeguard the lives of those within its jurisdiction.'[41] Further, as was explained by the Court in the case of *Osman v UK*,[42] the positive obligation embodied in Article 2 includes a duty:

> To secure the right to life by putting in place effective criminal-law sanctions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[43]

In *Osman,* it was also established that Article 2 can be seen to imply a substantive obligation requiring the state to 'take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another.'[44] However, this particular aspect of the Article 2 duty is subject to stringent qualifications, and will only arise in 'certain well-defined circumstances.'[45] It is therefore unlikely that this particular obligation will be regarded as

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[35] See, for example, *McCann and Others v United Kingdom* (1995) 21 EHRR, para 147. See also Amitai Etzioni, 'Life: The Most Basic Right' (2010) 9 Journal of Human Rights 100, 105; Douwe Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Human rights handbooks, No.8) (Council of Europe, Strasbourg 2006) 6.
[36] HRA, s 1(1)(a), Sch 1.
[37] European Convention on Human Rights, Article 2(1).
[38] Robin CA White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 141.
[39] See Steve Foster, *Human Rights & Civil Liberties* (3rd edn, Longman 2011) 190-195, 758-761.
[40] (1998) 27 EHRR 212.
[41] ibid, para 36.
[42] (2000) 29 EHRR 245.
[43] ibid, para 6.
[44] ibid. See also *Opuz v Turkey* (2010) 50 EHRR 28, para 128.
[45] *Osman v United Kingdom* (2000) 29 EHRR 245, para 6. The Court went on to clarify that, 'not every claimed risk to life can entail ... a requirement to take operational measures to prevent that risk from materialising,' and that in order for this obligation to arise it must therefore 'be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' (para 116). The

applying in respect of a state's duty to protect citizens against terrorism unless a clear and reasonably imminent threat to specific potential victims is identified.[46]

As established by the foregoing discussion, it is incumbent upon states to protect national security and safeguard the lives of the population by taking positive steps to combat terrorism. In addition, modern liberal states are required to secure the enjoyment of the rights and freedoms of their citizens, an obligation which, in relation to the UK, is imposed by Article 1 ECHR[47] and embodied in the HRA.[48] Whilst terrorism poses a direct threat to security and fundamental human rights, in responding to this threat, states must seek to ensure that the measures they introduce do not unduly curtail individual rights or liberties, or serve to undermine the democratic values they are intended to protect. In the counter-terrorism context, it is often claimed that 'security' and 'liberty' must consequently be balanced, governments' asserting that in order to increase the former it is necessary to reduce the latter. The next section will therefore examine the concept of 'security' and also consider the complex interplay between the twin imperatives of 'liberty' and 'security', the trade-off between which has become the 'dominant paradigm that shapes how we think about counterterrorist law.'[49]

II. Liberty v Security

The provision of security and combating terrorism are key priorities on the political agendas of many Western states.[50] In light of events such as 9/11, the 2004 Madrid train bombings,

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stringency of the test which applies in respect of this obligation was noted by the House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225, Lord Brown commenting that it is such that it 'will not easily be satisfied' [115].

[46] Ian Turner, 'The Prevention of Terrorism: In Support of Control Orders, and Beyond' (2004) 62(3) Northern Ireland Legal Quarterly 335, 352-354

[47] Article 1 ECHR provides: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

[48] Human Rights Act 1998. See Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (2004-04 HC 100) para 81.

[49] Laura K Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge University Press 2008) 2.

[50] In relation to the UK, see Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Cm 7291, 2008) paras 3.2-3.9; *Labour Party Manifesto 2010: A Future Fair For All*, para 5.5; Cabinet Office, *The Coalition: Our Programme for Government* (2010)

and the 7/7 attacks, few would contest that it is legitimate for governments to take robust action in order to safeguard national security and protect the public against the threat of terrorist violence. Indeed, although they must strive to uphold human rights and maintain their fidelity to the rule of law whilst fighting terrorism, as Gearty and Kimbell emphasise, 'There is no obligation on a democratic state to prove its liberal *bona fides* by allowing itself to be destroyed by its enemies.'[51] The task of responding effectively to the threat terrorist activity poses to national security whilst protecting individual rights and liberties thus represents a complex, yet vital challenge for modern liberal democracies.

The notion of 'security', and the purported need to 'balance' liberty and security, have become ubiquitous features of political and academic discourse on counter-terrorism.[52] The balance metaphor, which is premised on the idea that countering terrorism may necessitate trade-offs between individual 'liberty'[53] (or civil liberties) and collective security, is one that was frequently invoked by the Labour government between 1997-2010. The 2004 Home Office discussion paper, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*,[54] for example, stated:

> There is nothing new about the dilemma of how best to ensure the security of a society, while protecting the individual rights of its citizens. Democratic governments have always had to strike a balance between the powers of the state and the rights of individuals. ... It is the Government's ultimate responsibility to find a fair and effective balance between security and liberty.[55]

24; Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010) paras 0.7, 1.2.

[51] Conor A Gearty and John A Kimbell, *Terrorism and the Rule of Law* (Civil Liberties Research Unit, London 1995) 16. See also Helena Kennedy, *Just Law: The Changing Face of Justice - and Why it Matters to Us All* (Vintage 2005) 33.

[52] See Walker, *Terrorism and the Law* (OUP 2011) 19-20; Lucia Zedner, *Security* (Routledge 2009) 135.

[53] Here, the term 'liberty' is used in an expansive sense to cover the collection of rights and liberties guaranteed by such legal instruments as the European Convention on Human Rights. The concept of 'liberty' is examined in detail in chapter 4 (pp 100-104) of this thesis.

[54] Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (Cm 6147, 2004).

[55] ibid David Blunkett (Home Secretary), Foreword, i-iii. See also Charles Clarke (Home Secretary), 'Liberty and Security: Striking the Right Balance (Speech to the European Parliament, October 2005) <http://press.homeoffice.gov.uk/Speeches/speeches-archive/speuro-parliament-1005> accessed 15 January 2009.

It was also asserted in the Labour government's counter-terrorism strategy that, 'A fundamental challenge facing any government is to balance measures intended to protect security and the right to life with the impact they may have on the other rights that we cherish and which form the basis for our society.'[56] Whilst 'security' has become a critical term in post-9/11 counter-terrorism rhetoric,[57] and 'Talk of a liberty-security balance has become so common that many view it as just an ambient feature of our political environment',[58] the scope and meaning of 'security', and whether it is appropriate to frame the counter-terrorism enterprise in terms of 'balance', are issues which have generated considerable debate.

With the exception of certain absolute rights,[59] the rights and liberties enshrined in the ECHR are conditional.[60] Most of the rights guaranteed by the ECHR may therefore be restricted in particular circumstances,[61] such as where it is necessary in the interests of national security or public safety,[62] or derogated from in times of war or other public emergency threatening the life of the nation.[63] The ECHR's qualification and derogation clauses thus permit states to limit individual rights for purposes connected with protecting the nation's security. Indeed, that the Convention's provisions allow states to strike a 'balance' between 'defending the institutions of democracy in the common interest and the protection of individual rights' when combating terrorism was unambiguously recognised by the ECtHR in the cases of *Brogan v United Kingdom*[64] and *Fox, Campbell and Hartley v United Kingdom.*[65]

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[56] Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7457, 2009) para 7.06. For use of the balance metaphor by the Coalition government, see Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 3; HC Deb 13 July 2010, vol 513, col 800 (Theresa May).

[57] Loader and Walker suggest that 'Security has become *the* political vernacular of our times': Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press 2007) 9. See also Michael Dumper and Esther D Reed, 'Introduction' in Esther D Reed and Michael Dumper (eds), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge University Press 2012) 2.

[58] Jeremy Waldron, 'Safety and Security' (2006) 85 Nebraska Law Review 454, 455.

[59] In relation to the ECHR, the following rights enjoy absolute status: Article 3, the prohibition of torture or inhuman or degrading treatment or punishment; Article 4(1), the prohibition of slavery; Article 7(1), the prohibition of retrospective criminal law.

[60] See Foster (n 39) 61-69.

[61] See Article 5(1)(a)-(f) ECHR.

[62] See Articles 6(1), 8(2), 9(2), 10(2), and 11(2) of the ECHR.

[63] See Article 15 ECHR.

[64] (1989) 11 EHRR 117, para 48.

The balancing approach, although endorsed by many politicians, the Strasbourg Court, and such commentators as Posner,[66] and Golder and Williams,[67] has been increasingly questioned by academics and human rights advocates. Detailed critiques of the balancing model - or 'trade-off thesis' - are, for example, provided by Waldron, who submits that the rhetoric of balance must be subjected to 'careful analytical scrutiny',[68] and Macdonald, who argues that, 'The balance metaphor's image of a set of scales fails to capture the complexity of the task of analysing counterterrorism policy.'[69] Further, the idea of 'balancing' liberty and security has been described by others as 'problematic',[70] 'troubling',[71] and 'based on a mistaken rationale'.[72]

A range of concerns are associated with using the concept of 'balance' in respect of states' counter-terrorism policies. Firstly, the balancing approach involves dichotomising security and liberty in a manner which suggests that they are inherently conflicting values which are locked in a zero-sum contest - or, as Ashworth puts it, a 'hydraulic relationship'[73] - whereby an increase in one necessarily involves a reduction in the other.[74] Second, presenting security and liberty as being in binary opposition fails to acknowledge the 'osmotic links'[75] that exist between the two values, an issue considered in more detail below. Thirdly, there is

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[65] (1991) 13 EHRR 157, para 15.
[66] Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (OUP 2006) 148.
[67] Golder and Williams argue that, 'the proper method for assessing ... counter-terrorism laws, from a human rights perspective, is to adopt a "balancing approach"': Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) Journal of Comparative Policy Analysis 43, 44.
[68] Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *The Journal of Political Philosophy* 191, 194. See also Jeremy Waldron, 'Safety and Security' (2006) 85 Nebraska Law Review 454.
[69] Stuart Macdonald, 'Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy' (2008) 15(1) Journal of International and Comparative Law 96, 143. See also Stuart Macdonald, 'The Unbalanced Imagery of Anti-Terrorism Policy' (2009) 18(2) Cornell Journal of Law and Public Policy 519.
[70] Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) Journal of Law and Society 507, 532.
[71] Donohue (n 49) 3.
[72] Rene van Swaaningen, 'Fear and the Trade-off Between Security and Liberty' in Mireille Hildebrandt, Abiola Makinwa and Anna Oehmichen (eds), *Controlling Security in a Culture of Fear* (Boom Legal Publishers 2009) 51.
[73] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 208.
[74] Macdonald, 'Why We Should Abandon the Balance Metaphor' (n 69) 96.
[75] Michael Dumper and Esther D Reed, 'Introduction' in Reed and Dumper (n 57) 3.

the possibility that by allowing liberties to be restricted in order to protect against terrorism, this will diminish security against the state, creating the potential for abuses of power, and increasing the prospect of encroachments upon individual rights by the government and its agents.[76] Another criticism of the balancing approach is that the enhancements in security and reductions in liberty it entails are often unevenly distributed amongst the population.[77] Whilst the majority may not suffer any noticeable diminution in the protection of their rights, post-9/11, it is the liberties of resident aliens, ethnic minorities, and members of the Muslim community, that are most likely to be 'traded-off' for the security gains promised by counter-terrorism measures. Indeed, in relation to the UK, this is exemplified by the ATCSA, Part 4 detention regime, which applied exclusively to non-nationals.[78]

One of the primary criticisms of the 'balancing' approach, as noted above, is that it assumes a polarity between 'liberty' and 'security', and in doing so, pays insufficient regard to the relationship between the two values. This presumed dichotomy therefore obscures the fact that, in many ways, 'security' and 'liberty' are complementary, rather than antithetical. In order to begin to appreciate their interrelationship, it is necessary to determine the meanings attributed to these concepts. Both 'liberty', the nature and scope of which is considered elsewhere in this thesis,[79] and 'security', as used in contemporary political discourse, can, however, be somewhat opaque terms.

Whilst some conceptions of 'security' place emphasis upon threats to individual liberty emanating from the state itself,[80] in the counter-terrorism context the focus is instead upon the security of the state, or 'national security', as it is commonly referred to. 'National

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[76] David Luban, 'Eight Fallacies About Liberty and Security' in Richard A Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press 2005) 245. See also John Gardner, 'What Security is There Against Arbitrary Government' (2006) 28(5) London Review of Books 19.

[77] See Jeremy Waldron, 'Safety and Security' (2006) 85 Nebraska Law Review 454, 465; Philip A Thomas, 'Emergency and Anti-Terrorist Powers – 9/11: USA and UK (2003) 26 Fordham International Law Journal 1193, 1208; Ronald Dworkin, 'The Threat to Patriotism' (2002) 49(3) New York Review of Books <www.nybooks.com/articles/archives/2002/feb/28/the-threat-to-patriotism/> accessed 26 June 2012.

[78] ATCSA, ss 21-23. See chapter 3 (pp 46-48) of this thesis.

[79] See chapter 4 (pp 100-104).

[80] See Lucia Zedner, *Security* (Routledge, London 2009).

security' is understood to concern both the preservation of the state, its territory, and the institutions of government, and also the protection of the state's citizenry from internal and external threats.[81] The 'security' for which the balancing approach proposes trading-off certain liberties is a multifaceted concept. In basic terms, as Waldron explains, 'Security is ... about elementary matters of harm and survival.'[82] More nuanced explanations, however, stress that 'security' has both objective and subjective dimensions.[83] Security as an objective condition primarily concerns physical safety and the absence of threats to bodily integrity, although a richer notion of objective security, it is submitted, may also entail the protection of people's material well-being and way of life.[84] The subjective conception, meanwhile, focuses upon the psychological aspects of 'security'. As Zedner elaborates, subjective security involves 'the positive condition of feeling safe, and freedom from anxiety or apprehension defined negatively by reference to insecurity.'[85] It should be noted, however, that although there is undeniably a strong link between objective and subjective security, due to the fear generated by terrorism, and the exaggerated perception of risk that terrorist violence can engender, there is not always a rational relationship between people's subjective feelings of fear and insecurity and the actual threat of harm from terrorist activity.[86]

In relation to political pronouncements on counter-terrorism, appeals to objective security, in the form of protection from loss of life and physical harm from terrorist violence, have traditionally been the norm. However, the notion of subjective security, and its importance as a social value, is now also increasingly acknowledged. For example, following 9/11, in discussing the need to safeguard the nation's security against terrorist atrocities, the then

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[81] See Eric Metcalfe, 'Terror, Reason and Rights' in Reed and Dumper (n 57) 154-160; Julian Richards, *A Guide to National Security: Threats, Responses, and Strategies* (OUP 2012) 7-17.
[82] Jeremy Waldron, 'Safety and Security' in Reed and Dumper (n 57) 31.
[83] Macdonald, 'Why We Should Abandon the Balance Metaphor' (n 69) 99.
[84] See Jeremy Waldron, 'Safety and Security' in Reed and Dumper (n 57) (eds) 18.
[85] Lucia Zedner, 'The Concept of Security: An Agenda for Comparative Analysis (2003) 23(1) Legal Studies 153, 155. See also Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press 2007) 157.
[86] Macdonald, 'Why We Should Abandon the Balance Metaphor' (n 69) 108.

prime minister, Tony Blair, proclaimed, 'the most basic liberty of all is the right of the ordinary citizen to go about their business free from fear or terror.'[87] In addition, the central aim of the CONTEST counter-terrorism strategy is expressed as being to reduce the risk from terrorism, 'so that people can go about their daily lives freely and with confidence.'[88]

'Security', then, is conceived of as a public good.[89] Rather than being irreconcilable with liberty, however, security arguably constitutes 'the *sine qua non*'[90] for citizens to be able to exercise their rights and liberties. Thus, as Walker succinctly observes, 'security is a value for liberty, and liberty is a value for security.'[91] Neither absolute security nor absolute liberty are realistically obtainable, therefore, as essential values, they must necessarily co-exist and interact. Consequently, circumstances will inevitably arise in which there is a perceived tension between them. However, talk of 'trade-offs' between 'competing' rights in the name of 'balancing' liberty and security should be eschewed on the grounds that it is too crude an approach, especially when applied to an issue as complex as responding proportionately to the threat of terrorism in a rights-based democracy. Ultimately, therefore, it is argued that instead of approaching the issue of countering terrorism from the perspective that upholding human rights and safeguarding national security are opposing objectives, a more appropriate approach, as expounded in the ICJ Berlin Declaration, is to regard them as forming 'part of a seamless web of protection incumbent upon the State.'[92]

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[87] HC Deb 14 September 2001, vol 372, col 606.
[88] Home Office, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, 2006) para 5. See also Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7457, 2009) 8; Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) 6.
[89] Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press 2007) 31.
[90] Jeremy Waldron, 'Safety and Security' in Reed and Dumper (n 57), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge University Press 2012) 22. Lazarus similarly argues that 'a minimum threshold of security' constitutes a 'material condition for a citizen's enjoyment of his or her liberty, dignity or equality': Liora Lazarus, 'Mapping the Right to Security' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 327
[91] Walker, *Terrorism and the Law* (n 52) 19.
[92] International Commission of Jurists, *The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (2004), Preamble. See also International Commission of Jurists, *Assessing Damage* (n 8) 21.

III. Responding to Terrorism: The Primacy of Prosecution

'At the root of it, terrorism is a crime. So criminal activities related to terrorism ... can and should be prosecuted.'[93] This statement, which featured prominently on the Office for Security and Counter-Terrorism website,[94] endorses the view that terrorism is fundamentally a crime and should therefore be treated as such. Characteristically, terrorism involves the commission of acts which are proscribed by the criminal law, including, amongst others, murder, manslaughter, serious offences against the person, criminal damage,[95] and offences of making or possessing explosives or causing explosions.[96] Further, the inchoate equivalents of attempting or conspiring to commit such acts, or inciting/encouraging or assisting their commission,[97] also constitute criminal offences. Thus, in many instances, terrorist activity may be prosecuted through the criminal justice system as 'normal' crimes.[98]

Whilst terrorist acts often fall squarely within the purview of the ordinary criminal law, those which do not may, alternatively, be susceptible to prosecution under one of the UK's anti-terrorism statutes. In part a legacy of the nation's experience in combating Irish Republican terrorism, the UK has what the government itself described as, 'some of the most developed and sophisticated anti-terrorism legislation in the world.'[99] This specialist legislation contains

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[93] Home Office, Office for Security and Counter-Terrorism website: 'Legislation' section <http://security.homeoffice.gov.uk/legislation/> accessed 6 August 2008. Following the change of government in May 2010, the Home Office website was archived by the National Archives. The archived version of the 'Legislation' section can now be accessed at <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/legislation/> accessed 12 June 2014.

[94] Home Office, Office for Security and Counter-Terrorism website <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/> accessed 12 June 2014.

[95] Criminal Damage Act 1971, ss 1-3.

[96] Explosive Substances Act 1883, ss 2-4.

[97] With effect from 1 October 2008, the Serious Crimes Act 2007 abolished the common law offence of incitement (s 59), replacing it with three new inchoate offences. These offences are, 'intentionally encouraging or assisting an offence' (s 44); 'encouraging or assisting an offence believing it will be committed' (s 45); and 'encouraging or assisting offences believing one or more will be committed' (s 46).

[98] As David Anderson notes, 'the main perpetrators of the most serious acts of terrorism are almost always charged with offences under the ordinary criminal law': *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014) para 11.1. See, for example, *R v Bourgass* [2005] EWCA Crim 1943; *R v Barot* [2007] EWCA Crim 1119; *R v Ibrahim* [2008] EWCA Crim 880; *R v Khyam* [2008] EWCA Crim 1612.

[99] Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (Cm 6147, 2004) para 17. In the press release that accompanied the Independent

an array of terrorism-related offences, the majority of which are located in the TA 2000 and TA 2006. The 2000 Act criminalises a range of activities, including, membership[100] or support[101] of a proscribed organisation, fund-raising for terrorist purposes,[102] weapons training,[103] possession of articles for terrorist purposes,[104] and inciting terrorism overseas.[105] In addition, the TA 2006 makes it a criminal offence to encourage terrorism,[106] disseminate terrorist publications,[107] engage in conduct preparatory to committing, or assisting another to commit, acts of terrorism,[108] provide terrorist training[109] or attend at a place used for such purposes,[110] or make or possess a radioactive device.[111] There is, then, clearly a multitude of both criminal and terrorism-related offences under which those who engage in terrorist activity may be charged.[112]

The pursuit of terrorists as criminals through the criminal justice system is an approach which garners widespread support. Indeed, it has been explicitly endorsed by both Lord Carlile[113] and David Anderson,[114] and by successive Directors of Public Prosecutions.[115]

Reviewer's 2014 report on the Terrorism Acts (David Anderson, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014)) the UK's anti-terrorism laws were similarly described as 'some of the most extensive ... in the western world': 'UK Independent Reviewer of Terrorism Criticises Too-Broad Definition of Terrorism' (2014) 1 <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/22-July-2014-PRESS-RELEASE.pdf> accessed 22 July 2014.

[100] TA 2000, s 11.

[101] ibid s 12.

[102] ibid s 15.

[103] ibid s 54.

[104] ibid s 57.

[105] ibid ss 59-61.

[106] TA 2006, s 1.

[107] ibid s 2.

[108] ibid s 5.

[109] ibid s 6.

[110] ibid s 8.

[111] ibid s 9.

[112] For further discussion of criminal offences relating to terrorism, see Walker, *Terrorism and the Law* (n 52) 203-252.

[113] See Lord Carlile, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2008) para 4. Lord Carlile held the position of Independent Reviewer of terrorism legislation from September 2001 to February 2011.

[114] See David Anderson, *Final Report* (n 18) paras 2.9, 3.20. David Anderson replaced Lord Carlile as Independent Reviewer on 21 February 2011. The role of the Independent Reviewer in respect of the Prevention of Terrorism Act 2005 is discussed in chapter 3 of this thesis (pp 94-95).

[115] Kier Starmer QC, who was the Director of Public Prosecutions (DPP) from November 2008 to November 2013, in his evidence before the Home Affairs Committee in November 2009, stated: 'I agree with many others that prosecution would be far better than preventative measures and that

The criminal justice approach has also been strongly advocated by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights,[116] the JCHR,[117] prominent academic commentators such as Conor Gearty,[118] Clive Walker,[119] Paul Wilkinson[120] and Lucia Zedner,[121] and various human rights NGOs, including Amnesty International,[122] JUSTICE,[123] and Human Rights Watch.[124]

The pronounced preference for criminal prosecution is principally explained by reference to the exacting procedural standards of the criminal process. Commensurate with the gravity of the potential consequences for the individual of being convicted of a criminal offence, such as penal incarceration, along with the associated moral stigma and implications for future life and career opportunities, the criminal trial is attended by a number of crucial safeguards. Under both the domestic criminal law[125] and Article 6 ECHR,[126] those charged with criminal

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includes control orders. So there ought to be, in my view, a presumption in favour of prosecution': Home Affairs Committee, *The Home Office's Response to Terrorist Attacks* (HC 2009-10, 117 II) Ev 27. Sir Ken MacDonald QC, who was DPP between 2003-2008, likewise suggested that 'we should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice.' 'Foreword' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) vi.

[116] International Commission of Jurists, *Assessing Damage* (n 8) 15, 161.

[117] See JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2007-08, HL 57, HC 356) para 61; *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (2005-06, HL 240, HC 1576).

[118] Gearty contends that 'the human rights scholar should argue for the criminal process as the right way of securing the protection of all in the face of the threat of ... terrorist violence': Conor Gearty, 'Terrorism and Human Rights' (n 118) 361.

[119] See Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd edn, OUP 2009) 182, 210, 242. See also Clive Walker, 'Prosecuting Terrorism: the Old Bailey versus Belmarsh' (2009) 79 Amicus Curiae 21.

[120] Wilkinson argues that 'the only satisfactory way for a liberal state to put terrorists safely out of action for a very long time is to convict them, and if they have committed serious offences, to insist on them serving long prison terms.' Paul Wilkinson (ed), *Terrorism versus Democracy: The Liberal State Response* (2nd edn, Routledge 2006) 83.

[121] See Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2007) 32(4) Journal of Law and Society 507.

[122] See Amnesty International UK, 'Prosecute Don't Persecute' (5 July 2007) <www.amnesty.org.uk/press-releases/uk-%E2%80%98prosecute-dont-persecute%E2%80%99-says-amnesty-law-lords-hear-appeal-control-orders-cases> accessed 1 July 2014.

[123] JUSTICE Director, Eric Metcalf, submits that, 'terrorism should first and foremost be addressed as what it is: a crime': JUSTICE, *Counter-terrorism and Human Rights* (JUSTICE Futures Paper, 2007) 30.

[124] See Human Rights Watch, *Hearts and Minds: Putting Human Rights at the Center of United Kingdom Counterterrorism Policy* (2007) <www.hrw.org/legacy/backgrounder/eca/uk0607/> accessed 1 July 2014.

[125] *R v Sang* [1980] AC 402.

[126] Article 6(1) ECHR provides: 'In the determination of ... any criminal charge ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 6 is discussed in further detail in chapter 4 of this thesis.

offences are guaranteed a fair trial, entailing the accused's right to a hearing before an independent and impartial tribunal, the presumption of innocence, the right to pre-trial disclosure of material evidence, the opportunity to cross-examine witnesses,[127] and the requirement of proof beyond reasonable doubt. These protections are seen to reflect the seriousness of being charged with a criminal offence and are intended to ensure, so far as possible, that guilt is attributed to the right person.[128] It would therefore appear that, in light of the significant penalties which attach to many terrorist offences, it is with ample justification that Ashworth asserts that, 'conviction of a terrorist offence is an extremely serious matter for any individual, and all proper safeguards must [therefore] be observed.'[129]

The case for giving primacy to the criminal process, at least from a human rights perspective, is an undeniably strong one. However, in spite of this, and notwithstanding repeated assertions that prosecution is its preferred approach,[130] a number of the UK government's key post-9/11 anti-terrorism initiatives have entailed significant departures from the traditional criminal justice paradigm. Indeed, as is discussed in the following section, recourse to preventive counter-terrorism measures such as detention without trial,[131] control orders, and TPIMs, has been primarily justified by claims that there are certain terrorist suspects who, for various reasons, the government is unable to prosecute.

IV. Control Orders and TPIMs: A 'Necessary Alternative'[132]

At the Second Reading of the Prevention of Terrorism Bill in the House of Commons, the rationale for introducing control orders was explained by Charles Clarke in the following terms:

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[127] See Article 6(2) and (3).
[128] See Conor Gearty, 'Terrorism and Human Rights' (n 118) 361.
[129] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 219.
[130] See, for example, Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) para 7.03; Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) para 4.25.
[131] ATCSA, ss 21-23. See Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001/3644, sch. The Part 4 detention regime is discussed in chapter 3 of this thesis (pp 46-47).
[132] Home Office, *Review of Counter-Terrorism and Security Powers* (n 56) 40.

> These orders are for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked because of the seriousness of the risk that they pose to everybody else in the country.[133]

As discussed in further detail below, in this context, the inability to prosecute is due to specific evidentiary constraints, in particular, the sensitive nature of the national security evidence against the suspect and the inadmissibility of domestic intercepts as evidence in criminal trials.[134] The inability to deport, meanwhile, is primarily due to the ECtHR decisions which provide that an individual may not be deported where there is a risk that they will suffer treatment that would violate Article 3 of the ECHR[135] in the country to which they are returned.

i. The Inability to Prosecute

Since 9/11, the UK government has consistently maintained that prosecution is its preferred method of dealing with individuals who engage in acts of terrorism.[136] Indeed, the counter-terrorism strategies of both the Labour[137] and Coalition[138] governments assert the priority of prosecuting those who are suspected of involvement in terrorism-related activity. For a number of reasons, however, the prosecution of some suspects does not represent a viable option.[139]

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[133] HC Deb 23 Feb 2005, vol 431, col 339.
[134] Regulation of Investigatory Powers Act 2000 [RIPA 2000], s 17.
[135] Article 3 provides that: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[136] The UK government's prioritisation of criminal prosecution in responding to terrorism can, as Walker notes, arguably be traced back to the *Diplock Report* of 1972 (*Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cmnd 5185, 1972)): Clive Walker, 'Prosecuting Terrorism: the Old Bailey Versus Belmarsh' (n 119) 21.
[137] See Home Office, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, 2006) paras 69, 71; Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) para 7.03.
[138] Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) para 4.25.
[139] Addressing the rationale for the introducing the Prevention of Terrorism Bill, Charles Clarke stated, 'The fact is that there will always be some people – including some extremely dangerous people – whom we cannot prosecute': HC Deb 22 February 2005, vol 431, col 152.

The principal factor that often militates against prosecution is the nature of the material upon which allegations against terrorist suspects is based. As explained by former Director General of MI5, Eliza Manningham-Buller:

> We may be confident that an individual or group is planning an attack but that confidence comes from the sort of intelligence I described earlier, patchy and fragmentary and uncertain, to be interpreted and assessed. All too often it falls short of evidence to support criminal charges to bring an individual before the courts, the best solution achievable.[140]

Thus, while such intelligence may give rise to a well-founded suspicion of involvement in terrorism-related activity, it might not be admissible as evidence in legal proceedings or be sufficiently robust to satisfy the criminal standard of proof beyond reasonable doubt.[141]

The potentially devastating consequences of a terrorist attack means that it may be necessary for law enforcement agencies to intervene at an early stage in order to prevent plots coming to fruition. While early intervention serves to protect the public, it can result in there being limited admissible evidence against those involved.[142] In these circumstances, it is therefore unlikely that the CPS 'threshold test'[143] for charging a suspect with an offence, which requires prosecutors to be satisfied that there is evidence 'capable of establishing a realistic prospect of conviction',[144] will be met.

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[140] Eliza Manningham-Buller, 'The International Terrorist Threat and the Dilemmas in Countering It' (speech at the Ridderzaal Binnenhof, the Hague, Netherlands, 1 September 2005) <www.mi5.gov.uk/home/about-us/who-we-are/staff-and-management/director-general/speeches-by-the-director-general/director-generals-speech-to-the-aivd-2005.html> accessed 15 February 2014.

[141] See JCHR, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention* (2005-06, HL 240, HC 1576) paras 31-32; Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (HC 2003-04, 100) para 232.

[142] See Home Office, *Review of Counter-Terrorism and Security Powers* (n 56) 37 (para 10); Robin Simcox, *The Presumption of Innocence: Difficulties in Bringing Terrorist Suspects to Trial* (Henry Jackson Society, 2013) 2.

[143] Crown Prosecution Service, *The Code for Crown Prosecutors* (2013) 11-12 <www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf> accessed 14 February 2014.

[144] ibid 11. The threshold test requires that 'there is at least a reasonable suspicion that the person to be charged has committed the offence', and that prosecutors 'must be satisfied that there are reasonable grounds for believing that the continuing investigation will provide further evidence, within a reasonable period of time, so that all the evidence together is capable of establishing a realistic prospect of conviction in accordance with the Full Code Test' (11-12).

Another frequently cited obstacle to prosecution is the inadmissibility of domestic intercept evidence in criminal trials.[145] Although foreign intercepts,[146] the products of surveillance and eavesdropping,[147] and telephone conversations recorded with the consent of one of the participants or by a hidden microphone not attached to the telephone,[148] are all admissible, RIPA 2000, s 17 prohibits the use of material intercepted under a UK interception warrant in criminal proceedings.[149] Whilst some contend that removing this statutory bar would significantly enhance the prospects of successfully prosecuting suspects,[150] and thereby obviate the need for measures like control orders and TPIMs, as David Anderson notes, 'the inadmissibility of domestic telephone intercepts is by no means the only difficulty in converting intelligence into evidence usable in a criminal court.'[151]

Even where material that is probative of guilt is legally admissible, it may nonetheless be deemed too sensitive to adduce as evidence in legal proceedings for a variety of reasons. Disclosing such information in open court could risk exposing intelligence-gathering techniques or sources, endanger covert operatives, or harm relationships with foreign governments and their intelligence agencies.[152] In relation to certain suspects, therefore, the preferred option of prosecution is deliberately not pursued by the government on the basis that it could prove inimical to national security.[153]

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[145] See, for example, HC Deb 26 January 2005, vol 430, col 307 (Charles Clarke).
[146] *R v P* [2002] 1 AC 146.
[147] *R v Allsop and others* [2005] EWCA Crim 703; *R v E* [2004] EWCA Crim 1243.
[148] Privy Council Review, *Intercept as Evidence: Report* (Cm 7324, 2008) para 22.
[149] RIPA 2000, s 17(1). Section 17(4) provides that, for the purposes of the Act, '"intercepted communication" means any communication intercepted in the course of its transmission by means of a postal service or telecommunication system'.
[150] See Amnesty International, *The Terrorism Prevention and Investigation Measures Bill 2011: Control Orders Redux* (2011) 5; JUSTICE, *Home Office Review of Counter-Terrorism and Security Powers: Written Submission of JUSTICE* (2010) paras 192-193; Liberty, *From War to Law* (2010) paras 36, 38.
[151] David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) para 7.14.
[152] See James Renwick and Gregory F Treverton, *The Challenges of Trying Terrorists as Criminals* (RAND 2008); Simcox (n 142).
[153] See HC Deb 22 February 2005, vol 431, col 152 (Charles Clarke); Home Office, *Review of Counter-Terrorism and Security Powers* (n 56) 37 (para 10).

ii. The Inability to Deport

Where a terrorist suspect who cannot be prosecuted is a foreign national, pursuant to the Immigration Act 1971, s 3(5)(a), they may be deported from the UK if the Home Secretary deems their deportation to be conducive to the public good. Indeed, the use of deportation as a means of disrupting terrorist activity constitutes an important aspect of the PURSUE strand of the UK government's counter-terrorism strategy.[154] However, an individual can only be deported if their removal is compatible with the UK's commitments under international human rights law.[155] The main legal obstacle to the deportation of non-national terrorist suspects is Article 3 ECHR,[156] which prohibits torture and inhuman or degrading treatment or punishment in absolute terms.[157] In the key case of *Chahal v United Kingdom*,[158] the ECtHR held that, whilst it was mindful of the immense difficulties faced by states in protecting their communities against terrorist violence:

> [T]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. The prohibition provided by Article 3 ... against ill-treatment is equally absolute in expulsion cases.[159]

Thus, Convention rights apply extra-territorially and the responsibility of the returning state is engaged in deportation cases where there are 'substantial grounds ... for believing that an

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[154] See Home Office, *Countering International Terrorism* (Cm 6888, 2006) para 73; Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) para 8.23; *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) paras 1.21, 4.30.

[155] See United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 3(1); United Nations Convention relating to the Status of Refugees 1951, Article 33. See also Alexander Horne and Melanie Gower, *Deportation of Individuals Who May Face a Risk of Torture* (House of Commons Standard Note SN/HA/4151, 2013) paras 1.1-1.3.

[156] On Article 3, see Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, Human Rights Handbooks No. 6 (Council of Europe Publishing, 2003).

[157] Unlike many of the other Convention rights, Article 3 permits no exceptions and cannot be derogated from even in times of war or public emergency. See Article 15(2) of the European Convention on Human Rights.

[158] (1997) 23 EHRR 413. The case concerned a challenge to the Home Secretary's decision to deport Karamjit Singh Chahal to India on the grounds that his alleged involvement in Sikh separatist activities constituted a threat to the UK's national security.

[159] ibid paras 79-80. As established in the earlier case of *Soering v United Kingdom* (1989) 11 EHRR 439, this principle also applies to extradition.

individual would face a real risk of being subjected to treatment contrary to Article 3'[160] in the receiving country. Where such a risk is believed to exist, the government is therefore prevented from deporting a suspect, regardless of the threat they are seen to present to national security.[161]

Following 9/11, various states, including the UK, have sought to persuade the Strasbourg Court that the *Chahal* principle[162] should be modified, arguing that in expulsion cases, the threat that suspects pose should be a relevant factor to be weighed against the risk of ill-treatment if they are returned to their own country.[163] In *Saadi v Italy*,[164] however, the Grand Chamber unequivocally affirmed that, 'since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment.'[165] Consequently, the argument of the Italian and UK[166] governments that the risk of harm to the individual if removed should be balanced against their dangerousness to the community if not sent back, was rejected by the Court as 'misconceived'.[167] The *Saadi*

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[160] *Chahal v United Kingdom* (1997) 23 EHRR 413, para 80.
[161] It was asserted by the Court that, 'In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration': ibid para 80.
[162] The principle of *non-refoulement*.
[163] See *Ramzy v Netherlands* (Application No 25424/05), in which the governments of the UK, Italy, Lithuania, Portugal, and Slovakia intervened as third parties, arguing that the approach followed by the ECtHR in *Chahal* should be 'altered and clarified' in light of the increased threat from international terrorism. See also *A v Netherlands* (Application No 4900/06).
[164] (2009) 49 EHRR 30. The case concerned the Italian authorities' decision to deport Nassim Saadi, a Tunisian national lawfully residing in Italy, to Tunisia. Though not convicted of any terrorist offences in Italy, he had been convicted in absentia of terrorism-related offences by a military court in Tunis and had been sentenced to twenty years' imprisonment. It was claimed by Saadi that if deported he would be exposed to a risk of being subjected to ill-treatment contrary to Article 3 in Tunisia, where the mistreatment of alleged terrorists was routine and well-documented. See Daniel Moeckli, '*Saadi v Italy: The Rules of the Game Have Not Changed*' (2008) 8(3) HRLR 534.
[165] *Saadi v Italy* (2009) 49 EHRR 30, para 138.
[166] The UK Government was a third-party intervener in the case. See paras 117-123 of the judgment.
[167] *Saadi v Italy* (2009) 49 EHRR 30, para 139. In respect of this argument, the Court concluded that, 'The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other': para 139.

decision has also been re-affirmed by the ECtHR in a number of subsequent cases,[168] and was applied directly against the UK government in *NA v United Kingdom.*[169]

In addition, deportation may also 'exceptionally' be precluded by Article 6 of the ECHR.[170] In *Othman v United Kingdom,*[171] for example, the ECtHR held that deportation is prohibited where the deportee has suffered or risks suffering 'a flagrant denial of justice' in the receiving state, entailing a breach of the principles of a fair trial 'which is so fundamental as to amount to a nullification, or destruction of the very essence of, the right guaranteed by ... Article [6]'.[172]

One method used by the government to circumvent the constraints imposed by the ECtHR jurisprudence is the negotiation of framework deportation with assurance (DWA) arrangements with foreign governments.[173] This system is based on Memoranda of Understanding,[174] whereby the receiving state agrees that, if deported, an individual will not be exposed to treatment that would violate Article 3.[175] To date, the UK has agreed

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[168] See, for example, *Ismoilov v Russia* (2009) 49 EHRR 42 and *Ryabikin v Russia* (2009) 48 EHRR 55.

[169] (2009) 48 EHRR 15. *NA* concerned a challenge to the proposed deportation of the applicant to Sri Lanka. Here, the ECtHR found that, given the particular factors present in the case, including the applicant's Tamil ethnicity, his previous arrest and detention on suspicion of involvement with the Tamil Tigers (LTTE), the current climate of violence in Sri Lanka, and the authorities' ongoing efforts to combat the LTTE, there was a real risk that he would be exposed to ill-treatment in violation of Article 3 if returned.

[170] In *Soering v United Kingdom* (1989) 11 EHRR 439, the ECtHR noted that an issue might exceptionally be raised under Article 6 in extradition or expulsion cases where the individual 'has suffered or risks suffering a flagrant denial of a fair trial' in the state to which they are sent: para 113. See also *Einhorn v France* (Application No 71555/01) para 32.

[171] (2012) 55 EHRR 1.

[172] ibid para 260. In *Othman*, the real risk that Abu Qatada would suffer a 'flagrant denial of justice' in violation of Article 6 arose from the risk that evidence obtained by torture would be used in his retrial for terrorism-related offences in Jordan: para 282.

[173] See Home Office, *Countering International Terrorism* (Cm 6888, 2006) 19; Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) para 8.27; *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) paras 4.30-4.31.

[174] Detailed discussion of the legal and practical issues associated with the use of Memoranda of Understanding in the deportation context is outside the scope of this thesis.

[175] See Horne and Gower, *Deportation of Individuals Who May Face a Risk of Torture* (n 155) 14-17; Kate Jones, 'Deportations with Assurances: Addressing Key Criticisms' (2008) 57(1) ICLQ 183; Jennifer Tooze, 'Deportation with Assurances: The Approach of the UK Courts' [2010] PL 362.

framework DWA arrangements with Ethiopia, Jordan, Lebanon, Libya[176] and Morocco,[177] and also has an arrangement based upon an exchange of letters in place with Algeria.[178] Although controversial,[179] where assessed to be credible, these arrangements therefore allow the government to deport foreign terror suspects to these countries without contravening the UK's human rights obligations.[180] While they may facilitate the removal of some foreign terror suspects, this strategy does not, however, eliminate the need for measures such as control orders or TPIMs. Indeed, not all assurances have been deemed an adequate guarantee against ill-treatment by the courts.[181] Furthermore, the threat posed by suspects who are British citizens, as 24 of the 52 individuals subjected to control orders during the lifetime of the regime were,[182] and as nine out of the ten TPIM subjects to date have been,[183] obviously cannot be dealt with by means of deportation.

Although prosecution and deportation represent the UK government's preferred options for dealing with terrorist suspects, these are not always possible. Control orders, and their

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[176] In a 2011 report, the Foreign Affairs Committee however noted that the DWA with Libya was no longer in force: Foreign Affairs Committee, *The FCO's Human Rights Work 2010-11* (HC 2010-12, 964) para 85.

[177] Home Office, *Review of Counter-Terrorism and Security Powers* (n 56) 4; Website of the Foreign and Commonwealth Office, 'Memoranda of Understanding on Diplomatic Assurances' <www.gov.uk/government/collections/memoranda-of-understanding-on-deportations-with-assurances> accessed 25 November 2013.

[178] There is no Memorandum of Understanding in place with Algeria, instead the arrangement is based upon an exchange of letters between the British and Algerian governments. See Website of the Foreign and Commonwealth Office, 'Exchange of Letters: Algeria' <www.gov.uk/government/publications/memoranda-of-understanding-on-deportations-with-assurances-dwa-algeria> accessed 25 November 2013.

[179] See Amnesty International, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture* (2010); Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (2005); International Commission of Jurists, *Assessing Damage* (n 8) 104-106; UNCHR, 'Report of the Special Rapporteur on the question of torture, Manfred Nowak' (E/CN.4/2006/6, 23 December 2005) paras 31-32.

[180] See *Othman v United Kingdom* (2012) 55 EHRR 1, paras 205-207; *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

[181] See, for example, *AS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289. See also *Abid Naseer and others v Secretary of State for the Home Department* [2010] UKSIAC 77/09.

[182] David Anderson, *Final Report* (n 18) para 3.14.

[183] David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2014) para 3.6. As of February 2014, DD is the only foreign national against whom a TPIM notice has been made.

replacement, TPIMs, therefore constitute measures designed to 'plug the gap'[184] where no other viable strategy for addressing the threat posed by a 'small and potentially very dangerous cohort of individuals'[185] is seen to exist. Indeed, as the Coalition's *Review of Counter-Terrorism and Security Powers* concluded, where legal or practical impediments prevent a suspect being prosecuted or deported, imposing restrictions on their actions under such preventive orders, 'will be an imperfect if sometimes necessary alternative.'[186]

V. 'Old Wine in New Bottles'?[187]

Introducing the control order proposals before the House of Commons in January 2005, the Home Secretary openly acknowledged that the scheme represented, 'a very substantial increase in the executive powers of the state in relation to British citizens.'[188] However, whilst the PTA's provisions were patently 'contentious',[189] they were by no means novel. Indeed, examination of the historical record proves the House of Lords Select Committee on the Constitution's proclamation that there was 'no direct precedent for the powers granted to the Secretary of State'[190] under the 2005 Act, to be misconceived. This section will therefore briefly consider an assortment of measures, which in nature, if not in scope, can be regarded as precursors to control orders.

Commentaries from a range of sources have compared control orders to a variety of antecedent measures. In his appraisal of the Prevention of Terrorism Bill, JUSTICE Director, Roger Smith, suggested that anti-social behaviour orders provided 'some sort of

[184] Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2011) para 82.
[185] ibid para 47.
[186] Home Office, *Review of Counter-Terrorism and Security Powers* (n 56) 40. See also Lord Macdonald, *Review of Counter-terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003, 2011) 11.
[187] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate 2007) x. Bonner suggests that the use of executive measures in responding to terrorism post-9/11, 'far from being "new"... [is] very much a case of old wine in new bottles' (x). See also Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer 2014) 2.
[188] HC Deb 26 January 2005, vol 430, col 309 (Charles Clarke).
[189] ibid.
[190] House of Lords Select Committee on the Constitution, *Prevention of Terrorism Bill: Report* (HL 2004-05, 66) para 10.

precedent.'[191] Others, meanwhile, invoked analogies between control orders and the executive orders made pursuant to the regulations issued under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922,[192] along with 'the repressive regimes of detention, deportation and banishment, exile and 'rustication' deployed by British Governors in a variety of colonies.'[193]

Further, the Home Secretary's statement that, at the 'top end', controlees could be required to 'remain at their premises',[194] lead to the control orders scheme being likened to house arrest as practiced by 'repressive regimes from South Africa to Zimbabwe to Burma.'[195] Whilst limited parallels may be drawn with these examples, it is in the counter-terror context, and in particular certain measures enacted in response to the campaign of Irish irredentist terrorism that reached its apogee during the latter half of the twentieth century, that the most salient precedents can be located.

i. The Prevention of Violence (Temporary Provisions) Act 1939

The Prevention of Violence (Temporary Provisions) Act 1939 (PVA), introduced by the Chamberlain government in response to the IRA's mainland bombing campaign in mid-1939,[196] can be regarded as a forerunner to the PTA.[197] The PVA conferred upon the Home Secretary 'extraordinary powers' of expulsion, prohibition and registration, measures which were designed to forestall further terrorist attacks against Great Britain.[198] An expulsion order

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[191] Roger Smith, 'Global Threat?' (2005) 149(5) Solicitors Journal 128, 128.
[192] Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395, 1404. Regulations 23A and 23B (S.R.O. 36/1922), for example, empowered the Civil Authority to make orders prohibiting individuals from entering, or residing in, particular areas, or imposing a requirement that the subject report to the police at specific times and dates. For detailed discussion of the operation of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 see Donohue (n 49) 40-116.
[193] David Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights' (2006) 12 European Public Law 45, 62. See also Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 280.
[194] HC Deb 26 January 2005, vol 430, col 308 (Charles Clarke).
[195] Ben MacIntyre, 'Guilty until proven even guiltier' *The Times* (London, January 29 2005).
[196] See Owen G Lomas, 'The Executive and the Anti-Terrorist Legislation of 1939' [1980] Public Law 16; See also Donohue (n 49) 208-216.
[197] Walker, 'Keeping Control of Terrorists' (n 192) 1403.
[198] The long title proclaimed the Prevention of Violence (Temporary Provisions) Act 1939 to be: An Act to prevent the commission in Great Britain of further acts of violence designed to influence public

could be made where the Home Secretary was 'reasonably satisfied' that a person[199] was concerned in the preparation or instigation of acts of violence directed at influencing government policy or public opinion with respect to Irish affairs or was knowingly harbouring such a person,[200] whereas prohibition orders could be issued to deny suspected terrorists entry to the British mainland.[201] However, it is to registration orders, under which the individual was required to register their personal details with, and report regularly to, the police,[202] that control orders bear the strongest resemblance. Whilst there are evident similarities between the requirements imposed by registration orders and the obligations to which controlees were made subject under the PTA, as Walker observes, '[registration] orders were far less intrusive than the 2005 Act equivalents - the idea [being] to ... facilitate surveillance rather than to avert the need for it.'[203] It was initially intended that this legislation would expire after two years,[204] however, through annual renewal it ultimately survived until 1954,[205] by which time 190 expulsion orders, 71 prohibition orders, and 29 registration orders had been issued.[206]

ii. The Prevention of Terrorism (Temporary Provisions) Acts 1974-1989

The policy of imposing restrictions upon suspected terrorists' freedom of movement was also a central feature of the Prevention of Terrorism (Temporary Provisions) Acts 1974-1989.[207] The backdrop to the enactment of this statute, which was substantially modelled on the 1939

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opinion or Government policy with respect to Irish affairs; and to confer on the Secretary of State extraordinary powers in the behalf; and for purposes connected with the matters aforesaid.

[199] Expulsion and prohibition orders could only be made against individuals classified as non-residents, or those who had been resident in Great Britain for less than twenty years. See Prevention of Violence (Temporary Provisions) Act 1939, ss 1(2), (4).

[200] Prevention of Violence (Temporary Provisions) Act 1939, s 1(2).

[201] ibid s 1(4).

[202] ibid s 1(3).

[203] Walker, 'Keeping Control of Terrorists' (n 192) 1403.

[204] Prevention of Violence (Temporary Provisions) Act 1939, s 5(2).

[205] The Prevention of Violence (Temporary Provisions) Act 1939 expired on 31 December 1954 by virtue of the Expiring Law Continuance Act 1953, s 1(1), Sch 1, pt I, and was subsequently repealed by the Statute Law (Repeals) Act 1973.

[206] HC Deb 15 November 1951, vol 493, col 1209.

[207] The Prevention of Terrorism (Temporary Provisions) Act was originally enacted in 1974. The 1974 Act was then repealed and replaced by the Prevention of Terrorism (Temporary Provisions) Act 1976, which was subsequently re-enacted in 1984 (Prevention of Terrorism (Temporary Provisions) Act 1984), and then again (with additions) in 1989 (Prevention of Terrorism (Temporary Provisions) Act 1989).

Act, was again a period of intense terrorist violence, this time perpetrated by the Provisional IRA.[208] By mid-November 1974, there had been 99 separate terrorist incidents, resulting in 145 casualties and 17 deaths.[209] However, it was the devastating dual pub bombings in Birmingham on November 21, 1974, which left 21 people dead and a further 184 injured, which provided the most immediate catalyst. Responding to the public's outrage at the attacks, the Bill was laid before Parliament on November 28 by the Labour government's Home Secretary, Roy Jenkins. Despite the admittedly 'draconian' nature of the powers contained therein,[210] aided by the overwhelming bipartisan support engendered by the circumstances, the Act became law the following day,[211] a mere 180 hours after the atrocity that had provoked its introduction.[212]

The Prevention of Terrorism (Temporary Provisions) Act conferred powers upon the Home Secretary to be exercised 'as appears expedient to prevent acts of terrorism (whether in Great Britain of elsewhere)' connected with the affairs of Northern Ireland.[213] Most germane to this discussion, the Act, in its amended 1989 incarnation, authorised the Home Secretary to issue orders excluding persons from Great Britain,[214] Northern Ireland,[215] or the United Kingdom,[216] if satisfied that they were or had been concerned in the commission, preparation or instigation of acts of terrorism,[217] or were attempting, or may attempt, to enter Great Britain with a view to being so concerned.[218] Whilst detailed analysis of the operation

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[208] In December 1969, the IRA split into two factions, the Provisional IRA and the Official IRA. Since that date the majority of Nationalist terrorism has been carried out by the Provisionals.
[209] Clive Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) 32.
[210] HC Deb 25 November 1974, vol 882, col 35. See the comments of then Home Secretary, Roy Jenkins, who, whilst asserting that the powers were 'fully justified to meet the clear and present danger', characterised the powers as 'Draconian ... [and] unprecedented in peacetime.'
[211] The Act received the Royal Assent at 9.30 am on the 29 November 1974.
[212] David Bonner, 'Responding to Crisis: Legislating Against Terrorism' (2006) 122 Law Quarterly Review 602, 630.
[213] Prevention of Terrorism (Temporary Provisions) Act 1974, s 3(1).
[214] ibid Prevention of Terrorism (Temporary Provisions) Act 1989, s 5.
[215] ibid s 6.
[216] ibid s 7.
[217] ibid ss 5(1)(a), 6(1)(a), 7(1)(a).
[218] ibid ss 5(1)(b), 6(1)(b), 7(1)(b).

of these Acts is outside the scope of this study,[219] it is noteworthy that the exclusion regime endured for just under twenty-six years, eventually being brought to an end when the Prevention of Terrorism (Temporary Provisions) Act 1989 was repealed and replaced by the TA 2000.[220]

This summary review reveals that there are clear parallels between past and present practice regarding the use of executive orders to impose restrictions upon individual liberty in order to prevent terrorist activity. Despite the manifest similarities between control orders and the aforementioned powers contained in the PVA and successive Prevention of Terrorism (Temporary Provisions) Acts, at no point during the parliamentary debates were these precedents discussed,[221] nor was any reference made to them in either of the JCHR's reports[222] on the Bill. Indeed, these precedents seemingly had 'little apparent influence'[223] on the design of the legal framework introduced by the PTA 2005, an examination of which is the focus of the following chapter.

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[219] For a comprehensive discussion of this legislation, see: Walker, *The Prevention of Terrorism in British Law* (n 209). See also Donohue (n 49) 216-255.

[220] TA 2000, s 2(1), sch 16. The decision not to include the power to make exclusion orders in the Terrorism Act 2000 followed Lord Lloyd's recommendation in his *Report on the Inquiry into Legislation against Terrorism* (Cm 3420, 1996) that the power should not be re-enacted under new permanent legislation. See also the Government's consultation paper *Legislation Against Terrorism* (Cm 4178, 1998), Chapter 5: Exclusion.

[221] Nor were any of these antecedents mentioned in the Research Paper which accompanied the Bill: Arabella Thorpe, *The Prevention of Terrorism Bill (Bill 61 of 2004/05): House of Commons Library Research Paper 05/14* (2005).

[222] Joint Committee on Human Rights, *Prevention of Terrorism Bill: Preliminary Report (*2004-05, HL 61, HC 389); Joint Committee on Human Rights, *Prevention of Terrorism Bill* (2004-05, HL 68, HC 334).

[223] Walker, *Terrorism and the Law* (n 52) 300.

Chapter 3
The Control Order Regime

Having identified the rationale for the introduction of control orders in chapter 2,[1] this chapter begins by considering the immediate background to, and enactment of, the PTA. This is followed by a legal analysis of statutory scheme under which the control order system was operated by the UK government between March 2005 and December 2011.

I. The Anti-terrorism, Crime and Security Act 2001, Part 4: Detention Without Trial

Although the extensive TA 2000 had only recently been enacted,[2] and 'the UK's armoury of anti-terrorism measures [was] already widely regarded as among the most rigorous in Europe,'[3] the Blair government nevertheless swiftly responded to the 9/11 attacks by introducing the ATCSA.[4] Part 4 of this highly contentious Act empowered the Home Secretary to indefinitely detain, without charge or trial, non-nationals who were suspected of international terrorism,[5] but whom the government could not prosecute or deport.[6]

The implementation of the ATCSA detention regime, labelled 'Guantánamo "lite"' by Ni Aolain and Gross,[7] and viewed by some as entailing the resurrection of the draconian policy of internment previously used in Northern Ireland,[8] necessitated the entry of derogations

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[1] See pp 33-41.
[2] The TA 2000, which comprises 131 sections and 16 schedules, received the Royal Assent on 20 July 2000, and came into force on 19 February 2001.
[3] JCHR, *Anti-terrorism, Crime and Security Bill* (2001-02, HL 37, HC 372) para 30.
[4] The ATCSA was subject to a remarkably rapid passage through Parliament, the Bill being introduced on 19 November 2001, and receiving the Royal Assent a mere 25 days later on 14 December 2001.
[5] ATCSA, ss 21-23. Section 21(1) provided that a certificate could be issued against an individual where the Secretary of State (a) reasonably believed that the person's presence in the United Kingdom was a risk to national security, and (b) reasonably suspected that the person was a terrorist. The power to detain following certification was contained in s 23(1).
[6] See Human Rights Act 1998 (Designated Derogation) Order 2001 SI 201/3644, sch. The reasons why the government is unable to prosecute or deport certain terrorist suspects is discussed in chapter 2 of this thesis (pp 34-36).
[7] Fionnuala Ni Aoláin and Oren Gross, 'Introduction: Guantanamo and Beyond' in Fionnuala Ni Aoláin and Oren Gross (eds), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press 2013) 33.
[8] Amnesty International described the Part 4 powers as 'a disturbing echo of the disastrous internment of the early 1970s that proved so counter-productive in the context of the conflict in Northern Ireland':

from Article 5(1) ECHR[9] and Article 9 ICCPR.[10] The Part 4 scheme, which existed from 14 December 2001 to 14 March 2005,[11] proved 'immensely controversial throughout its short life',[12] and was subject to vehement criticism from a variety of parliamentary committees,[13] NGOs,[14] and academic commentators.[15] It was, however, the 'body blow'[16] dealt to the regime by the House of Lords' decision in *A and Others* v *Secretary of State for the Home Department* (the *Belmarsh* case)[17] that ultimately led the to the replacement of detention under Part 4 with control orders. In *A*,[18] while it was accepted by all but Lord Hoffmann[19] that there existed within the UK an 'emergency threatening the life of the nation' sufficient to satisfy the threshold for derogation under Article 15 ECHR,[20] by a majority of 8-1,[21] the Law Lords held that ATCSA, s 23 was incompatible with Articles 5 and 14 of the ECHR. As Lord Bingham explained, the s 23 detention power was deemed to be both disproportionate, in that it 'left British suspected terrorists at large' whilst allowing 'non-UK suspected terrorists to leave the country with impunity',[22] and discriminatory, as it differentiated between suspected international terrorists 'on the ground of nationality or immigration status.'[23] The derogation

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United Kingdom: Human Rights: A Broken Promise (2006) 14. See also Helen Fenwick, 'The Anti-terrorism, Crime and Security Act 2001: A Proportionate Response to September 11 2001? (2002) 65(5) MLR 724, 737; Kent Roach K, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 271.

[9] Human Rights Act 1998 (Designated Derogation) Order 2001 SI 201/3644.

[10] UK Derogation under the ICCPR, 18 December 2001.

[11] During the regime's lifetime, 16 foreign nationals were detained under Part 4, two of whom (Ajouaou and F) voluntarily left the UK for France and Morocco. One additional individual was certified under ATCSA, s 21 but detained under other powers. See HC Deb 18 November 2003, vol 413, col 27WS (David Blunkett).

[12] Conor Gearty, 'Terrorism and Human Rights' (2007) 42(3) Government and Opposition 340, 358.

[13] See Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001, Review: Report* (HC 2003-04, 100) paras 185-204; JCHR, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4* (2003-04, HL 38, HC 381).

[14] See Amnesty International, *Human Rights: A Broken Promise* (2006) 13-17.

[15] Tomkins, for example, described the ATCSA as 'the most draconian legislation Parliament has passed in peacetime in over a century': Adam Tomkins, 'Legislating Against Terror; The Anti-terrorism, Crime and Security Act 2001' [2002] Public Law 205, 205. See also Fenwick, 'The Anti-terrorism, Crime and Security Act 2001' (n 8).

[16] Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604, 605.

[17] [2004] UKHL 56.

[18] *A and Others* v *Secretary of State for the Home Department* [2004] UKHL 56.

[19] ibid [88]-[97].

[20] ibid. See, for example, [119] (Lord Hope) and [154] (Lord Scott).

[21] Lord Walker dissenting [191]-[218].

[22] ibid [43]. As Lord Nichols noted, the detainees' prison was said to be one with 'only three walls' [81].

[23] ibid [73]. See also [157] (Lord Scott).

order was therefore quashed and a declaration of incompatibility was made under s 4 of the HRA.

II. The Introduction of the Prevention of Terrorism Act 2005

The Government's initial response to the House of Lords' decision in *A* was delivered in the form of a written ministerial statement issued by the Home Secretary to Parliament on the day of the judgment.[24] In this robustly worded statement Charles Clarke made it clear that, despite the declaration of incompatibility, the Part 4 provisions would remain in force, it being for Parliament, rather than the courts, to decide whether, and in what manner, the law should be amended.[25] Clarke also explained that he would not be revoking the certificates or releasing any of the detainees as it was believed they continued to pose a significant threat to national security.[26]

The following Monday witnessed a return to the discussion of the *Belmarsh* judgment in the House of Commons.[27] Despite vigorous questioning and calls for clarification in respect of how the Government intended to respond to the decision, the Home Secretary asserted that he would not be rushed into coming to a conclusion on such a crucial issue, insisting that no statement would be made until due consideration had been given to the Law Lords' judgment.[28] In fact, it was not to be until over a month later that the legislative consequences of *A*[29] were actually revealed.

On 26 January 2005, the Home Secretary made a statement to the House of Commons on the future of the Part 4 powers.[30] In this, he confirmed that, although the Government maintained that the powers had been justified and had played a crucial role in addressing the post-9/11 public emergency and containing the threat posed by those certified and

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[24] HC Deb 16 December 2004, vol 428, col 151WS (Charles Clarke).
[25] ibid.
[26] ibid.
[27] HC Deb 20 December 2004, vol 428, cols 1911-1919 (Charles Clarke).
[28] HC Deb 20 December 2004, vol 428, cols 1911-1912 (Charles Clarke).
[29] *A* (n 18).
[30] HC Deb 26 January 2005, vol 430, cols 305-306 (Charles Clarke).

detained under them,[31] he accepted the House of Lords' declaration that ATCSA, s 23 was incompatible with the ECHR.[32] Having reiterated his conviction that there remained a public emergency threatening the life of the nation, the Home Secretary announced that the detention regime was to be replaced by a 'twin-track approach', comprising, deportation with assurances for foreign nationals,[33] and a new mechanism, control orders, for use against those suspected of involvement in terrorism-related activity who could not be prosecuted or deported.[34]

Elaborating upon the planned measures, the Home Secretary explained that control orders would be preventive in nature, being designed to 'disrupt those seeking to carry out attacks–whether [in the UK] ... or elsewhere–or who are planning or otherwise supporting such activities.'[35] The orders would allow for the imposition of controls tailored to the specific threat posed by each individual, and would be applicable to any suspected terrorist, irrespective of nationality, thus addressing the Law Lords' concerns regarding proportionality and discrimination.[36] Next, Clarke turned to the timescale for enacting the proposals. Although mindful of the serious time pressures involved, a Bill was to be introduced as soon as practicable in order that the control orders legislation could be passed in time to obviate the need for renewal of the Part 4 powers,[37] which were due to expire on 14 March.[38]

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[31] According to the Home Secretary, the justification for the Part 4 'immigration powers' derived from the fact that, in the immediate aftermath of 9/11, the terrorist threat 'appeared to come predominantly, albeit not exclusively, from foreign nationals', combined with the need, pursuant to UN Security Council Resolution 1373 ((28 September 2001) UN Doc S/RES/1373), to take 'positive action against peripatetic terrorists' living in the UK: HC Deb 26 January 2005, vol 430, col 306 (Charles Clarke).

[32] HC Deb 26 January 2005, vol 430, cols 305-306 (Charles Clarke).

[33] The 'assurances' mentioned refer to 'diplomatic assurances' against treatment that would contravene Article 3 of the ECHR. This system is based upon 'Memoranda of Understanding' with countries to which terrorist suspects may be deported, whereby the receiving state agrees that, if detained following deportation, the deported person will be 'afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards': JCHR, *The UN Convention Against Torture* (2005-06, HL 185-I, HC 701-I) para 105. See chapter 2 of this thesis.

[34] HC Deb 26 January 2005, vol 430, cols 306-307 (Charles Clarke). See chapter 2 of this thesis.

[35] HC Deb 26 January 2005, vol 430, col 307 (Charles Clarke).

[36] ibid.

[37] By virtue of s 29 of the ATCSA, ss 21-23 were subject to annual renewal by order approved by resolution in both Houses of Parliament.

[38] HC Deb 26 January 2005, vol 430, col 308 (Charles Clarke).

Whilst the Government sagaciously decided to repeal ATCSA, Part 4 in response to the Law Lords' issuance of a declaration of incompatibility, they were under no legal obligation to do so. Consistent with the constitutional doctrine of parliamentary sovereignty, a declaration issued by a court[39] under HRA, s 4, 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.'[40] Thus, the fact that the government is not compelled to revoke the offending provision means that, as was acknowledged by Lord Scott in *A*, 'the import of such a declaration is political not legal.'[41] However, had the Government opted not to act upon the Lords' decision, it is likely that any attempt to secure the renewal of the Part 4 powers would have met with virtually insurmountable opposition from the House of Lords acting in its legislative capacity. Furthermore, as Bonner suggests, ignoring the declaration 'would have devalued the constitutional settlement embodied in the HRA ... and enhanced the risk of adverse comment by the European Court of Human Rights ... on the efficacy of a Declaration of Incompatibility as a remedy'.[42]

i. The Prevention of Terrorism Bill

The Prevention of Terrorism Bill[43] was announced in a Business Statement on Monday 21 February 2005, which listed it for debate on Second Reading two days later, with the Committee and remaining stages scheduled for the following Monday.[44] This expedited timetable, and the consequent curtailment of the opportunity for rigorous scrutiny and debate, unsurprisingly engendered consternation amongst parliamentarians,[45] along with

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[39] Only certain courts are able to make declarations of incompatibility. The HRA, s 4(5) specifies that the courts which have this power are the Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court; in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session; in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

[40] HRA, s 4(6)(a); nor is it 'binding on the parties to the proceedings in which it is made' (s 4(6)(b)).

[41] *A* (n 18) [142] (Lord Scott).

[42] David Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights' (2006) 12 *European Public Law* 45, 59.

[43] Prevention of Terrorism HC Bill (2004-05) [61].

[44] HC Deb 21 February 2005, vol 431, col 21 (Rt Hon Peter Hain MP, Leader of the House).

[45] HC Deb 21 February 2005, vol 431, cols 21-30; see also Robert Verkaik and Nigel Morris, 'MPs Condemn House Arrest and Tagging Plan to 'Control' Terror Suspects' *The Independent* (London 27

attracting negative comment from the JCHR[46] and condemnation from a range of human rights organisations.[47] Introducing the Bill in the House of Commons, the Home Secretary sought to justify the rapidity with which it was to progress through the legislative process on the grounds that simply renewing the Part 4 powers would be to fly in the face of the Law Lords' judgment and create an 'uncertain and unsolid' regime which would likely be subject to challenge in the ECtHR.[48] The claim that prolonging the life of Part 4 was not an acceptable option,[49] and that in enacting measures to replace it time was therefore of the essence, is, to some degree, persuasive. However, this does not detract from the fact that affording negligible parliamentary time to a statute with far-reaching human rights implications merely seems to conform to the lamentable pattern which has emerged in relation to the passing of much of the UK's anti-terrorism legislation.[50] Furthermore, in this instance the Government's failings are rendered particularly acute due to their having been forewarned by the Newton Committee in December 2003 that legislation to replace the Part 4 detention powers was needed as a matter of urgency.[51]

Following this inauspicious start, the Bill then had an exceptionally turbulent passage through Parliament, the Government's proposals being met with fierce cross-party criticism.[52] Various aspects of the regime provoked intense controversy, principal amongst

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January 2005) <www.independent.co.uk/news/uk/crime/mps-condemn-house-arrest-and-tagging-plan-to-control-terror-suspects-488385.html> accessed 30 June 2014.

[46] JCHR, *Prevention of Terrorism Bill: Preliminary Report* (2004-05, HL 61, HC 389) para 8; *Prevention of Terrorism Bill* (2004-05, HL 68, HC 334) para 1.

[47] See, for example, Amnesty International, *The Prevention of Terrorism Bill: A Grave Threat to Human Rights and the Rule of Law in the UK* (2005) AI Index EUR 45/005/2005 (Public); Liberty, *Prevention of Terrorism Bill: Liberty's Briefing for Second Reading in the House of Commons* (2005) para 1.

[48] HC Deb 22 February 2005, vol 431, col 159 (Charles Clarke).

[49] The Shadow Home Secretary, David Davis, had expressed the Opposition's willingness to support a temporary renewal of the Part 4 powers so as to allow the House of Commons adequate time to consider the Bill: HC Deb 22 February 2005, vol 431, col 157 (Charles Clarke).

[50] House of Lords Select Committee on the Constitution, *Fast Track Legislation: Constitutional Implications and Safeguards* (HL 2008-09, 116-I) paras 65-82. See also Conor Gearty, *Can Human Rights Survive?: The Hamlyn Lectures 2005* (Cambridge University Press 2006) 105; David Bonner, 'Responding to Crisis: Legislating Against Terrorism' (2006) 120 LQR 602.

[51] Privy Counsellor Review Committee, *Report* (n 13) para 4.

[52] For detailed discussion of the Bill's passage through parliament see Laraine Hanlon, 'UK Anti-Terrorist Legislation: Still Disproportionate?' (2007) 11 International Journal of Human Rights 481, 491-497.

which were the standard of proof applicable to the decision to impose a control order,[53] the timing and extent of judicial involvement in the making and review of the orders, and the absence of provision for ongoing Privy Counsellor review.[54] A further point of contention was the Government's refusal to include a sunset clause providing for the automatic expiry of the Act.[55] It was argued by members of both Houses that the insertion of such a clause was essential to ensure that there would be an opportunity for a more thorough appraisal of appropriate counter-terrorism measures within an acceptable time-frame.[56]

Not only does the Prevention of Terrorism Bill have the dubious honour of giving rise to the longest sitting of the House of Lords ever recorded,[57] but it also became 'the catalyst for the most severe bout of disagreement between the Houses of Commons and Lords in modern history.'[58] The Bill caused a bitter standoff between the two parliamentary chambers, with the government-controlled House of Commons repeatedly rejecting the Lords' proposed amendments.[59] However, the deadlock was eventually broken with the promise that, in lieu of the desired sunset clause, a new draft counter-terrorism Bill would be published in autumn of 2005, that, amongst other things, would allow for a comprehensive review, amendment, and if necessary, complete repeal, of the control orders legislation.[60] The PTA therefore came into force upon receiving the Royal Assent on March 11 2005,[61] just 18 days after its introduction in Parliament.

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[53] HC Deb 10 March 2005. vol 431, col 1770 (Dominic Grieve).
[54] HC Deb 10 March 2005, vol 431, col 1804 (Dominic Grieve).
[55] The Conservatives proposed the introduction of a clause providing that the Act would expire on 30 November 2005.
[56] See HC Deb 10 March 2005, vol 431, cols 1768-1770.
[57] See the comments of Lord Falconer, HL Deb 10 March 2005, vol 670, col 1059. The sitting of March 10 2005 actually lasted until 7.00 p.m. on March 11.
[58] Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395, 1408.
[59] The Bill passed between the two Houses four times in an epic parliamentary session which lasted over 30 hours. See House of Lords Select Committee on the Constitution, *Fast Track Legislation* (n 50) paras 81-82.
[60] HL Deb 10 March 2005, vol 431, cols 1058-1062.
[61] Excepting section 13(2), which entered into force on 14 March 2005.

Following the enactment of the PTA, ss 21-32 of the ATCSA were repealed with effect from 14 March 2005,[62] and the associated derogation from Article 5 ECHR rescinded.[63] Immediately prior to this, however, those still in detention pursuant to Part 4 were released by the SIAC.[64] Synchronous with the PTA's entry into force, on 11 March, eight[65] of the remaining detainees were released on bail by the SIAC chairman, Mr Justice Ouseley.[66] The stringent, yet exceptionally short-lived, bail conditions[67] imposed were to directly foreshadow the obligations to which the former detainees were subsequently made subject under the control orders issued against them by the Home Secretary in the first exercise of his newly acquired powers.[68]

III. Control Orders: The Statutory Scheme

The PTA comprised sixteen sections and one schedule. Sections 1-9 set out by whom, and in what circumstances, control orders could be made, the obligations they could impose, and the offences associated with their breach.[69] Sections 10-12 dealt with the procedure for appeals against control orders, the court's powers on appeal, and issues of jurisdiction

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[62] PTA, ss 16(2)(a), 16(3). However, pursuant to PTA, s 16(4), repeal was not to 'prevent or otherwise affect' any ongoing appeals or claims for compensation brought under ATCSA, s 25(1).
[63] Human Rights Act 1998 (Amendment) Order 2005 SI 2005/1071, which came into force on 8 April 2005.
[64] See R Ford, 'Terror Suspects Freed on Bail' *The Times* (London 12 March 2005) Home 6.
[65] B, E, H, K, P, Q, Abu Qatada and Mahmoud Abu Rideh.
[66] Detainee A, an Algerian national, had been released on bail by the SIAC on 10 March 2005 under the same conditions that were to be applied to the other eight detainees. Detainee G, who was already on bail (*G v Secretary of State for the Home Department*, SIAC App No SC/2/2002 (20 May 2004)) had his conditions relaxed. An eleventh (former) Part 4 detainee, I, was serving a prison sentence for other offences.
[67] The conditions included a 12 hour curfew (19.00-7.00), the requirement to reside at their home address, wear an electronic tag, and permit the police and other officials to carry out searches of their residence. In addition, the conditions allowed the use of one fixed telephone line, imposed a ban on the use of mobile phones or the internet, along with prohibiting meeting anyone inside or outside their residence without prior Home Office authorisation. See 'Keeping Them Under Control' *Times* (12 March 2005) Home 7; see also Mike Nellis, 'Electronic Monitoring and the Creation of Control Orders for Terrorist Suspects in Britain' in Tahir Abbas (ed), *Islamic Political Radicalism: A European Perspective* (Edinburgh University Press 2007) 270-272.
[68] Non-derogating control orders were made against the former detainees by the Home Secretary on 11 March 2005 under PTA, s 3(1)(b) and (c). HC Deb 16 June 2005, vol 435, cols 23-24WS.
[69] This part of the PTA also contained provisions on: arrest pending the making of a derogating control order (s 5); the revocation or modification of a control order (s 6); and criminal investigation after a control order had been made (s 8).

relating to control order decisions and derogation matters.[70] The duration of sections 1-9,[71] requirements for reporting and review, general interpretation, and connected repeals of legislation were covered in sections 13-16. The Schedule to the Act contained a range of provisions pertaining to control order proceedings and appeals, along with conferring special powers to make the rules of court to be followed in such proceedings.

The centrepiece of the PTA was the control order regime. A control order was statutorily defined as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.'[72] These orders could be made against any individual, irrespective of nationality or the nature of the terrorism involved.[73] Whilst only foreign nationals who were suspected of involvement in international terrorism, specifically those with links to Al-Qaeda and its associated networks,[74] could be detained under the ATCSA,[75] the control order provisions applied to both non-nationals and British citizens. That the 2005 Act was substantially broader in scope than its predecessor was perceived by some to be a cause for concern. Hanlon, in particular, was especially critical of this extension, suggesting that it created a 'deeply disturbing' potential for misuse

[70] In addition, s 12 dealt with the effect of the court's decisions on earlier convictions.
[71] Pursuant to PTA, s 13, sections 1-9 of the Act (the control order powers) were subject to annual renewal.
[72] PTA, s 1(1). PTA, s 15(1) specified that 'the public' meant 'the public in the whole or a part of the United Kingdom or the public in another country or territory, or any section of the public', and that 'terrorism' had the same meaning as in s 1 of the Terrorism Act 2000. For a detailed discussion of the definition of terrorism contained in TA 2000, see Lord Carlile, *The Definition of Terrorism* (Cm 7052, 2005); David Anderson, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014) 75-98. See also Clive Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond' [2007] Public Law 331.
[73] During the Prevention of Terrorism Bill's First Reading in the House of Commons, the Rt Hon Lady Hermon MP asked the Home Secretary to confirm whether control orders would be applicable against Martin McGuinness and Gerry Adams, as 'members of the IRA army council'. Charles Clarke, whilst refusing to comment on individual cases, confirmed that the PTA provided a 'framework to deal with all forms of terrorism': HC Deb 22 February 2005, vol 431, col 165.
[74] In *A v Secretary of State for the Home Department (No.2)* [2004] EWCA Civ 1123, the Court of Appeal held that the ATCSA's detention provisions applied only to those whose suspected involvement in international terrorism was specifically linked to Al-Qaeda and its associated networks, and that Part 4 could not therefore be used to detain foreign individuals belonging to other terrorist organisations such as ETA or the Real IRA. See [64]-[65] (Pill LJ); [216]-[217] and [220]-[221] (Laws LJ); and [373]-[375] (Neuberger LJ).
[75] ATCSA, s 23.

of the Act's powers.[76] However, as the Home Secretary explained at the time the control order proposals were unveiled, the PTA's more expansive ambit reflected the fact that by 2005 it had become apparent that the terrorist threat to the UK emanated not only from networks of foreign nationals with international links, but also from British citizens.[77] Indeed, although the PTA was enacted prior to the 7/7 attacks, the threat posed by British based jihadists[78] had already been demonstrated by the 'shoe bomber' Richard Reid,[79] Ahmed Omar Saeed Sheikh,[80] and Asif Mohammed and Hanif Omar Khan Sharif.[81] Thus, whilst it is clearly imperative that the reach of the state's counter-terrorism powers be limited to legitimate targets, the nature of the contemporary terrorist threat dictates that it is necessary for measures such as control orders to apply equally to nationals and non-nationals.

Pursuant to s 1(3), a control order could impose any obligations that the Secretary of State or the court considered necessary for purposes connected with preventing or restricting the controlled person's involvement in terrorism-related activity.[82] Under s 1(9), 'involvement in terrorism-related activity'[83] was 'afforded a very wide definition',[84] and could consist of any one or more of the following:

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[76] Hanlon suggested that the PTA's 'broader perspective' gave rise to the possibility that control orders could be used against 'hunt supporters, animal rights activists, members of 'Fathers for Justice', parents dismantling a mobile telephone mast in their children's school playground, environmentalists, liberals, and defenders of civil rights,' and that the powers could therefore potentially be employed by an unscrupulous government as a tool to 'crush any dissent.' Laraine Hanlon, 'UK Anti-Terrorist Legislation' (n 52) 498-499.

[77] According to the Home Secretary, by 2005 it had become clear that British nationals were 'now playing a more significant role' in the threats facing the UK: HC Deb 26 January 2005, vol 430, col 306.

[78] See Clive Walker, 'Terrorism: Prevention of Terrorism Act 2005 ss.2 and 3 – Non-Derogating Control Order – Whether "Deprivation of Liberty Under European Convention on Human Rights Art.5' (2008) 6 Criminal Law Review 486, 495.

[79] Reid, who was born in Bromley, South London, unsuccessfully attempted to blow up a plane on a transatlantic flight (American Airlines Flight 63) between Paris and Miami on 22 December 2001 by detonating explosive devices concealed in his shoes.

[80] Sheikh, who was born in London, was the alleged mastermind of the kidnapping and murder of the Daniel Pearl, a writer for the Wall Street Journal, in Pakistan in 2002.

[81] Hanif (who was killed in the attack) and Sharif were British-born terrorists involved in the suicide bombing of a bar in Tel Aviv on 30 April 2003, in which three people were killed and over 50 more were injured.

[82] PTA, s1(3). The Prevention of Terrorism Bill (HC Bill (2004-05) [61], as originally introduced, provided that the obligations imposed should be considered necessary for preventing or restricting the individual's 'further' involvement in terrorism-related activity (cl 1(2)).

[83] A proposal to constrain the definition of 'terrorism-related activity' by inserting the word "intended" into (b), (c) and (d) was rejected, Lord Falconer insisting that there were sufficient safeguards in the

(a) the commission, preparation or instigation of acts of terrorism;
(b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;
(c) conduct which gives encouragement to the commission, preparation of instigation of such acts, or which is intended to do so;
(d) conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraphs (a) to (c). [85]

The Act and accompanying documentation also made it clear that the obligations imposed could be designed to prevent involvement in terrorism-related activity generally, rather than just the specific activity which formed the basis for the Home Secretary's decision to make, or apply for the making of, the control order.[86]

The types of 'obligation' that could be imposed on a 'controlee' under a control order were listed in s 1(4) of the Act. This 'menu of potential obligations'[87] comprised:

(a) a prohibition or restriction on his possession or use of specified articles or substances;
(b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
(c) a restriction in respect of his work or other occupation, or in respect of his business;
(d) a restriction on his association or communications with specified persons or with other persons generally;
(e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
(f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;

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legislation to ensure that it was 'extraordinarily unlikely that the [Act] would catch people who were not in fact terrorists, but were inadvertently caught up in terrorism in some way': HL Deb 3 March 2005, vol 670, cols 458-60.

[84] Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge 2007) 1441.

[85] Section 1(9)(d), which originally read, 'conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity', was amended by section 79(1) of the CTA 2008. This amendment, which became effective on 16 February 2009 (Counter-Terrorism Act 2008 (Commencement No. 2) Order 2009), was made in order to remove any 'unintended ambiguity in the original definition.' The revised definition is deemed to have had effect since the PTA came into force in 2005 (CTA 2008, s 79(2)), reflecting the fact that 'this [was] the way the provision [had] always been interpreted and ... applied' (Explanatory Notes to the Counter-Terrorism Act 2008, paras 218-219.

[86] PTA, s 1(9) provided that 'for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.' See also Explanatory Notes to the Prevention of Terrorism Act 2005, para 31.

[87] Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) para 31.

(g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;
(h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;
(i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
(j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
(k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
(l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
(m) a requirement on him to allow himself to be photographed;
(n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
(o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
(p) a requirement on him to report to a specified person at specified times and places.

Supplemental to subsection (4)(n),[88] s 1(6) provided that controlled persons could be required to cooperate with practical arrangements for monitoring control orders, such as wearing, using and maintaining apparatus as directed.[89]

Despite its considerable breadth, the list of obligations set out under s 1(4) was not exhaustive, a fact which attracted trenchant criticism from various members of the House of Lords during the legislative process. Lord Plant, for example, described the list as 'long, onerous, open-ended and somewhat indefinite',[90] whilst Lord Kingsland opined that it would be 'quite wrong' to treat the list as merely illustrative, contending that the need for

[88] PTA, s 1(4)(n).
[89] PTA, s 1(6). PTA, s 16(5) provided that, for purposes connected with monitoring compliance with control order obligations, whether by electronic or other means, the Home Secretary could enter into such contracts and arrangements with third-parties as he considered appropriate.
[90] HL Deb 3 March 2005, vol 670, col 428.

prospective controlees to be able to foresee the measures to which they may be subject demanded that it be deemed conclusive.[91] The s 1(4) list's non-exclusivity, coupled with the open-ended discretion conferred under s 1(3) to impose *any* obligations considered necessary, was also questioned by the JCHR on grounds of possible incompatibility with the ECHR's requirement that interferences with the rights contained in Articles 8-11 of the Convention be 'prescribed by law'.[92]

Integral to the control orders regime was the power to restrict a person's movements. Section 1(5) provided that an order could require the controlee 'to remain at or within a particular place or area (whether for a particular period or at particular times or generally)', thus allowing for the imposition of curfews, and, more controversially, 'house arrest'. This was accompanied by the ability to prohibit, or impose geographical limitations upon, a person's movements.[93] In addition, it was specified by s 1(7) that a controlee could be required to provide information, in particular details relating to their proposed movements or other activities.[94] Under s 1(8), a prohibition, restriction or requirement imposed by a control order could be expressed in a manner that enabled it to be waived if the controlee obtained prior permission from a 'specified person'.[95]

The PTA made provision for two species of control order, non-derogating and derogating. The distinction between these orders was predicated upon the dividing line drawn within ECHR jurisprudence between permissible interferences with freedom of movement and deprivations of liberty. Those that were perceived to be compliant with right to liberty and security of person guaranteed by Article 5 ECHR were termed 'non-derogating' control

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[91] HL Deb 3 March 2005, vol 670, cols 425-26). In addition, a range of amendments were proposed that would have had the effect of expressly precluding the imposition of certain obligations, such as ones preventing or restricting the controlee from voting in person in elections (Amendment No 26), or requiring the controlled person to leave the United Kingdom (Amendment No 29). See Hansard HL Deb 3 March 2005, vol 670, cols 426-29.
[92] JCHR, *Preliminary Report* (n 46) para 18.
[93] PTA, s 1(5).
[94] ibid s 1(7)
[95] ibid s1(8). See also Explanatory Notes to the Prevention of Terrorism Act 2005, para 24.

orders,[96] whereas those which, due to the severity of the obligations thereby imposed, would actually deprive the controlee of their liberty, were known as 'derogating' control orders.[97] Reflecting their differing levels of stringency, there were significant divergences in relation to the processes for the making of non-derogating and derogating orders. The following sections will therefore progress to a more detailed analysis of each type of order, encompassing an examination of the procedures and personnel involved in their imposition, monitoring and review.

IV. Non-derogating Control Orders

The PTA defined a non-derogating control order as a 'control order made by the Secretary of State'.[98] Non-derogating orders could include such obligations as the Home Secretary considered necessary for purposes connected with preventing or restricting the controlee's involvement in terrorism-related activity.[99] They could not, however, contain obligations that were incompatible with the Article 5 right to liberty.[100] The Act therefore essentially distinguished non-derogating from derogating control orders on the basis that the former were made by the Home Secretary, rather than by the court,[101] and could only impose conditions short of a deprivation of liberty.[102]

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[96] ibid s 2.
[97] ibid s 4.
[98] PTA, ss 2(3), 15(1). Walker, with some justification, described this statutory definition as 'unhelpful', suggesting that a non-derogating control order might have been better defined as 'an order which does not contain derogating obligations': Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd edn, OUP 2009) para 7.27. In the Explanatory Notes to the Prevention of Terrorism Act 2005, non-derogating control orders were referred to as, 'Control orders that do not involve derogating from the European Convention on Human Rights ....' (para 5).
[99] PTA, s 1(3). Note, however, that s 2(9) stated: 'It shall be immaterial, for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted by the obligations is connected with matters to which the Secretary of State's grounds for suspicion relate.' This provision indicated that the obligations imposed by a non-derogating order could therefore be designed to prevent or restrict involvement in any terrorism-related activity, not just the activity to which the Home Secretary's grounds for suspicion related.
[100] PTA, s 1(2)(a).
[101] As discussed below, derogating control orders were to be made by the court on an application by the Home Secretary (PTA, ss 1(2)(b), 4(1)).
[102] PTA, s 1(2).

i. The Procedure for Making Non-derogating Control Orders

The Prevention of Terrorism Bill,[103] as originally drafted, empowered the Home Secretary to make non-derogating control orders.[104] The lack of any judicial involvement prior to the issuing of a non-derogating order proved to be a particularly contentious aspect of the proposed scheme, provoking heated debate within Parliament,[105] and being condemned by JUSTICE as 'one of the Bill's most glaring flaws ....'[106] Seeking to justify the procedure in the House of Commons, Charles Clarke explained that the Government believed there were three reasons why the Home Secretary should impose non-derogating orders.[107] First, that the protection of national security was the responsibility of the government. Second, that there was no legal or constitutional principle that precluded the Home Secretary from making such orders.[108] Thirdly, it was argued that, as making control orders involved 'an analysis of the overall security situation and assessments of risks posed by a particular individual ...', and required the 'careful sifting of a wide range of intelligence material', the Home Secretary was better placed than the courts to perform this function.[109]

During the Bill's passage through Parliament, the allocation of the power to make non-derogating control orders to the Home Secretary, and the limited nature of the court's *ex post* supervisory jurisdiction,[110] were extensively criticized by members of both Houses.[111] In

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[103] Prevention of Terrorism HC Bill (2004-05) [61], as introduced in the House of Commons on 22 February 2005.
[104] ibid, cl 1(1).
[105] See, for example, HC Deb 22 February 2005, vol 431, cols 156-160.
[106] JUSTICE and the International Commission of Jurists, *Prevention of Terrorism Bill: Joint Briefing for House of Lords Second Reading* (2005) para 48. See also Human Rights Watch, *Commentary on the Prevention of Terrorism Bill* (2005) 4; Amnesty International, *The Prevention of Terrorism Bill: A Grave Threat to Human Rights and the Rule of Law in the UK* (2005) 2.
[107] HC Deb 9 March 2005, vol 431, col 1575.
[108] Charles Clarke also went on to state that 'there is nothing in the law of the European Convention on Human Rights that requires the judiciary to make such orders': HC Deb 9 March 2005, vol 431, col 1575.
[109] ibid. See also HC Deb 28 February 2005, vol 431, col 695 (Charles Clarke). Walker dismisses this contention as implausible, 'given that judges regularly have to assess materials (and occasionally must assess claims) relating to national security in other contexts': Walker, 'Keeping Control of Terrorists' (n 58) 1420.
[110] Under the Bill, after a non-derogating order had been made, the controlled person was to be given a right to appeal to the High Court against the making of the order (cl 7(1)). In hearing such an appeal, the court's function was limited to determining whether the Home Secretary's decision to

its Report on the Bill, the JCHR also expressed strong concern regarding the restricted role given to the court,[112] insisting that prior judicial involvement was required as an 'independent safeguard against arbitrary deprivations of liberty ....'[113] In addition, the Joint Committee disputed the Government's assertion that the Home Secretary was best placed to decide whether to impose control orders, observing that:

> Both the Home Secretary and the Prime Minister have been very candid in saying that they are proposing legislation of this exceptional kind because they do not want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding ... A person who is determined to avoid being accused of failing to do more to protect the public is extremely unlikely to be the best person to conduct a rigorous scrutiny of the strict necessity for a particular order. That role is best performed by independent courts.[114]

Despite initially rejecting parliamentarians' calls for the judiciary to be given a more extensive role in the process,[115] in the face of mounting political pressure, and the need for the legislation to be in place before the expiry of the ATCSA's Part 4 detention powers,[116] the Government was forced to yield. During the Commons' consideration of the Lords' amendments, having accepted that 'some measure of judicial involvement is necessary and desirable',[117] Charles Clarke explained that he was therefore proposing a revised procedure for issuing non-derogating orders, whereby the Home Secretary would be required to apply to the High Court for permission in advance of the order being made.[118] This 'curious formulation'[119] was subsequently approved, and enacted in section 3(1)(a).[120] Thus, whilst

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impose the order, or any of the obligations under it, was 'flawed' (cl 7(4)), applying the principles applicable on an application for judicial review (cl 7(7)).

[111] See, for example, HC Deb 22 February 2005, vol 431, col 156; HC Deb 23 February 2005, vol 431, col 359 (David Davis); HL Deb 3 March 2005, vol 670, cols 368-370; HL Deb 8 March 2005, vol 670, cols 645-646.

[112] JCHR, *Prevention of Terrorism Bill* (2004-05, HL 68, HC 334) paras 11-17. See also JCHR, *Preliminary Report* (n 46) paras 15-17.

[113] JCHR, *Prevention of Terrorism Bill* (n 46) para 14.

[114] ibid para 16.

[115] HC Deb 28 February 2005, vol 431, cols 697-699.

[116] Pursuant to section 29 of the ATCSA, the Part 4 powers were due to lapse on 14 March 2005.

[117] HC Deb 9 March 2005, vol 431, col 1579.

[118] ibid.

[119] Conor Gearty, *Civil Liberties* (OUP 2007) 119.

[120] PTA, s 3(1)(a).

the Home Secretary formally retained the power to make non-derogating orders,[121] save where specified exceptions applied,[122] he first had to obtain the permission of the court to do so.[123]

Pursuant to section 2(1), the Home Secretary could make a non-derogating control order where he had reasonable grounds for suspecting that an individual was or had been involved in terrorism-related activity,[124] and where he considered that it was necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.[125] Section 2(1) thus imposed a 'two-pronged test'[126] for making non-derogating control orders. The first element of the test involved an assessment of fact, whilst the second required a value judgment in respect of what was necessary in terms of public protection.[127] Of particular concern was the evidentiary standard which applied to the issuing of non-derogating orders.[128] Under sub-section (1)(a), the threshold for making non-derogating orders was reasonable suspicion, a standard of proof that is even lower than the balance of probabilities. Indeed, this standard - which also applied to certification under ATCSA, Part 4[129] - is one which SIAC, in *Ajouaou,*[130] described as, 'not a demanding test for the Secretary of State to meet.'[131]

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[121] ibid s 1.
[122] ibid ss 3(1)(b), (c).
[123] ibid s 3(1)(a).
[124] ibid s 2(1)(a)
[125] ibid s 2(1)(b). Section 2(2) further provided that the Home Secretary could make a non-derogating order against an individual who was already subject to a control order imposed by the court, where the court had decided to revoke its order but had postponed the revocation in order to allow the Home Secretary to decide whether to impose a new order himself.
[126] HL Deb 7 March, vol 670, col 504 (Lord Falconer).
[127] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2006] 3 WLR 839 [57].
[128] See Eminent Jurists Panel, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists, 2009) 121; Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 Current Legal Problems 174, 176.
[129] ATCSA, s 21(1)(b).
[130] *Ajouaou and others v Secretary of the State for the Home Department* [2003] UKSIAC SC/1,6,7,9,10/2002. The case involved the first substantive appeals to be heard by SIAC pursuant to s 25 of the ATCSA. Each of the five appellants sought to challenge their certification as a suspected international terrorist under s 21(1) of the 2001 Act.
[131] ibid [71]. See also Eric Metcalfe, 'Protecting a Free Society? Control Orders and the Prevention of Terrorism Act 2005' (2005) 2(1) Justice Journal 8, 13; JUSTICE and the International Commission of Jurists, *Prevention of Terrorism Bill: Joint Briefing for House of Lords Second Reading* (2005) paras 52-54.

Together with the matter of who should be responsible for making non-derogating orders, the standard of proof emerged as a pivotal issue during the PTA's passage through Parliament.[132] It was variously contended that the threshold should be raised, so as to require either proof beyond reasonable doubt,[133] or alternatively, on the balance of probabilities.[134] Disquiet regarding the low standard of proof was expressed in especially strong terms by members of the House of Lords.[135] Labour peer, Lord Plant, for example, insisted that it was vital that the standard be 'sufficiently high to match the gravity of the claimed involvement in terrorism',[136] going on to assert that, given the potentially devastating impact a control order could have upon the lives of the controlee and their family, 'at the very least the civil standard of proof should prevail ....'[137] The Government, nonetheless, remained adamant that reasonable suspicion was appropriate, arguing that because control orders were preventive rather than punitive, their issuance would involve 'an exercise in risk assessment and evaluation of intelligence material,'[138] as opposed to dealing with proof of issues of fact.[139] Charles Clarke, meanwhile, claimed that adopting a higher test could frustrate the objectives of the control order powers and mean that 'potentially dangerous individuals could simply slip away.'[140]

During the debates, statements from *Rehman*[141] and *A (No 2)*[142] were cited by the Government in support of the proposition that the reasonable suspicion test was apposite.[143]

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[132] See Joo-Cheong Tham, 'Parliamentary Deliberation and the National Executive: The Case of Control Orders' [2010] Public Law 79, 95.
[133] HC Deb 22 February 2005, vol 431, col 159 (Mark Oaten).
[134] HL Deb 7 March 2005, vol 670, col 486 (Lord Kingsland).
[135] See, HL Deb 3 March 2005, vol 670, col 376 (Lord Carlile); HL Deb 7 March 2005, vol 670, cols 487-488 (Lord Goodhart). During the legislative process, the House of Lords twice changed the standard of proof from reasonable suspicion to the balance of probabilities. In both instances the Lords' amendments were subsequently rejected by the House of Commons.
[136] HL Deb 1 March 2005, vol 670, col 145.
[137] ibid.
[138] HL Deb 7 March 2005, vol 670, col 504 (Lord Falconer).
[139] HL Deb 7 March 2005, vol 670, cols 503-504.
[140] HC Deb 9 March 2005, vol 431, col 1587. This view was apparently confirmed by advice for the Security Service: HC Deb 10 March 2005, vol 431, col 1798 (Hazel Blears).
[141] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2001] 3 WLR 877.
[142] *A and others v Secretary of State for the Home Department (No 2)* [2004] EWCA Civ 1123, [2005] 1 WLR 414.

Both of these cases contain instructive comments regarding standards of proof and their application to counter-terrorism measures. In *Rehman* - which concerned a deportation order made on national security grounds[144] - Lord Hoffmann averred that:

> In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact.[145]

Whilst in *A (No 2)*,[146] Laws LJ, addressing the level of proof required for the certification of suspected international terrorists under ATCSA, s 21, observed that, 'The nature of the subject matter is such that it will as I have indicated very often, usually, be impossible to prove the past facts which make the case that A is a terrorist.'[147] These pronouncements, the Government argued, endorsed the view that conventional standards like the balance of probabilities are inappropriate where, as was the case with the issuing of control orders, the decision is one which involves a risk assessment based upon the analysis of complex intelligence material.[148]

While reasonable suspicion may be a test well suited to processes which entail analysing and drawing inferences from intelligence, there nonetheless remains some concern that such onerous, rights-infringing obligations as were often contained in non-derogating orders could be imposed on the basis of such a low standard of proof.[149] It is, however, important to note that in his 2011 report, Lord Carlile concluded that every non-derogating order that had

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[143] HL Deb 7 March 2005, vol 670, cols 504-505 (Lord Falconer); HC Deb 9 March 2005, vol 431, col 1587 (Charles Clarke); HC Deb 10 March 2005, vol 431, col 1797 (Hazel Blears).
[144] The Home Secretary issued a deportation order under s 3(5)(b) of the Immigration Act 1971 on the grounds that Mr Rehman, a Pakistani national, was involved with the Islamic extremist organisation Markaz Dawa al Irshad (Lashkar e Tayyaba).
[145] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2001] 3 WLR 877 [56].
[146] The appeal principally concerned the admissibility of evidence which has or may have been procured by torture inflicted by foreign state officials.
[147] *A (No 2)* (n 142) [231].
[148] HL Deb 7 March 2005, vol 670, cols 504-505 (Lord Falconer); HC Deb 9 March 2005, vol 431, col 1587 (Charles Clarke); HC Deb 10 March 2005, vol 431, col 1797 (Hazel Blears).
[149] See JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act (Continuance in Force of Sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915) paras 55-66.

been made and confirmed by the courts since the system was introduced in 2005, would have 'at least satisfied the standard of reasonable grounds for belief, and in most cases by some distance the full civil standard of balance of probabilities.'[150]

ii. Non-derogating Control Orders: Duration and Renewal[151]

A non-derogating control order lasted for 12 months,[152] but could be renewed on one or more occasions.[153] Pursuant to s 2(6), renewal required the Home Secretary to consider the order's continuation necessary to protect the public from a risk of terrorism, and the obligations it imposed necessary to prevent or restrict the controlee's involvement in terrorism-related activity.[154] Whilst appeal against renewal was possible under s 10(1), the court was required to dismiss the controlee's challenge unless it determined that the Home Secretary's decision regarding the necessity of the order's renewal or the obligations it imposed was 'flawed'.[155]

iii. Court Supervision of Non-derogating Control Orders

Section 3 of the PTA provided for supervision by the court of the making of non-derogating orders. The process of making a control order began with the Security Service and the police putting together a case specifying the grounds for the order and the measures thought necessary to prevent the individual in question from engaging in terrorism-related activity.[156] If the Home Secretary thought that the test for imposing a non-derogating order was met,[157]

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[150] Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2011) para 29.
[151] The renewal and duration of non-derogating control orders, along with a range of associated issues, are discussed in chapter 4 of this thesis.
[152] PTA, s 2(4)(a). Pursuant to s 2(5), the control order had to specify the date on which it would cease to have effect.
[153] ibid s 2(4)(b).
[154] ibid s 2(6). Under s 2(7), the renewal period began to run from either the time the original order would otherwise have ceased to have effect, or the beginning of the seventh day after renewal, whichever was the earliest. In accordance with s 2(8), the renewal instrument was required to specify the expiration date of the renewed order.
[155] ibid ss 10(4), (8).
[156] HC Deb 9 March 2005, vol 431, col 1579 (Charles Clarke).
[157] PTA, s 2(1).

in accordance with section 3(1)(a),[158] he was then required to apply to the court for permission to make the order. CPR 76.8 prescribed that such applications were to be made by filing with the court –

> (a) a statement of reasons to support the application;
> (b) all relevant material;
> (c) any written submissions; and
> (d) the proposed control order.

Upon receiving the application, the court would consider whether the Home Secretary's decision that there were grounds to make the order was 'obviously flawed'.[159] In making this assessment, the court was to apply the principles applicable to judicial review.[160] Unless it concluded that the decision was obviously flawed, the court would grant permission[161] and give directions for a full hearing to take place as soon as reasonably practicable.[162] As the court was only able to deny permission where the Home Secretary's decision was 'obviously flawed',[163] this rendered it unlikely that a control order would be refused at this preliminary stage.[164]

In addition, s 3(1) also contained two exceptional procedures under which the Home Secretary was able to make non-derogating orders without first obtaining the court's permission. The first of these involved the Home Secretary certifying within the control order that the urgency of the case precluded him from seeking the court's permission in advance.[165] This procedure was intended for use in situations where it was believed there was a risk that the prospective subject may abscond should the order's imposition be delayed.[166] The second exception applied where the control order was made before 14

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[158] ibid s 3(1)(a).
[159] ibid s 3(2)(a).
[160] ibid s 3(11).
[161] ibid s 3(2)(b).
[162] ibid s 3(2)(c).
[163] A test Lord Kingsland described as 'well below even the test that applies in judicial review': HL Deb 10 March 2005, vol 670, col 869.
[164] Fenwick, *Civil Liberties and Human Rights* (n 84) 1445.
[165] PTA, s 3(1)(b).
[166] HL Deb 10 March 2005, vol 670, col 858 (Lord Falconer).

March 2005, in respect of an individual at the time certified under ATCSA, s 21(1).[167] Where an order was made pursuant to either of these procedures, it was then immediately referred to the court,[168] which was required to assess whether the Home Secretary's decision to impose the order was obviously flawed.[169]

Consistent with the 'sensitive nature of these intelligence-led procedures',[170] these initial court hearings could be, and routinely were, *ex parte*, without the subject of the order being notified of the application or reference, and without any representations being made on their behalf.[171] However, once permission was granted or the control order confirmed, it was mandatory for a full hearing to be ordered.[172] Further, within seven days of its decision, the court had to arrange for the controlee to be given an opportunity to make representations *inter partes* about the directions already given or the making of further directions.[173] During the regime's first year, this limited time frame was said to have given rise to various practical problems.[174] Although these initial difficulties were apparently resolved once the system had 'bedded down',[175] s 3(7) was subsequently amended,[176] the CTA 2008 inserting a new s 3(7A) so as to clarify that the seven days ran from the time the order was served upon the controlee, rather than from when the court gave its permission.[177]

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[167] PTA, s 3(1)(c). This exception applied to those individuals detained under Part 4 of the ATCSA 2001. Section 99 of the Counter-Terrorism Act 2008 subsequently provided for the repeal of section 3(1)(c) (Sch 9, Pt 5).
[168] PTA, s 3(3)(a). See CPR 76.9.
[169] PTA, s 3(3)(b). The court was required to begin considering such references within seven days of the order being made (s 3(4)). If it determined that the Home Secretary's decision was obviously flawed, the order would be quashed (s 3(6)(a)). Alternatively, if it concluded that the decision to make the order was not obviously flawed, but that decision to impose a particular obligation was, the order would be confirmed, but the relevant obligation quashed (s 3(6)(b)). In relation to orders made pursuant to section 3(1)(b), the court could instead quash the Home Secretary's certificate of urgency (s 3(8)). Where the order was confirmed, whether in its original or modified form, the court was then required to give directions for a full hearing to take place (ss 3(6)(b), 3(c)).
[170] Walker, *Blackstone's Guide* (n 98) para 7.38.
[171] PTA, s 3(5). Where the hearing concerned a reference under s 3(3)(a), the court was, however, required to ensure that the controlled person was notified of its decision (s 3(9)).
[172] PTA, ss 3(2)(c), 3(6)(b), (c). See also CPR 76.10.
[173] PTA, s 3(5).
[174] Lord Carlile, *First Report* (n 87) para 49.
[175] Lord Carlile, *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2007) para 46.
[176] Counter-Terrorism Act 2008, ss 80(1), (2).
[177] Section 3(7A) was inserted by Counter-Terrorism Act 2008, s 80(3). The amendment became effective on February 16, 2009.

At the full hearing, the court's role was to consider whether the Home Secretary's decision that the requirements of s 2(1)(a) and (b) were satisfied was 'flawed',[178] and also determine whether the decision to impose any of the obligations contained in the control order was 'flawed'.[179] In making these assessments, the court was again required to apply judicial review principles.[180] If the court determined that a decision of the Home Secretary was flawed, it had to either quash the order,[181] quash one or more of the obligations imposed by the order,[182] or give directions to the Home Secretary to revoke or modify the order.[183] In all other cases, it had to confirm the order.[184] The quashing of an order could, however, be stayed pending appeal.[185] In addition, s 3(14) provided that the court was required to discontinue the hearing if requested to do so by the controlee.

In relation to the review of the order at the full hearing, s 3(11) stipulated that the court 'must apply the principles applicable on an application for judicial review.'[186] As Sullivan J explained in *MB*,[187] this meant that the court was not able to engage in merits review,[188] and could not substitute its own findings for those of the Home Secretary. Thus, even at the full hearing stage, judicial scrutiny was limited to determining whether any of the Home Secretary's decisions were 'flawed' according to the established grounds for judicial review, comprising, illegality, irrationality, procedural impropriety,[189] and proportionality.[190] The fact

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[178] PTA, s 3(10)(a). The court had to determine whether the Home Secretary's decision that there were reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity was flawed, and whether the Home Secretary's decision that the control order was necessary for purposes connected with protecting members of the public from a risk of terrorism was flawed.

[179] PTA, s 3(10)(b). Although s 3(10) uses the term 'flawed', rather than 'obviously flawed' - as is used under ss 3(2), (6) and (8) - there appears to be no practical difference between these standards, both being defined by reference to 'the principles applicable on an application for judicial review' under s 3(11).

[180] PTA, s 3(11).

[181] ibid s 3(12)(a).

[182] ibid s 3(12)(b).

[183] ibid s 3(12)(c).

[184] ibid s 3(13).

[185] ibid s 15(2).

[186] ibid s 3(11).

[187] *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin), [2006] HRLR 29.

[188] ibid [79] (Sullivan J). See also *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [28] (Lord Steyn).

[189] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 (Lord Diplock).

that the court's role was confined to one of supervision and the application of judicial review principles attracted criticism from both the Constitutional Affairs Committee[191] and the JCHR,[192] the latter asserting that a 'merely supervisory jurisdiction'[193] over a decision based on reasonable suspicion, constituted 'a very weak form of judicial control over measures with a potentially drastic impact on Convention rights'.[194] Whether the court proceedings relating to non-derogating orders, and the level of judicial supervision for which they provided, complied with the requirements of Article 6 ECHR, is examined in the next chapter.[195]

V. Derogating Control Orders

The second species of order provided for under the PTA, 'derogating control orders',[196] were so called as they entailed obligations that were or included 'derogating obligations'.[197] Whilst derogating orders could potentially impact upon a range of Convention rights, the Act specifically provided that 'derogating obligations' were those which were incompatible with the right to liberty enshrined in Article 5 ECHR.[198] Thus, the essential feature of derogating control orders was that, unlike their non-derogating counterparts, they would involve restrictions that amounted to a deprivation of liberty and could therefore only be made where a 'designated derogation'[199] from Article 5 was in place.[200]

From the outset, the Government made clear that derogating control orders were viewed as contingency powers, to be used only where the security threat presented by a particular

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[190] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [25]-[28] (Lord Steyn); *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [30] (Lord Bingham).
[191] Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (HC 2004-05, 323-I) paras 102-105.
[192] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act (Continuance in Force of Sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915).
[193] ibid para 63.
[194] ibid.
[195] Chapter 4: Control Orders and Human Rights.
[196] PTA, s 4(1)(a).
[197] ibid ss 1(2)(b), 1(10)(a).
[198] ibid s 1(10)(a).
[199] HRA, s 14(1)(b).
[200] PTA, ss 4(3)(c), 4(7)(c).

individual or individuals rendered it imperative to do so.[201] Introducing the Prevention of Terrorism Bill in the House of Commons, the Home Secretary explained that, despite being convinced that the threat from 'al-Qaeda, its agenda and its adherents' meant that there existed a 'continuing public emergency', he would not be seeking a derogation.[202] The decision not to derogate was based upon advice from the police and security services which indicated that non-derogating orders would be sufficient to address the danger posed by the individuals concerned,[203] meaning that derogating orders could not be said to be 'strictly required'[204] at that time.[205] In light of this announcement, the JCHR recommended that, as there was no immediate necessity for derogating control orders, they should be removed from the Bill, asserting that the inclusion of 'such unprecedented powers of executive detention in legislation which is being rushed through Parliament at a speed which prevents proper scrutiny' was completely unjustified.[206] The Joint Committee further argued that introducing domestic legislation providing for future derogating control orders without a derogation being in force at the time of enactment may violate the ECHR.[207] There is, however, no legal precedent to support this contention, and, as Walker rightly submits, it is both 'mistaken in principle and contrary to European practice.'[208]

During the lifetime of the regime, ostensibly at least, no derogating control orders were issued. The absence of any cases in which the PTA's derogating provisions were invoked means that there is no empirical evidence upon which to base an assessment of derogating orders. However, statements made by the Home Secretary, whilst obviously somewhat speculative, do offer crucial insights into the circumstances in which the government

[201] HC Deb 22 February 2005, vol 431, cols 153-154. See also Explanatory Notes to the Prevention of Terrorism HC Bill (2004-05), para 105.
[202] HC Deb 22 February 2005, vol 431, col 153 (Charles Clarke).
[203] ibid.
[204] Article 15(1) ECHR stipulates that any measures derogating from a State's obligations under the Convention must be 'strictly required by the exigencies of the situation'.
[205] The Home Secretary explained that he had been advised by the police and security authorities that whilst depriving the individuals of their liberty would be 'valuable', it was not, at that time, considered necessary to deal with suspects concerned: HC Deb 22 February 2005, vol 431, col 153 (Charles Clarke).
[206] JCHR, *Preliminary Report* (n 46) para 8.
[207] ibid para 9. See also HC Deb 23 February 2005, vol 431, cols 390-391 (Richard Shepherd).
[208] Clive Walker, *Terrorism and the Law* (OUP 2011) 311.

envisioned derogating orders being made, along with the nature of the obligations that they may have involved.

In oral evidence before the JCHR in February 2005, Charles Clarke explained in clear terms the type of terrorist threat he felt would warrant the use of derogating orders. Responding to the Chair's request for clarification on the kinds of terrorism in relation to which control orders would be available, the Home Secretary confirmed that although the regime would apply to all forms of terrorism, derogating orders would only be utilized in response to 'the most extreme threats', in particular 'international terrorism of the al-Qaeda variety'.[209] Whilst the claim that derogating orders would be reserved for 'the most dangerous forms of terrorism'[210] implied that their application was prospectively limited, the contemporary prevalence of mass-casualty 'al-Qaeda variety' terrorism, suggests that, in reality, this may have not necessarily have been the case.

As delineated above, the fundamental characteristic of derogating control orders was that they would have involved obligations that were incompatible with Article 5. The question that therefore inevitably arose was: when would the obligations imposed, either singly or cumulatively, be of sufficient severity to breach the Article 5 threshold? Neither the Act itself, nor the accompanying explanatory notes,[211] furnished any instruction on this pivotal issue. Some degree of guidance as to the Government's view on this matter was, however, provided during the Bill's First Reading in the House of Commons. Here, the Home Secretary elucidated that derogation would be necessary where the control order included 'a requirement for the individual to remain in a particular place at all times'.[212] Indeed, that an obligation to remain at a specified location 'at all times' would constitute a deprivation of liberty is confirmed by a series of Strasbourg decisions dealing with twenty-four hour house

[209] JCHR, *Prevention of Terrorism Bill* (n 46) Ev 5 (Q 14).
[210] ibid.
[211] Explanatory Notes to the Prevention of Terrorism HC Bill (2004-05).
[212] HC Deb 22 February 2005, vol 431, col 152 (Charles Clarke).

arrest.[213] Furthermore, some commentators have suggested that although it was not explicitly provided for in the Act,[214] derogating control orders could potentially have allowed for detention in prison.[215]

i. The Prevention of Terrorism Bill: The Procedure for Making Derogating Control Orders

Pursuant to ss 1(2)(b) and 4(1), the power to make a derogating control order was exercisable by the court on an application by the Home Secretary.[216] This arrangement differed significantly from that which featured in the original draft of the Bill, where the authority to make derogating orders was vested exclusively in the Home Secretary.[217] Under the Bill, the Home Secretary could make an order if satisfied, on the balance of probabilities, that the individual was or had been involved in terrorism-related activities and the order was considered necessary for purposes connected with protecting the public from risks associated with a specific public emergency, in respect of which there existed a valid derogation from Article 5 ECHR.[218] Once made, the order was then to be immediately referred to the High Court,[219] where it would be considered within seven days.[220] If not satisfied that the matters relied on by the Home Secretary were capable of constituting reasonable grounds for making a derogating order against the controlee, the Court was required to quash the order.[221]

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[213] *NC v Italy* App no 24952/94, [2002] X ECHR 824, para 33; *Mancini v Italy* App no 44955/98 (ECtHR, 2 August 2001), para 17; *Vachev v Bulgaria* App no 42987/98 (ECtHR, 8 October 2004), para 64; *Niklova v Bulgaria* (No. 2) App no 40896/98, [2004] I ECHR 462, para 60; *Pekov v Bulgaria* App no 50358/99, [2006] 43 ECHR 299, para 73. For further discussion see chapter 4 of this thesis.
[214] No 'obligation' of confinement in prison was included in section 1(4) of the Prevention of Terrorism Act 2005. This list of obligations, however, was not exhaustive.
[215] See Fenwick, *Civil Liberties and Human Rights* (n 84) 1439; Susanne Forster, 'Control Orders: Borders to the Freedom of Movement or Moving the Borders of Freedom?' in Marianne Wade and Almir Maljevic (eds) *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer 2009) 354. Walker, however, suggests that it 'may be doubted' whether a derogating control order could, in fact, have allowed 'internment': Walker, *Blackstone's Guide* (n 98) 222.
[216] PTA, ss 1(2)(b), 4(1).
[217] Prevention of Terrorism HC Bill (2004-05) [61], cl 2(1).
[218] ibid.
[219] ibid cl 2(2).
[220] ibid cl 2(3).
[221] ibid cl 2(4).

Principal amongst the concerns that arose in relation to the proposed procedure was the lack of judicial involvement in the making of derogating control orders. As outlined above, clause 2(1) provided for derogating orders to be made by the Home Secretary without prior judicial authorisation.[222] In its Preliminary Report on the Bill, the JCHR expressed serious doubts about whether the Bill's *ex post* judicial procedure would satisfy the European Convention's requirement that the power to deprive an individual of their liberty must be subject to adequate safeguards against arbitrary detention, opining that the ECtHR would be likely to consider the scheme inconsistent with the rule of law.[223]

The purported rationale for excluding a requirement of prior judicial authorisation was explained by the Home Secretary in the following terms:

> [T]he executive has the responsibility for the national security of the country in a way that no judge can have ... for any Home Secretary at any time to say that he would delegate responsibility for ... national security issues to someone else would [therefore] be a serious derogation of responsibility.[224]

It was also contended that it is proper for judgements concerning the nation's security to be made by the Home Secretary, as he, unlike the judiciary, is directly accountable to Parliament.[225] Further, implicit in the Home Secretary's statements on this issue was the suggestion that the need to obtain advance judicial approval could prove deleterious to national security where circumstances dictated that it was necessary for a derogating control order to be imposed immediately.[226]

The importance of the executive's role in safeguarding national security is incontrovertible,[227] nor is it disputed that the Home Secretary is well placed to assess whether an individual poses a threat sufficient to warrant the imposition of measures such as control orders, or that expeditious action may be vital in certain situations. However, the Government's refusal to

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[222] ibid cl 2(1).
[223] JCHR, *Preliminary Report* (n 46) paras 10-11.
[224] Oral evidence taken before the JCHR on 9 February 2005. See JCHR, *Prevention of Terrorism Bill* (n 46) Ev 11-12 (Q 42).
[225] ibid. See also HC Deb 22 February 2005, vol 431, col 154 (Charles Clarke).
[226] HC Deb 22 February 2005, vol 431, col 154 (Charles Clarke).
[227] See chapter 2 of this thesis.

countenance prior judicial authorisation of derogating control orders on the basis that this would have constituted an abdication of the executive's responsibility for the nation's security appears predicated upon a misconceived notion of the separation of powers.[228] As the JCHR commented, such a claim ignores the judiciary's 'long accepted and respected ... responsibility for the liberty of the individual',[229] to deny which by invoking national security 'is to subvert our traditional constitutional division of powers.'[230]

Following the JCHR's censorious remarks, along with trenchant opposition in the House of Commons,[231] the Government conceded, amending the Bill in the Lords to provide that derogating control orders had to be made by the High Court as opposed to the Home Secretary.[232] Whilst the revised procedure was generally regarded as being an improvement upon the original scheme, for some, it nonetheless remained unacceptably flawed. The JCHR, for example, questioned whether the amended procedure represented a sufficient safeguard against arbitrary detention to satisfy the basic requirement of legality.[233] Liberty, meanwhile, asserted that allowing the court to make its own determination about the need for a derogating control order 'did not transform control order authorisation into a fair and lawful process,'[234] but instead merely gave the procedure a 'thin veneer of fairness.'[235]

For a number of parliamentarians, and reportedly also some senior members of the judiciary,[236] the prospect of judges being required to make derogating control orders was exceedingly disquieting. In the Commons, David Trimble claimed that the involvement of the courts would bring them into disrepute.[237] Similar fears were also voiced in the Upper House,

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[228] JCHR, *Preliminary Report* (n 46) para 12.
[229] ibid.
[230] ibid.
[231] See, for example, the comments of Mr Mark Oaten MP: HC Deb 23 February, vol 431, col 370.
[232] HL Deb 7 March 2005, vol 670, cols 517-519.
[233] JCHR, *Prevention of Terrorism Bill* (n 46) paras 4-10.
[234] Liberty, *Prevention of Terrorism Bill: Liberty's Briefing for the Remaining Stages in the House of Lords* (2005) para 3.
[235] ibid para 4.
[236] HC Deb 9 March 2005, vol 431, col 1576 (Charles Clarke).
[237] HC Deb 23 February 2005, vol 431, col 419.

Lord Waddington stating that he was 'deeply worried' about the proposed scheme,[238] whilst Lord Lloyd declared that the decision to impose derogating control orders was one in which judges ought not to participate, as doing so could expose them to damaging political backlash.[239] Having reluctantly yielded on the matter of allowing the Home Secretary to unilaterally impose derogating control orders, the Government was, however, unwilling to make any further amendments to what they considered an 'appropriate' procedure which adequately met concerns regarding the need for judicial involvement in the issuing of derogating orders.[240]

ii. The Prevention of Terrorism Act 2005: The Procedure for Making Derogating Control Orders

The procedure for making derogating control orders was set out under PTA, s 4. Pursuant to s 4(1), the Home Secretary was required to apply to the court for the making of a derogating control order,[241] CPR 76.4 specifying that this application was to be made by filing with the court –

> (a) a statement of reasons to support the application for –
> (i) making such an order, and
> (ii) imposing each of the obligations to be imposed by that order;
> (b) all relevant material;
> (c) any written submissions; and
> (d) a draft of the order sought.

Upon receiving an application, the court was then required to hold an 'immediate'[242] preliminary hearing, the purpose of which was to determine whether to make the requested order.[243]

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[238] HL Deb 1 March 2005, vol 670, col 147.
[239] HL Deb 1 March, vol 670, col 163.
[240] HC Deb 9 March 2005, vol 431, col 1578 (Charles Clarke).
[241] PTA, s 4(1).
[242] The Act did not specify what time scale the term 'immediate' denoted in this context. However, it was suggested that this would take place within 24-48 hours. See JCHR, *Prevention of Terrorism Bill* (n 46) para 3.
[243] PTA, s 4(1)(a).

iii. The Preliminary Hearing

The preliminary hearing relating to a derogating control order could be held without the subject being notified of the application or being given the opportunity to make representations to the court.[244] The test to be applied by the court was set out under s 4(3), which specified that it could make the order against the individual in question where it appeared:

> (a) that there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity;
>
> (b) that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting members of the public from a risk of terrorism;
>
> (c) that the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or part of Article 5 of the Human Rights Convention; and
>
> (d) that the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.

If the court made the order, it was then required to give directions for the holding of a full *inter partes* hearing to determine whether to confirm the order.[245] In the interim between the making of the order and the court's final decision at the confirmation hearing, the court was able to impose such obligations as it had reasonable grounds for believing were necessary for purposes connected with preventing or restricting the controlee's involvement in terrorism-related activity.[246]

Although the preliminary hearing provided for extensive judicial involvement in the making of derogating orders, the process nevertheless remained deficient in a number of respects. The lack of adversarial procedure prior to imposing a derogating control order, in particular, was

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[244] ibid s 4(2).
[245] ibid s 4(1)(b); CPR 76.5(1)(a).
[246] PTA, s 4(4).

robustly criticised by the JCHR.[247] Whilst conceding that an *ex parte* application would be appropriate where there was a risk that an individual would abscond if notified about the proposed order, the JCHR concluded that, as s 5 permitted detention pending a derogating control order,[248] there was no legitimate reason why the preliminary hearing should not be *inter partes*.[249] Another aspect of the preliminary hearing which provoked concern was the test for making a derogating control order. Under s 4(3)(a), the test to be applied by the court was essentially whether there was a *prima facie* case for imposing the order against the individual in question.[250] Whilst this test was 'rather more searching than for a non-derogating order',[251] it was nonetheless clearly a low threshold for imposing an order depriving an individual of their liberty, especially given the breadth of the PTA's definition of 'involvement in terrorism-related activity'.[252]

iv. The Full Hearing

In accordance with CPR 76.5(1)(b), the full hearing was required to commence no later than 7 days after the date on which the order was made. At this hearing the court could confirm the control order, with or without modifications,[253] or revoke it.[254] Section 4(7) provided that the court could confirm the order only if –

> (a) it is satisfied on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity;
>
> (b) it considers that the imposition of a control order is necessary for purposes connected with protecting members of the public from a risk of terrorism;
>
> (c) it appears to the court that the risk is one arising out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and

[247] JCHR, *Prevention of Terrorism Bill* (n 46) para 5.
[248] PTA, s 5(1).
[249] JCHR, *Prevention of Terrorism Bill* (n 46) para 5.
[250] Prevention of Terrorism Act 2005, s 4(3)(a).
[251] Walker, 'Keeping Control of Terrorists' (n 58) 1425.
[252] JCHR, *Prevention of Terrorism Bill* (n 46) para 6.
[253] PTA, s 4(5)(a).
[254] ibid s 4(5)(b). Section 4(5)(b) further provided that, 'where the court revokes the order it may (if it thinks fit) direct that this Act is to have effect as if the order had been quashed.'

(d) the obligations to be imposed by the order or (as the case may be) by the order as modified are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.[255]

Although the test to be applied by the court when considering whether to confirm the order was significantly more demanding than that which applied to the decision whether to make the order in the first instance,[256] derogating control order proceedings nonetheless fell 'far short, in terms of due process, of a criminal trial.'[257]

The low standard of proof applicable to derogating control orders under s 4 engendered particular concern. The JCHR, amongst others,[258] was highly critical of the fact that derogating orders could be imposed on the ordinary civil standard, arguing that:

> Deprivation of liberty on a balance of probabilities is anathema both to the common law's traditional protection for the liberty of the individual and to the guarantees in modern human rights instruments which reflect those ancient guarantees. In our view the appropriate standard for such measures is the beyond reasonable doubt standard.[259]

Indeed, their case for advocating that the criminal standard should apply to any orders which involve a deprivation of liberty is clearly a strong one.[260]

The important issue of the burden of proof was addressed at some length during the Bill's Committee Stage in the House of Lords, Lord Falconer elucidating that in these circumstances, the balance of probabilities test would require the court to assess 'whether it is more likely than not the suspect is or has been a terrorist.'[261] He further explained that, 'as the courts have said in others contexts', where the allegations against the suspect are

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[255] PTA, s 4(7).
[256] At the preliminary hearing the court could make the order where it appeared that there was 'material which (if not disproved) ... [was] capable of being relied on by the court as establishing that the individual ... [was or had been] involved in terrorism-related activity': PTA, s 4(3)(a)).
[257] Fenwick, *Civil Liberties and Human Rights* (n 84) 1444.
[258] See Zedner, 'Preventive Justice or Pre-Punishment?' (n 128) 178; Fenwick, *Civil Liberties and Human Rights* (n 84) 1444.
[259] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915) para 64.
[260] ibid para 66.
[261] HL Deb 7 March 2005, vol 670, col 507.

serious, 'the standard of proof ... goes up.'[262] As alluded to by Lord Falconer, in *R (on the application of McCann) v Manchester Crown Court*,[263] a case concerning anti-social behaviour orders, the House of Lords ruled that:

> [A]ccount should be taken of the seriousness of the matters to be proved and the implications of proving them ... if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard.[264]

Therefore, in applying the balance of probabilities test under s 4(7) the court would have been expected to adapt the civil standard so as to reflect the serious allegation that the suspect was or had been involved in terrorism-related activity and would be subject to a control order that deprived them of their liberty.[265] Thus, although the standard of proof for confirming a derogating control order was formally set at the balance of probabilities,[266] had it been applied, in practice it is likely the standard would have essentially been 'indistinguishable' from the significantly more exacting criminal standard of beyond reasonable doubt.

Once a derogating control order had been confirmed at the full hearing, a notice setting out its terms was then to be given to the controlee in person.[267] For the purposes of delivering notice of a control order a constable or other authorised person could, if necessary by force, enter and search any premises where he had reasonable grounds to believe the subject of the control order to be.[268]

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[262] ibid. On the variable nature of the civil standard of proof, see Andrew Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263.
[263] *R (on the application of McCann) v Manchester Crown Court* [2003] 1 AC 787. See also *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 [31] (Lord Bingham); *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 [90] (Lord Phillips).
[264] ibid [83] (Lord Hope).
[265] PTA, s 4(7).
[266] ibid s 4(7)(a).
[267] ibid s 7(8).
[268] ibid s 7(9).

v. Derogating Control Orders: Duration and Renewal

Pursuant to s 4(8), a derogating control order would last for six months,[269] unless revoked prior to the expiry of this period,[270] or it ceased to have effect under s 6.[271] Section 6(1) provided that a derogating control order had effect only if the relevant derogation remained in force and no more than 12 months had elapsed since the making of the order designating that derogation,[272] or the Home Secretary had made an order declaring that it remained necessary for him to have the power to impose derogating obligations by reference to that derogation.[273] The procedure by which the Home Secretary was able to make an order declaring the continuing necessity of imposing derogating obligations was set out under s 6(2)-(7).[274]

Derogating control orders could, on an application by the Home Secretary, be renewed by the court for further periods of up to six months.[275] The court's power of renewal could, however, only be exercised upon the satisfaction of the criteria set out under s 4(10). Thus, the Act required that the controlee's position be formally reviewed every 6 months, and provided that the duration of a derogating control order only be extended if the court considered its maintenance 'necessary for purposes connected with protecting members of the public from a risk of terrorism',[276] and regarded the obligations thereby imposed as 'necessary' to prevent or restrict the controlee's involvement in terrorism-related activity.[277] In

[269] PTA, s 4(8).
[270] ibid s 4(8)(a).
[271] ibid s 4(8)(b).
[272] ibid s 6(1)(b)(i).
[273] ibid s 6(1)(b)(ii).
[274] ibid s 6(2)-(7). This power was exercisable by statutory instrument (s 6(2)), requiring prior approval by resolution in both Parliamentary Houses (s 6(3)).
[275] ibid s 4(9). It is noteworthy that the Prevention of Terrorism Bill, as originally drafted, provided that derogating control orders could not be renewed (cl 4(1)(c)), the Home Secretary instead being authorised to make a new control order 'to the same or similar effect for a further 6 month period'(cl 4(2)(a)).
[276] ibid s 4(10)(a).
[277] ibid s 4(10)(d).

addition, the court also had the power to temporarily extend the period of a derogating order which was due to expire pending the conclusion of renewal proceedings.[278]

Notwithstanding the judiciary's leadership of the process, and s 4(10)'s strict preconditions for renewal, the fact that there was no cap on the number of times a derogating control order could potentially be renewed provokes similar concerns to those associated with the potentially indefinite duration of non-derogating orders.[279] Indeed, given the severity of the restrictions that were imposable under them, it may be argued that the case for setting a maximum time-limit applied with even greater force to derogating orders than it did to non-derogating ones.[280]

vi. Arrest and Detention Pending a Derogating Control Order

Section 5(1) provided for the power of arrest and detention pending the making of a derogating control order.[281] Where the Home Secretary had applied to the court for a derogating order, a constable was able to arrest the prospective controlee if they considered arrest and detention necessary to ensure that the individual was available to be given notice of the order should it be made.[282] Once arrested, the individual was to be taken to a 'designated place',[283] where they could be held for up to 48 hours,[284] this initial period of

[278] ibid s 4(11).
[279] PTA, s 4(10) provided that: the power of the court to renew a derogating control order is exercisable on as many occasions as the court thinks fit. The concerns associated with the renewal and duration of non-derogating control orders are discussed in chapter 4 of this thesis.
[280] See, for example, Lord Carlile, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Home Office, 2008) paras 50-51; JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2007-08, HL 57, HC 356) paras 85-87. The two-year upper limit proposed by Lord Carlile in respect of non-derogating orders, may, however, have required some adjustment in order to reflect the potentially increased likelihood of re-engagement by individuals whose previous level of involvement in terrorism-related activity had been deemed sufficiently serious to warrant the imposition of derogating control order.
[281] PTA, s 5(1).
[282] ibid.
[283] A 'designated place' meant any place designated by the Home Secretary under para 1(1) of Sch 8 to the TA 2000 as a place at which persons could be detained under s 41 of that Act: PTA, s 5(10).
[284] PTA, s 5(3).

detention being extendable for up to a further 48 hours by the High Court if necessary.[285] An individual detained pursuant to s 5 would be deemed to be in 'police detention' for the purposes of the Police and Criminal Evidence Act 1984,[286] and therefore entitled, with some modifications, to the rights granted to those held under s 41 of TA 2000,[287] including the right to consult a solicitor and have someone informed of their detention.[288] The s 5 power to detain would cease once an individual became bound by a derogating control order or the court dismissed the Home Secretary's application.[289]

The power to arrest and detain pending the making of a derogating control order did not feature in the original draft of the Prevention of Terrorism Bill. Indeed, it was only inserted after the legislation was amended so as to provide that it was the court, rather than the Home Secretary, who could issue derogating orders.[290] This revised arrangement was seen to create the possibility of a 'time lag' between the Home Secretary's application and the judge's making of the order. It was therefore argued that, in some cases, detention could be necessary in order to prevent the suspect disappearing in the interim.[291] The power to arrest and detain did not apply to non-derogating control orders, s 3(1)(b), under which the Home Secretary was able, where urgency required, to make a non-derogating order of immediate application, rendering it unnecessary.[292]

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[285] ibid s 5(4) provided that the period of detention could be extended for up to a further 48 hours if the court considered that it was necessary to do so to ensure that the individual in question was available to be given notice of any derogating control order that was made against him.
[286] ibid s 5(7).
[287] TA 2000, s 41 contains the power to arrest without warrant of a person who a constable reasonably suspects of being a terrorist.
[288] PTA s 5(8) provided that detainees were entitled the rights contained in paras 1(6), 2, 6 to 9 and 16 to 19 of Schedule 8 to the TA 2000. Note, however, the modifications specified in s 5(8)(a)-(c).
[289] ibid s 5(5).
[290] HL Deb 7 March 2005, vol 670, col 521. It was asserted by Baroness Scotland that it 'would leave a significant gap in the ... system' if there was no power to prevent an individual, in respect of whom the Home Secretary had applied to the court for a derogating control order, from disappearing before such time as the order, if made, could be served on him.
[291] HL Deb 7 March 2005, vol 670, col 529 (Baroness Scotland).
[292] PTA, s 3(1)(b).

vii. Derogating Control Orders: Conclusions

Initially regarded as one of the regime's most controversial aspects,[293] the power to issue derogating control orders was ultimately never used. Whilst the government maintained that the growing threat to the UK from international terrorism post-9/11 meant that the conditions for derogation were satisfied,[294] non-derogating orders were nevertheless deemed 'sufficient' to address the danger posed by those suspects made subject to control orders between 2005 and 2011.[295] Although not pursued, the possibility of derogating for the purposes of control orders was, however, said to have been considered by the government in 2007 following the disappearance of a number of controlees[296] and the series of adverse court decisions in which non-derogating orders were held to be in breach of Article 5.[297] Further, given that the domestic courts[298] and the ECtHR[299] accepted that a 'public emergency' existed sufficient to justify the derogation entered in 2001,[300] it appears plausible that, in light

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[293] Human Rights Watch, for example, described derogating control orders as an 'indefensible attempt to reintroduce detention without trial': *Commentary on the Prevention of Terrorism Bill 2005* (Human Rights Watch Briefing Paper, 2005). Bonner, meanwhile, asserted that the 'house arrest' enabled by derogating orders, constituted 'internment by another name': David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate 2007) 346. See also JCHR, *Preliminary Report* (n 46) paras 6-9; Ben MacIntyre, 'Guilty Until Proven Guiltier' *The Times* (London, January 29, 2005).

[294] In its 2007 reply to the JCHR, the Government explained that the 'decision not to derogate from Article 5 for the purposes of control orders ... [did] not reflect an assessment that we no longer face a public emergency threatening the life of the nation': Home Office, *Government Reply to the Nineteenth Report of the Joint Committee on Human Rights of Session 2006-07* (Cm 7215, 2007) 16. See also HC Deb 22 February 2005, vol 431, col 153 (Charles Clarke); JCHR, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (2009-10, HL 86, HC 111) para 14.

[295] See HC Deb 22 February 2005, vol 431, col 153 (Charles Clarke); Lord Carlile, *Sixth Report* (n 150) para 13. For an opposing view on the adequacy of non-derogating control orders, see the comments of then Home Secretary, John Reid: HC Deb 24 May 2007, vol 460, col 1428.

[296] See chapter 6 of this thesis.

[297] See HC Deb 24 May 2007, vol 460, col 1428 (John Reid). See also Alan Travis and Vikram Dodd, 'Reid Warning to Judges Over Control Orders' *The Guardian* (London, 25 May 2007) <www.guardian.co.uk/politics/2007/may/25/uk.topstories3> accessed 18 July 2013. See chapter 4 of this thesis.

[298] *A* (n 18) [29], [118]-[119], [154], [166], [208], [226]; see, however, the notable dissent of Lord Hoffmann [86]-[97]. See also *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502.

[299] *A v United Kingdom* (2009) 49 EHRR 29, paras 180-181. For further discussion, see Steve Foster, 'The Fight Against Terrorism, Detention Without Trial and Human Rights' (2009) 14(1) Coventry Law Journal 4.

[300] Human Rights Act (Designated Derogation) Order 2001, SI 2001/3644.

of the events of 7/7, the issuance of a new derogation may have been a legally viable course of action.[301]

Throughout the regime's currency, Lord Carlile repeatedly expressed the hope that, 'given the restrictive nature of non-derogating orders', and the 'reverberations' that a fresh derogation would potentially cause, no derogating control orders would be considered necessary.[302] He thus welcomed[303] the conclusion reached by the *Review of Counter-Terrorism and Security Powers* that, as it was 'highly unlikely' that a future derogation would be required,[304] the replacement for control orders would make no provision for imposing conditions that would deprive an individual of their right to liberty.[305] From a human rights perspective, the fact that neither TPIMs,[306] nor their 'enhanced' variant, E-TPIMs,[307] expressly permit derogation from Article 5, may therefore be regarded as a positive development in the design of the UK's preventive counter-terrorism measures.

VI. Revocation or Modification of Control Orders

The modification and revocation of non-derogating[308] and derogating[309] control orders were covered by PTA, s 7. In respect of non-derogating orders, where the controlee considered that there had been a material change in circumstances, they could apply to the Home

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[301] See Clive Walker, 'The Threat of Terrorism and the Fate of Control Orders' [2010] Public Law 4, 11; Bonner, *Executive Measures* (n 293) 313.
[302] Lord Carlile, *First Report* (n 87) para 50; *Second Report* (n 175) para 47; *Third Report* (n 280) para 54; *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Home Office, 2009) paras 63; *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Home Office, 2010) paras 128; *Sixth Report* (n 150) para 119. See also David Anderson, *Control Orders in 2011: The Final Report of the Independent Reviewer on the Prevention of Terrorism Act* (2012) para 3.3.
[303] Lord Carlile stated that, having examined the Coalition's proposals for replacement of control orders, he was 'content that the possibility of making derogating orders is to be removed': *Sixth Report* (n 150) para 13.
[304] Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 41. See also HC Deb 26 January 2011, vol 552, cols 308-309 (Theresa May).
[305] ibid 43.
[306] TPIMA, sch 1.
[307] Draft Enhanced Terrorism Prevention and Investigation Measures Bill (Cm 8166, 2011), sch 1.
[308] PTA, ss 7(1)-(3).
[309] ibid ss 7(4)-(7).

Secretary for the revocation of the order,[310] or, alternatively, for the modification of the obligations thereby imposed.[311] The Home Secretary meanwhile had the power to revoke a non-derogating order, or relax or remove any of the obligations it imposed.[312] Appeals against non-consensual modifications to non-derogating orders were provided for under s 10.[313]

VII. Section 8: The Duty to Consider Prosecution

The introduction of the Prevention of Terrorism Bill[314] in Parliament was accompanied by an affirmation that the government's preferred approach, its 'first option', was to prosecute and convict terrorists.[315] During the Bill's Second Reading in the Commons, the Home Secretary was again at great pains to stress the seriousness with which the government took the view that, 'we must go down the prosecution route first and foremost, if we can achieve that.'[316] Elaborating upon this point, Charles Clarke emphasised that control orders would only be used in circumstances where prosecution was not viable.[317] Furthermore, it was explained that, prior to making a control order, he would consult with the police regarding the prospects of bringing criminal charges against the individual concerned, and would seek confirmation that the police would continue investigations throughout the duration of the order with a view to prosecuting the controlee should it become feasible.[318] Despite these assurances, the Bill's lack of provisions expressly requiring prior consultation or compelling ongoing investigation into the possibility of prosecution provoked calls for amendment.[319] In response

[310] ibid s 7(1)(a).
[311] ibid s 7(1)(b).
[312] ibid s 7(2). By s 7(3), the Home Secretary could not, however, modify any of the obligations in a manner that would have the effect of converting a non-derogating control order into a derogating one.
[313] ibid s 10(1)(b).
[314] Prevention of Terrorism HC Bill (2004-05) [61].
[315] HC Deb 22 February 2005, vol 431, col 151 (Charles Clarke).
[316] HC Deb 23 February 2005, vol 431, col 339 (Charles Clarke).
[317] The reasons why the government is unable to prosecute certain terrorist suspects are discussed in chapter 2 of this thesis.
[318] HC Deb 23 February 2005, vol 431, col 339 (Charles Clarke).
[319] HC Deb 23 February 2005, vol 431, cols 340-341 (David Kidney).

to parliamentarians' concerns, s 8 was therefore inserted at the House of Lords' Committee Stage.[320]

Section 8 applied where it appeared to the Home Secretary that the individual's suspected involvement in terrorism-related activity may have involved the commission of an offence relating to terrorism, and that the commission of that offence was being or would fall to be investigated by a police force.[321] If this threshold requirement was satisfied, before making, or applying for, a control order, the Home Secretary was required to consult the chief police officer about whether there was evidence that could realistically be used for the purposes of a prosecution.[322] If it was determined that prosecution was not possible, and a control order was made, the Home Secretary had to inform the chief officer.[323] Once informed, the chief officer, in consultation with the relevant prosecuting authority,[324] was then required to ensure that the investigation of the controlee's conduct was kept under review, with a view to securing their prosecution for a terrorism-related offence should that become possible.[325]

The focus placed on prosecution under s 8 evidently appears consistent with the government's claims that the criminal justice route constitutes its preferred approach for dealing with terrorist suspects. Comments made by the Independent Reviewer, along with information revealed in the case of *E*,[326] however, gave rise to a number of concerns relating to both the nature of the statutory duties and also the assiduity with which they were discharged in practice.

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[320] HL Deb 7 March 2005, vol 670, cols 536-538 (Baroness Scotland).
[321] PTA, s 8(1).
[322] ibid s 8(2).
[323] ibid s 8(3).
[324] PTA, s 8(7) specified that, in relation to offences that would be likely to be prosecuted in England and Wales, the relevant prosecuting authority was the Director of Public Prosecutions; in Scotland, it was the appropriate procurator fiscal; and in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.
[325] ibid ss 8(4)-(5).
[326] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin).

First, it was suggested by Lord Carlile that the section's qualifying criteria[327] could serve to 'exclude cases where on public interest grounds it had been pre-determined that there should be no investigation with a view to prosecution.'[328] Despite this potential limitation upon s 8's scope, it is noteworthy that, during the regime's lifetime, there were no cases in which such a determination was actually made.[329]

The fact that the police, rather than the CPS, were given responsibility for assessing the viability of prosecution[330] under s 8 is described by Walker as 'obtuse'.[331] The rationale for this somewhat peculiar arrangement was said to be the need to maintain the independence of the DPP and ensure a clear divide between the Home Secretary and the prosecuting authorities so as to prevent any improper interference by the executive in the latter's decisions.[332] Whilst the government claimed that it would be standard practice for police to consult the CPS before advising the Home Secretary whether prosecution was possible,[333] the Act itself did not stipulate that such consultation had to take place prior to the making of a control order. In addition, although the chief police officer was obliged to consult the prosecuting authority after the order was made, s 8(5) provided that this need only be 'to the extent that he [considered] it appropriate to do so',[334] s 8(6) further stating that this requirement could be satisfied by consultation that took place wholly or partly before the passing of the PTA.[335] The s 8 duties were therefore neither as all-embracing or far reaching as initial impressions may suggest.

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[327] PTA, s 8(1).
[328] Lord Carlile, *First Report* (n 87) para 55.
[329] Lord Carlile, *Sixth Report* (n 150) para 141.
[330] PTA, s 8(2).
[331] Walker, 'Keeping Control of Terrorists' (n 58) 1429. Indeed, Walker suggests that 'There seems to be a muddle here between the possibilities of investigation and the collection of more evidence (a police affair) and decisions about the weight of that evidence and the public interest (a prosecution affair)' (1429).
[332] HL Deb 3 March 2005, vol 670, col 442 (Baroness Scotland). Walker, however, argues that it is unclear why the prosecuting authorities should be more deserving of symbolic independence than the police in this context, and also submits that it is 'illogical' to regard prosecutors as lacking independence simply because their professional judgment is reported to the Home Secretary rather than to a court. See Walker, 'Keeping Control of Terrorists' (n 58) 1430.
[333] HL Deb 3 March 2005, vol 670. col 440 (Baroness Scotland).
[334] PTA, s 8(5).
[335] ibid s 8(6).

Central to s 8 was the obligation imposed upon the Home Secretary to consult the chief police officer about the feasibility of prosecution.[336] Indeed, the importance of this process was strongly emphasised by Lord Carlile,[337] who asserted that it 'must never be regarded as a vestigial exercise.'[338] In his first three annual reports, Lord Carlile was particularly critical of the lack of detail contained in the letters from chief officers certifying that there was no realistic prospect of prosecution.[339] He consequently proposed that these letters should give clear reasons for the inability to prosecute, with an 'open' version being in terms disclosable to the controlee, and, if necessary, a 'closed' version being produced for the court.[340] This recommendation, which the JCHR also strongly endorsed,[341] was accepted by the government, the Home Secretary confirming that the police had agreed to 'proactively consider on a case-by-case basis whether any further information ... could be explained in the letter'.[342] Despite this pledge, in his Second Report, Lord Carlile noted that although the letters now gave 'slight reasons' he believed that additional detail was still necessary.[343] Furthermore, he remarked that, in some cases, evidence that there had been a thorough and continuing examination of the possibility of prosecution was unconvincing.[344] In light of this, he urged that all future decisions whether to prosecute should be preceded by detailed and documented consultation between the CPS, the police, the Security Service and the Home Office, adding that, given the small number of cases involved, this request could not be deemed excessive.[345]

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[336] ibid 8(2).
[337] See, for example, Lord Carlile, *Second Report* (n 75) para 53.
[338] ibid para 57.
[339] Lord Carlile, *First Report* (n 87) para 58; *Second Report* (n 75) para 57; *Third Report* (n 280) para 74.
[340] Lord Carlile, *First Report* (n 87) para 58.
[341] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act (Continuance in force of sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915) para 21.
[342] Secretary of State for the Home Department, Charles Clark, *Home Secretary's Response to the First Annual Review* (2006) 2.
[343] Suggesting, for example, that an explanation of the sensitivity of the material that could not be placed before the court be provided, in the closed version if necessary: Lord Carlile, *Second Report* (n 75) para 57.
[344] ibid.
[345] ibid.

i. The Control Order Review Group

In his *First Report*, Lord Carlile called for the establishment of a Home Office-led procedure whereby officials and representatives of the control authorities meet to monitor each case.[346] In response to this recommendation, in 2006, the Home Office established the Control Order Review Group (CORG).[347] According to its terms of reference, the CORG's purpose was to bring together Home Office officials, the controlees' case workers, and law enforcement and intelligence representatives on a quarterly basis in order to keep all extant control orders under formal, audited review, ensure that the obligations imposed were necessary and proportionate, and monitor the order's impact on the mental and physical wellbeing of the controlees and their families.[348] Most significantly from the perspective of s 8, the CORG was also required to 'keep the prospect of prosecution under review, including for breach of the order.'[349]

ii. The Possibility of Prosecution: Judicial Challenges

The operation of the systems for reviewing the possibility of prosecution were exposed to judicial scrutiny in the case of *E*,[350] in which one of the grounds of challenge was that the Home Secretary had failed to fully comply with s 8(2).[351] At first instance, whilst the 'particular importance of considering prosecution where the imposition of preventive measures are being considered'[352] was acknowledged, the High Court nevertheless rejected the contention that the s 8(2) duty to consult constituted a condition precedent for making a

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[346] Lord Carlile, *First Report* (n 87) para 43.
[347] Secretary of State for the Home Department, Charles Clark, *Home Secretary's Response to the First Annual Review* (2006) 1-2.
[348] 'Terms of Reference for the Control Order Review Group', see Lord Carlile, *Third Report* (n 280) para 47.
[349] ibid.
[350] *Secretary of State for the Home Department v E* [2007] EWHC 233 Admin.
[351] It was argued that the decision to maintain E's control order was 'flawed' due to the Home Secretary having failed to discharge his duty of consultation under s 8(2): ibid [11]. The legal challenges under Articles 3, 5 and 8 of the ECHR are discussed in chapter 4 of this thesis.
[352] ibid [248] (Beatson J).

non-derogating control order.[353] Although there had been no breach of s 8(2),[354] according to Beatson J, once the order was made, the Home Secretary then became subject to an implicit 'continuing duty' to keep the matter of prosecution under review.[355] On the facts, it was found that this duty had not been adequately discharged as the prospects of prosecution had not been reviewed in light of significant new material - in the form of two Belgian court judgments in which E's associates were prosecuted for terrorism offences[356] - which had become available since the making of E's order in March 2005.[357] It was consequently held that the Home Secretary's failure to consider the impact of this material on the viability of prosecuting E meant that the decision to maintain his control order was necessarily 'flawed'.[358]

The Court of Appeal,[359] whilst agreeing in part with High Court's judgment, 'saw the matter differently.'[360] Firstly, it was affirmed that 'when properly considered in its statutory context',[361] the s 8(2) duty was not a condition precedent.[362] It was also accepted that, once the order was made, the Home Secretary was under an implied duty to keep the order, and the matter of prosecution, under continuing review.[363] This duty involved the Home Secretary doing what he could to ensure the ongoing review was meaningful, which required him to take 'reasonable steps' to ensure that the prosecuting authorities were keeping the

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[353] ibid. Indeed, as Beatson J noted, the condition precedents applicable to the making of non-derogating control orders were those set out in PTA, s 2(1).
[354] ibid [284]. See also [251].
[355] ibid. See also [248].
[356] ibid see [65]-[70]. In the Belgian proceedings, intercept evidence from Spain and the Netherlands had been admitted, which, as it originated from abroad, would therefore in principle be admissible in England (see [287]).
[357] Belgian judgments were then obtained by the Home Office in November 2005, and, after being translated into English, became part of the open case against E in January 2006.
[358] ibid [293]. Beatson J [310] held that the appropriate course in respect of the failure to review the prospects of prosecuting E in light of the Belgian judgments would be to quash the control order, either under PTA, s 3(12)(a) or, in respect of its renewal, s 10(7)(a).
[359] *Secretary of State for the Home Department v E and another* [2007] EWCA Civ 459.
[360] Dominic McGoldrick, 'Security Detention: United Kingdom Practice' (2008) 40(3) Case Western Reserve Journal of International Law 507, 525.
[361] *Secretary of State for the Home Department v E and another* [2007] EWCA Civ 459 [87].
[362] ibid.
[363] ibid [94], [97].

prospects of prosecution under review.[364] It did not, however, extend to the Home Secretary becoming the prosecuting authority.[365] Having reviewed the facts, the Court concluded that, as the Home Office had received the Belgian judgments in November 2005, and these had not been provided to the police until February and March 2006, there had been a breach by the Home Secretary of his duty to keep the question of possible prosecution under review, 'not in the sense that the decision to prosecute was one for him ... but in the sense that it was incumbent on him to provide the police with material in his possession which was or might be relevant to any reconsideration of prosecution.'[366]

The Court of Appeal's decision in respect of s 8 was subsequently upheld by the House of Lords.[367] Their Lordships unanimously agreed that the s 8(2) duty to consult, while 'expressed in strong mandatory terms',[368] and 'plainly ... to be taken seriously',[369] was not a condition precedent for making a control order.[370] The view that, once the order was made, the Home Secretary was under an implicit duty to ensure that the prospect of prosecution was kept under 'meaningful' continuing review, requiring him to supply the police with any relevant materials, was also explicitly endorsed.[371]

These judgments thus served to clarify the scope of the s 8 duties, establishing that the obligation to keep prosecution under review could not be satisfied by the Home Secretary merely making periodic inquiry of the police as to whether the prospect of successful prosecution had increased.[372] E's legal challenge regarding s 8, however, ultimately 'ended in a whimper',[373] it being determined that, even if the Home Secretary 'had acted diligently

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[364] ibid [97].
[365] ibid.
[366] ibid [97] (Pill LJ).
[367] *Secretary of State for the Home Department v E and another* [2007] UKHL 47.
[368] ibid [15] (Lord Bingham).
[369] ibid.
[370] ibid; [23] Lord Hoffmann; [27]-[28] (Baroness Hale); [32] (Lord Carswell); [36] Lord Brown).
[371] See [18] Lord Bingham; [28] (Baroness Hale).
[372] ibid [18].
[373] Walker, *Terrorism and the Law* (n 208) 322.

and expeditiously in relation to the Belgian judgments ... they could not have given rise to a prosecution at any time material to [the] case.'[374]

iii. Control Orders and Criminal Prosecution: Conclusions

The government claimed that, as a result of the recommendations made by Lord Carlile and the judgments in *E*, improved procedures were implemented for reviewing the prospects of prosecution.[375] Despite the possibility of prosecution being considered on an ongoing basis pursuant to s 8,[376] and also assessed on a quarterly basis by the CORG, no controlee was ever successfully prosecuted, other than for breaches of their order.[377] However, given the nature of the restrictions control orders imposed on suspects, the express purpose of which was to prevent their involvement in terrorism-related activity,[378] it is arguably unsurprising that, as David Anderson reported, they proved 'not [to be] effective as an aid to the investigation and prosecution of terrorist crime.'[379]

VIII. Breach of a Control Order

The contravention of an obligation imposed by a control order without reasonable excuse was a criminal offence,[380] punishable on indictment for a maximum term of five years, or a

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[374] *E* [2007] EWCA Civ 459 [103] (Pill LJ). See also E [2007] UKHL 47 [21] (Lord Bingham); [34] (Lord Carswell).

[375] Secretary of State for the Home Department, Jacqui Smith, *The Government Reply to the Report by Lord Carlile of Berriew QC: Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7194, 2007) 5-7. From 2008 onwards, Lord Carlile's annual reports acknowledged that the quality of the letters from the chief police officers to the Home Secretary regarding possible prosecution had improved year-on-year: *Third Report* (n 280) para 74; *Fourth Report* (n 302) para 78; *Fifth Report* (n 302) para 154; *Sixth Report* (n 150) para 145.

[376] As interpreted by the Court of Appeal and House of Lords in *E*.

[377] David Anderson, *Final Report* (n 302) para 3.51. Out of the total of 52 controlees, only nine were ever arrested on suspicion of a terrorist offence during the currency of their control order. Of this nine, only one individual was charged with a terrorist offence. Further, the activity in respect of which he was charged actually pre-dated his control order; and the charges did not result in a conviction: David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) para 8.14.

[378] PTA, s 1(3).

[379] David Anderson, *Final Report* (n 302) para 3.52.

[380] PTA, s 9(1). Further offences of failing, without reasonable excuse, to report as required on entering and leaving the UK, and of intentionally obstructing the delivery of notice of a control order under s 7(9), were contained in ss 9(2) and 9(3) respectively.

fine, or both,[381] and on summary conviction, to a prison sentence of up to twelve months, or a fine, or both.[382] Whilst small breaches, such as a few minutes' lateness in reporting to the police station or monitoring company, were reported to be 'commonplace',[383] prosecutions for these minor infractions tended not to be pursued.[384] Repeated, or more significant, violations were, however, taken seriously, and over the regime's lifetime 14 controlees were prosecuted for breaching the terms of their order.[385] As David Anderson notes, the outcome of these prosecutions 'was not encouraging for the authorities', [386] with only two controlees being convicted, MB receiving a sentence of 20 weeks' imprisonment,[387] and BX 15 months.[388] Despite the difficulties encountered in successfully prosecuting controlees for breach,[389] in his 'End of Term Report' on the system, Anderson nevertheless concluded that control orders proved 'generally enforceable',[390] as demonstrated by the complete absence of absconds after June 2007,[391] and the 'relatively minor nature of the breaches that were prosecuted in [the] later years'[392] of the regime.

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[381] ibid s 9(4)(a).
[382] ibid s 9(4)(b).
[383] David Anderson, *Final Report* (n 302) para 3.59. See also Lord Carlile, *Special Report of the Independent Reviewer in Relation to Quarterly Reports to Parliament Under Section 14(1) of the Prevention of Terrorism Act 2005* (2006) para 13.
[384] Lord Carlile, *Sixth Report* (n 150) para 33.
[385] David Anderson, *Final Report* (n 302) para 3.61. One controlee was prosecuted for breaching his control order obligations on two separate occasions.
[386] ibid para 3.62.
[387] ibid. The outcomes in respect of the other prosecutions were as follows: two acquittals; in six cases no evidence was offered as it was considered no longer in the public interest to continue with the trial; one controlee absconded prior to his trial; and one controlee voluntarily left the UK, resulting in the case being closed. At the time of the *Final Report*, three trials remained pending (para 3.62).
[388] Lord Carlile, *Sixth Report* (n 150) 65. See also *Secretary of State for the Home Department v BX* [2010] EWHC 990 (Admin) [13] for details of the breaches with which BX was charged.
[389] According to Anderson, two of the principal difficulties in securing convictions were that juries did 'not always take a serious view of repeated small breaches of apparently mundane requirements', and the fact that, in some cases, it was not possible to deploy evidence of non-compliance in court for fear of divulging how the intelligence had been collected: David Anderson, *Final Report* (n 302) para 10.5. See also *Secretary of State for the Home Department v Cerie Bullivant* [2008] EWHC 337 (Admin), in which Bullivant was acquitted by the jury on the basis that his mental health problems (anxiety and depression) were regarded as constituting a 'reasonable excuse' for breaching his control order.
[390] David Anderson, *Final Report* (n 302) 6.
[391] The issue of absconds is discussed in chapter six of this thesis.
[392] David Anderson, *Final Report* (n 302) para 6.16.

IX. Renewal and Review

As David Anderson observed in his 2012 report on the Act, 'exceptional powers require exceptional safeguards.'[393] In accordance with this, and so as to ensure that there would be an opportunity for annual parliamentary debate on the continuation of the control order system, s 13 provided that, unless renewed by Parliament,[394] ss 1-9 of the PTA would automatically expire after 12 months.[395]

Scrutiny of the regime was also secured through the reporting and review requirements imposed by s 14. Pursuant to s 14(1), the Home Secretary had to report to Parliament every three months on the exercise of the control order powers during that period.[396] In addition, under s 14(2), the Home Secretary was required to appoint a person to review the operation of the Act on an annual basis.[397] During the lifetime of the regime, seven such reports were produced, six by Lord Carlile,[398] who held the post of Independent Reviewer between 2005-2011, and one by his successor, David Anderson.[399] These reports, 'which were informed by secret material',[400] had to be laid before Parliament.[401] As a means of providing oversight of the PTA's operation, the Independent Reviewer's reports were invaluable, often being referred to at length by MPs in the annual renewal debates.[402] Furthermore, certain

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[393] David Anderson, *Final Report* (n 302) para 1.6.
[394] PTA, s 13(4). Sections 1-9 could be renewed for periods not exceeding one year at a time by order made by statutory instrument (s 13(2)(c)), the draft of which had to be laid before Parliament and approved by a resolution of each House (s 13(4)). Prior to making the renewal order, the Home Secretary was required to consult the independent reviewer of terrorism legislation, the Intelligence Services Commissioner, and the Director-General of Security Service (s 13(3)). During the regime's lifetime, ss 1-9 were renewed by statutory instrument six times - see: SI 2006/512, SI 2007/706, SI 2008/559, SI 2009/554, SI 2010/645 and 2011/716.
[395] PTA, s 13(1). The initial 12 month period began on the day the PTA was passed (11 March 2005).
[396] These reports took the form of written ministerial statements. See, for example, HC Deb 16 June 2005, vol 435, cols 23-24WS (Charles Clarke).
[397] PTA, s 14(3).
[398] In addition to these six annual reports, at the request of then Home Secretary, John Reid, Lord Carlile also produced a one-off report on the Home Secretary's quarterly reports to Parliament: *Special Report of the Independent Reviewer in Relation to Quarterly Reports to Parliament Under Section 14(1) of the Prevention of Terrorism Act 2005* (2006).
[399] David Anderson, *Final Report* (n 302).
[400] ibid para 1.6. See also Lord Carlile, *First Report* (n 87) para 35.
[401] PTA, s 17(6).
[402] See, for example, the 2007 renewal debates in House of Commons: HC Deb 22 February 2007, vol 457, cols 434-460.

recommendations made by Lord Carlile also proved influential in terms of government practice, as demonstrated by the creation of the Control Order Review Group.[403] Throughout the regime's lifetime, various parliamentary Committees also 'maintained a close and often critical interest in control orders',[404] most notably the JCHR, who produced yearly reports to coincide with the renewal of PTA, ss 1-9.[405]

Whilst these safeguards ensured that the operation of the regime was subject to regular, often rigorous, scrutiny, as will be discussed in the following chapter, it was the review of control orders by the courts that proved to be the crucial mechanism through which the human rights of the individual controlees were protected.

[403] See Home Office, *Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (Cm 7797, 2010) paras 35-39.
[404] David Anderson, *Final Report* (n 302) para 1.7.
[405] See, for example, JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act (Continuance in Force of Sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915). The JCHR's reports primarily focused on the regime's compliance with ECHR rights, including Articles, 3, 5, 6 and 8, the duration of control orders, and also the possibility of prosecuting controlees.

Chapter 4
The Control Order Regime and Human Rights

According to CONTEST,[1] the protection of human rights constitutes a 'key principle' which underpins the UK government's counter-terrorism work both at home and overseas.[2] Nevertheless, as Walker observes, one 'unrelenting theme'[3] that has emerged in relation to the UK's response to the threat of terrorism - pre- and post-9/11 - has been the 'troublesome relationship'[4] between counter-terrorism measures and human rights.

Measures introduced to combat terrorism often entail restrictions upon a range of human rights and civil liberties.[5] Whilst anti-terrorism laws frequently engender concerns regarding compliance with Articles 3, 6, 8, 9, 10, 11 and 14 of the ECHR,[6] the right to liberty and security of person under Article 5 is, as Foster notes, 'especially susceptible to interference'.[7] Indeed, a number of the UK's counter-terrorism measures have had particularly significant implications in relation to the Article 5 right to liberty, such as internment,[8] exclusion orders,[9] the extended pre-charge detention of terrorist suspects,[10]

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[1] CONTEST is the United Kingdom's counter-terrorism strategy. CONTEST, and its main aims, are discussed in chapter 2 of this thesis.

[2] Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009) 63. See also Home Office, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, 2006) para 44; Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) para 1.14.

[3] Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' [2004] Criminal Law Review 55, 70.

[4] ibid. See also Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).

[5] Fenwick, for example, states that, 'A tediously familiar aspect of the counter-terrorist scheme is that it often runs counter to British common law traditions and opposes the values of the European Convention on Human Rights': Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge 2007) 1329.

[6] See Colin Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' (2002) 3 European Human Rights Law Review 287; Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32(1) International and Comparative Law Quarterly 82.

[7] Steve Foster, *Human Rights and Civil Liberties* (3rd edn, Longman 2011) 765. See also Stefan Sottiaux, *Terrorism and the Limitation of Rights* (Hart Publishing 2008) 197.

[8] See Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press 1989) 86-96; John McGuffin, *Internment* (Anvil Books 1973); RJ Spjut, 'Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' (1986) 49(6) Modern Law Review 712.

[9] See chapter 2 (pp 43-45) of this thesis.

police powers of stop and search under TA 2000, s 44,[11] and detention without trial pursuant to Part 4 of the ATCSA.[12] Furthermore, the UK has also invoked Article 15 of the Convention in order to derogate from Article 5 in respect of certain provisions designed to address threats from both domestic and international terrorism.[13]

I. Control Orders and Human Rights

As noted by the Independent Reviewer in his *Final Report* on the PTA,[14] one of the principal reasons 'controversy attended control orders throughout the life of the regime'[15] was due to their impact upon a number of 'basic freedoms'.[16] Although they routinely involved interferences with a variety of Convention rights,[17] control orders were most frequently challenged on the grounds that the obligations imposed, in combination, amounted to a deprivation of liberty contrary to Article 5. Other significant human rights issues associated with control orders concerned whether the procedures involved in their issuance and review contravened Article 6's fair trial requirements,[18] and whether the restrictions they imposed

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[10] Pre-charge detention of terrorist suspects for up to 7 days was permitted under successive Prevention of Terrorism (Temporary Provisions) Acts (1974, 1976, 1984 and 1989). The seven day upper limit was also initially maintained under the TA 2000, which came into force on 19 February 2001. Section 306 of the Criminal Justice Act 2003, however, subsequently amended Sch 8 of the TA 2000, increasing the maximum period of pre-charge detention to 14 days. The pre-charge detention limit was then further extended to 28 days by ss 23-25 of the TA 2006. Pursuant to s 25 of the TA 2006, the pre-charge detention limit under sch 8 of the TA 2000 reverted to 14 days on 25 January 2011, following the lapse of the most recent renewal order. See Alexander Horne and Gavin Berman, *Pre-charge Detention in Terrorism Cases* (SN/HA/5634, House of Commons Library, 2012).

[11] TA 2000, s 44. See also Sch 7 of the Act, which provides for the power to stop and search at ports and airports without reasonable suspicion.

[12] ATCSA, ss 21-23. See chapter 3 (pp 45-47) of this thesis.

[13] See *Ireland v United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644; *A v Secretary of State for the Home Department* [2004] UKHL 56; *A v United Kingdom* (2009) 49 EHRR 29. See also Jean Allain, 'Derogation from the European Convention of Human Rights in the Light of "Other Obligations Under International Law"' (2005) 5 European Human Rights Law Review 480; Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 69.

[14] David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012).

[15] ibid para 1.3.

[16] ibid.

[17] See JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915) para 25.

[18] Article 6 ECHR: Right to a Fair Trial.

infringed the controlee's or their family members' rights under Article 8[19] and Article 3[20] of the ECHR. This chapter therefore critiques the operation of the control order regime from a human rights perspective, and, through analysis of relevant domestic and European jurisprudence, evaluates the regime's conformity, in principle and in practice, with the rights enshrined in these Articles. Various related matters, including the duration of control orders, the prospect that suspects may re-engage in terrorism-related activity once free of restraint, and the legality of personal search obligations, are also considered.

II. Article 5 ECHR

Article 5 of the ECHR, and the legal differentiation between restrictions upon, and deprivations of, personal liberty, were crucial to the control order regime. The orders issued under the PTA involved the imposition of a range of obligations upon terrorist suspects in order to prevent or restrict their involvement in terrorism-related activity.[21] All control orders therefore inevitably resulted, to differing degrees, in a diminution of the controlee's liberty. However, it was the actual extent of the diminution that was determinative of the type, and also the legality, of the control order used in each case.

Central to the PTA's statutory regime was the demarcation of non-derogating and derogating control orders.[22] The distinction between the two species of order was premised upon the dividing line which is drawn within ECHR jurisprudence between permissible interferences with freedom of movement and situations where the severity of the restriction involved amounts to a deprivation of liberty. Thus, whilst non-derogating control orders were seen to be compliant with 'right to liberty and security of person' guaranteed by Article 5, derogating

[19] Article 8 ECHR: Right to Respect for Private and Family Life.
[20] Article 3 ECHR: Prohibition of Torture.
[21] PTA, ss 1(1), 1(3).
[22] ibid ss 1(2), 2, 4. See chapter 3 of this thesis.

control orders involved an interference with a controlee's liberty on grounds other than those permitted under Article 5(1)(a)-(f).[23]

Whilst the distinction between non-derogating and derogating orders was fundamental to the operation of the regime, the PTA itself provided extremely limited guidance as to the respective parameters of the different types of order. The clearest indication of where the boundary actually lay was furnished by s 15(1)'s general interpretative provision, which stated that a derogating control order was one that involved "derogating obligations",[24] s 1(10) of the Act instructively defining a "derogating obligation" as 'an obligation on an individual which is incompatible with his right to liberty under Article 5 of the Human Rights Convention'.[25] The lack of specific detail within the Act itself, along with the paucity of the discussion of this issue in the accompanying official documents,[26] meant that it remained unclear when the restrictions placed upon the controlee would be regarded as being of such a severity that they could only lawfully be imposed under a derogating control order.

In order to delimit non-derogating and derogating control orders in satisfactorily clear terms it is therefore necessary to undertake a detailed examination of Article 5 ECHR and its accompanying case law. The following analysis has a number of interrelated purposes. First, to identify the notion of 'liberty' that is relevant in this context and establish the nature and scope of the guarantee of 'liberty and security of person' enshrined in Article 5; second, to ascertain where the degree of interference with an individual's freedom is such that Article 5 is engaged; and third, to identify the precise locus of the dividing line between non-derogating and derogating control orders.

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[23] Prior to a derogating control order being made, it would therefore have been necessary to enter a derogation from Article 5 ECHR. See PTA, ss 4(3)(c), 4(7)(c).
[24] PTA, s 15(1).
[25] ibid s 1(10)(a).
[26] Neither the House of Commons Research Paper that accompanied the Bill (Arabella Thorp, 'The Prevention of Terrorism Bill: Bill 61 of 2004/05' (HC Library Research Paper 05/14, 2005)), nor the Explanatory Notes to the Prevention of Terrorism Act 2005, provide any further detail on this issue.

i. The Concept of 'Liberty'

Liberty, like 'security',[27] is a critical, yet complex concept.[28] The right to individual liberty is commonly held to be one of the most fundamental of all human rights.[29] Indeed, legal, political and philosophical discourse is replete with statements regarding the pre-eminence of the right to liberty. Lord Donaldson in *ex parte Cheblak*,[30] for instance, asserted that 'the liberty of the citizen under the law is the most fundamental of all freedoms', whilst Lord Hope in *A v Secretary of State for the Home Department*,[31] averred that, 'it is impossible ever to overstate the importance of the right to liberty in a democracy.'[32] In a 2007 speech entitled 'On Liberty', Gordon Brown,[33] meanwhile, explained that, 'a passion for liberty has determined the decisive political debates of our history', proclaiming that, in the UK, 'liberty is and remains at the centre our constitution'.[34]

The concept of 'liberty', and the manner in which it may be defined, has been subject to detailed consideration in various philosophical works. For example, in *On Liberty,* Mill posits that 'liberty consists in doing what one desires',[35] whilst in *Taking Rights Seriously*, Dworkin suggests that liberty, in a traditional sense, may be perceived as 'the absence of constraints placed by government upon what a man might do if he wants to.'[36] Berlin, who describes

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[27] See chapter 2 of this thesis.
[28] Indeed, Gearty asserts that, 'There are few words more dangerously confusing in their meaning than 'liberty' and 'security'.' Conor Gearty, 'Escaping Hobbes: Liberty and Security for our Democratic (Not Anti-terrorist) Age' in Esther D Reed and Michael Dumper, *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge University Press 2012) 35. See also Tom Bingham, *The Rule of Law* (Allen Lane 2010) 72-73.
[29] For a detailed account of the development of individual liberty, see Ben Wilson, *What Price Liberty? How Freedom Was Won and is Being Lost* (Faber and Faber 2009).
[30] *R v Secretary of State for the Home Department ex parte Cheblak* [1991] 1 WLR 890, 894.
[31] [2004] UKHL 56.
[32] ibid [100]. See also [81] (Lord Nicholls); [88] (Lord Hoffmann).
[33] Who was Prime Minister at the time.
[34] Gordon Brown, 'On Liberty' (Westminster University, 25 October 2007) <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk_politics/7062237.stm> accessed 11 July 2012.
[35] John Stuart Mill, 'On Liberty' in *On Liberty and Other Essays* (OUP 1991) 107.
[36] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 2005), 267. In 'Do Values Conflict? A Hedgehog's Approach', Dworkin alternatively proposes a more 'dynamic' conception of liberty, whereby 'Liberty consists in being able to do what one wishes, short of violating the rights of others, with the resources assigned by a reasonably just distribution of resources.' Ronald Dworkin, 'Do Values Conflict? A Hedgehog's Approach' (2001) 43 Arizona Law Review 251, 256.

liberty as the 'absence of obstacles' to actual or potential choices,[37] in 'Two Concepts of Liberty', further distinguishes between 'positive'[38] and 'negative'[39] notions of liberty. Whilst personal liberty may therefore be understood, in general terms, to refer to individual autonomy and the freedom to do as one chooses,[40] for legal purposes it is usually assigned a far more restrictive meaning, whereby focus is specifically placed upon physical liberty and freedom of movement.[41] Indeed, as discussed below, it is this narrower conception which is taken to apply to the right to liberty of the person under Article 5 of the ECHR.

ii. Article 5: The Right to Liberty and Security of Person

The rights to liberty and security of the person command a prominent place in most human rights instruments. The guarantee of personal liberty, and its protection against unwarranted interference by the state, constitute central features of the Magna Carta of 1215,[42] the Declaration of the Rights of Man 1789,[43] the US Bill of Rights 1791,[44] the Universal Declaration of Human Rights 1948,[45] and the International Covenant on Civil and Political

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[37] Isaiah Berlin, 'Introduction' in *Four Essays on Liberty* (OUP 1969) xl.

[38] According to Berlin, 'the 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will.' Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969) 131.

[39] Berlin explains 'negative' liberty in the following terms: 'I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to a degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved': ibid 122. On the notion of 'negative' liberty generally, see Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969) 122-131.

[40] Foster, *Human Rights and Civil Liberties* (n 7) 269.

[41] See Richard Stone, 'Deprivation of Liberty: The Scope of Article 5 of the European Convention of Human Rights' (2012) 1 European Human Rights Law Review 46, 47. See also, Sir William Blackstone, *Commentaries on the Law of England: Book 1: Of the Rights of Persons* (University of Chicago Press 1979) 130.

[42] Chapter 39: 'No free man shall be taken or imprisoned ... except by the lawful judgment of his peers or by the law of the land' (*Nullus liber homo capiatur, vel imprisonetur ... nisi per legale judicium parium suorum vel per legem terrae*).

[43] The Declaration of the Rights of Man and the Citizen 1789, Articles 4-9.

[44] Fifth Amendment: No person shall ... be deprived of life, liberty, or property, without due process of law. See also section 1 of the Fourteenth Amendment (1868).

[45] Article 3: Everyone has the right to life, liberty and security of person. In addition, Article 9 provides that: No one shall be subject to arbitrary arrest, detention or exile.

Rights 1966.[46] The right to liberty and security of person is also pivotal to the scheme of human rights protection under the ECHR, Article 5(1) of which provides:

> Everyone has the right to liberty and security of person. No one shall be deprived of is liberty save in the following cases[47] and in accordance with a procedure prescribed by law.

Whilst the right to liberty and security of person is given explicit recognition under Article 5, the actual substance of the protection is not readily apparent on a simple examination of the Convention text. In order to establish what is meant by the terms 'liberty' and 'security' in this context, it is therefore necessary to consider the manner in which they have been interpreted by the ECtHR and the European Commission of Human Rights.

Article 5 is one of the most frequently invoked Convention provisions and is consequently the subject of a considerable body of case law. Through close examination of a range of instructive decisions it is possible to clarify a number of critical issues, comprising: the notion of 'liberty' upon which Article 5 is founded; whether or not 'liberty' and 'security' constitute autonomous concepts; the object and precise scope of the Article 5 guarantee, and; the Strasbourg Court's approach to determining whether an individual has been deprived of their liberty.

iii. 'Liberty' and 'Security' of the Person: Autonomous Concepts?

Article 5 begins with the broad statement that 'Everyone has the right to liberty and security of person.'[48] The question therefore emerges, do 'liberty' and 'security' constitute autonomous concepts? Pursuant to normal principles of interpretation, the two terms should be given separate meanings. A limited number of Commission decisions have also

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[46] Article 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
[47] The 'cases' in which a person may legitimately be deprived of their liberty are enumerated under Article 5(1)(a)-(f).
[48] Article 5(1) ECHR.

suggested that 'liberty' and 'security' may be regarded as distinct concepts.[49] Further, despite opining that it is difficult to assign any independent meaning to the term, Warbrick suggests that, 'it is just conceivable that ["security"] could be read as imposing upon the State obligations to ensure the uninterrupted enjoyment of an individual's liberty.'[50] However, as the ECtHR has confirmed in a number of cases, the prevalent view is that liberty and security of person should be construed as a unitary notion.[51] Indeed, a welcome degree of clarity was injected into this area by the case of *Bozano*,[52] the Court elucidating that the primary focus of Article 5 is the deprivation of liberty, the term 'security' signifying that arrest or detention must not be arbitrary.[53] Thus, in relation to Article 5, 'security of person' is merely an 'auxiliary concept',[54] which, as Macovei explains, 'must be understood in the context of physical liberty and ... cannot be interpreted as referring to different matters (such as a duty on the state to give someone personal protection from an attack by others ...).'[55] Ultimately, therefore, it appears clear that the phrase 'liberty and security of person' should be read as a whole, Article 5(1) embodying an essential safeguard designed to protect individuals against arbitrary interferences with their physical liberty by the state.

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[49] *East African Asians v United Kingdom* (1978) 13 DR 5, 10: In the Commission's view, the protection of "security" in this context is concerned with arbitrary interference, by a public authority, with an individual's personal "liberty". Or, in other words, any decision taken within the sphere of Article 5 must, in order to safeguard the individual's right to 'security of person', conform to the procedural as well as the substantive requirements laid down by an already existing law. In *Tsavachidis v Greece* (1997) 23 EHRR CD 135, the Commission asserted that '"liberty of person" ... means freedom from arrest and detention,' whereas "security of person" was said to be 'the protection against arbitrary interference with this liberty' (para 2). See Rhonda Powell, 'The Right to Security of Person in European Court of Human Rights Jurisprudence' (2007) 6 European Human Rights Law Review 649.

[50] Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32(1) International and Comparative Law Quarterly 82, 110.

[51] See, for example, *Altun v Turkey* App No 24561/94 (ECtHR, 1 June 2004), para 57. See also the Commission's decision in *A, B, C, D, E, F, G, H, and I v Federal Republic of Germany* App No 5573/72 and 6670/72 (Commission Decision, 16 July 1976), para 28: 'The term "liberty and security of person" in this provision must be read as a whole.'

[52] *Bozano v France* (1987) 9 EHRR 297.

[53] ibid, para 54: The Convention ... requires that any measure depriving the individual of liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. What is at stake here is not only the 'right to liberty' but also the 'right to security of person. See also *Öcalan v Turkey* (2005) 41 EHRR 985, para 83.

[54] Powell submits that, as an 'auxiliary concept', the Article 5 right to security of person 'is about *securing* liberty and has no independent content of its own': Powell, (n 49) 650.

[55] Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe Publishing 2002) 6. See chapter 2 of this thesis for discussion of the qualified right to protect which arises under Article 2 ECHR.

iv. The Article 5 Right to 'Liberty'

The core of Article 5 is the right to liberty of the person. Therefore, the first step in establishing the precise scope of the guarantee embodied within the provision is determining what is meant by the term 'liberty'. Neither the text of the Convention itself, nor the *travaux préparatoires*, contain any explicit statement as to what conception of liberty is applicable. However, authoritative explication of the concept was provided by the ECtHR in the case of *Engel*,[56] wherein it was determined that: 'In proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person.'[57] It is thus evident that Article 5 is exclusively protective of physical liberty, which is regarded as 'in the first rank of fundamental rights'[58] in any democratic society which purports to be governed in accordance with the rule of law.[59] In *Engel*, the Court further identified that the aim of Article 5 is to prevent unjustified interferences with personal liberty,[60] this assessment being reiterated and affirmed in numerous subsequent cases.[61] Indeed, the Article proscribes any deprivation of liberty that is not pursuant to one of the permissible grounds and imposed in accordance with a procedure prescribed by law.[62] The foregoing analysis therefore renders it apparent that Article 5, 'relates only to a very specific aspect of human liberty',[63] its essential concern being to protect individuals from being dispossessed of their physical liberty in an arbitrary manner.[64]

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[56] *Engel v Netherlands* (1976) 1 EHRR 647.
[57] ibid para 58.
[58] *McKay v United Kingdom* (2006) 44 EHRR 827, para 30.
[59] See *Winterwerp v The Netherlands* (1979) 2 EHRR 387, paras 37, 39; *Askoy v Turkey* (1996) 23 EHRR 553, para 76.
[60] *Engel* (n 56) para 58.
[61] See, for example, *Winterwerp* (n 59) para 37, *Bozano v France* (1987) 9 EHRR 297, para 54; *Brogan v United Kingdom* (1989) 11 EHRR 117, para 58; *Guzzardi v Italy* (1981) 3 EHRR 333, para 92; *A v United Kingdom* (2009) 49 EHRR 29, para 162.
[62] Article 5(1)(a)-(e) ECHR.
[63] EU Network of Independent Experts on Fundamental Rights, *Commentary on the Charter of Fundamental rights of the European Union* (2006) 67.
[64] Trechsel observes that Article 5 is based upon a 'rather specific model of protection of personal liberty', one which is strongly influenced by the Anglo-Saxon legal tradition: Stefan Trechsel, 'The Right to Liberty and Security of Person: Article 5 of the European Convention on Human Rights in the Strasbourg Case-law' (1980) 1(1) Human Rights Law Journal 88, 89-91.

v. The Scope of Article 5 ECHR

In order for Article 5 to be engaged, the circumstances must involve a 'deprivation' of liberty. Therefore, a necessary step in determining the application and scope of Article 5 is to establish precisely what 'deprivation of liberty' means in this context.

It appears clear from examination of the Convention itself that Article 5 is intended to afford protection against deprivations of, rather than mere restrictions upon, an individual's physical liberty. Firstly, that this interpretation is apposite is indicated by Article 5's use of the terms 'deprived of his liberty', 'arrest' and 'detention.'[65] The correctness of this approach can also be inferred from the existence of Article 2 of Protocol 4 of the Convention.[66] Article 2(1) of this optional Protocol guarantees to every legal resident of a state the right of 'liberty of movement' within the territory of that country. Were Article 5 to be construed to cover restrictions on freedom of movement, Article 2 of Protocol 4 would consequently be rendered otiose. Whilst it can therefore be confidently asserted that Article 5 is concerned exclusively with instances of deprivation of liberty, restrictions upon liberty of movement being the province of Article 2 of Protocol 4, determining exactly where the dividing line between these two provisions lies remains an issue fraught with complexity.

vi. Deprivation of Liberty

The paradigm case of deprivation of liberty arises where an individual is incarcerated in a penal institution following conviction by a competent court of law.[67] Whilst physical detention of this kind would plainly pose no difficulty in terms of classification, obviously not all situations are this clear cut. Where the restrictions upon an individual's liberty are less absolute, it becomes necessary to assess whether the degree of interference is such that a deprivation of liberty, within the meaning of Article 5, has occurred.

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[65] *Engel* (n 56) para 58.
[66] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto (1963).
[67] Article 5(1)(a) ECHR.

Although Article 5 is the subject of a substantial body of jurisprudence, as Stone observes, 'the Strasbourg case law is not particularly helpful, in that it provides no clear guidance as to when a restriction on freedom will reach the degree of intensity required for it to be regarded as a "deprivation of liberty".'[68] Despite the inevitable difficulties incurred in attempting to determine the locus of the divide between deprivations of, and restrictions upon, liberty with any real precision, as is discussed in detail below, this distinction was nonetheless integral to the operation of the control orders regime. In the following section, therefore, analysis of a number of key Article 5 cases will be used in order to delineate the Court's approach to this critical issue.

vii. Determining the Existence of a 'Deprivation of Liberty': The Approach of the European Court of Human Rights

There are manifold ways in which a person's liberty may be constrained by the state. Therefore, in determining whether an individual has been deprived of their liberty, focus must be placed upon their actual circumstances. Thus, the starting point of inquiry is the 'concrete situation' of the relevant individual.[69] The rationale for this approach was elucidated by the Court in the military discipline case of *Engel*:

> The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it applied to a civilian may not possess this characteristic when imposed upon a serviceman.[70]

It is therefore clear that the concept of 'deprivation of liberty' does not constitute a fixed legal standard which is to be applied in a uniform manner regardless of the circumstances involved. Indeed, the Court adopts a context sensitive, rather than formalistic, approach which takes into account the practical realities of the individual's case.

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[68] Stone (n 41) 51. See also Jim Murdoch, 'Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence' (1993) 42(3) International and Comparative Law Quarterly 494, 495.
[69] *Engel* (n 56) para 59.
[70] ibid.

Once the context of the applicant's loss of liberty has been identified, the Court will then proceed to consider all factors relevant to establishing whether the restriction of the individual's freedom is such that it is judged to fall within the scope of Article 5. As Fenwick identifies, the 'leading decision on non-paradigm cases of interferences with liberty'[71] is *Guzzardi v Italy*.[72] The case concerned a suspected Mafioso who had been placed under special supervision, which involved him being confined for a period of three years to a 2.5 square kilometre area of the remote island of Asinara, a nine-hour curfew (22:00-7:00), and a requirement to report to the authorities twice daily. In holding that the applicant's Article 5 rights had been violated,[73] the Court advocated a broad approach to determining whether a deprivation of liberty had occurred, under which, 'account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.'[74]

Despite the accepted approach being one which is based upon a detailed examination of the applicant's situation, assessing whether the Article 5 threshold has been crossed in a particular case is nevertheless often problematic. Indeed, the Court itself has explicitly recognised the difficulties inherent in classifying cases, acknowledging that, particularly in borderline cases, it is essentially 'a matter of pure opinion'.[75]

Although the process of categorization is frequently complex, and arguably somewhat imprecise, it is something which cannot be avoided, as it is determinative of Article 5's applicability in any given case. Due to the nature of the Court's approach, the formulation of any clear guidelines on where the boundary between Article 5 and Article 2 of Protocol 4 lies is inevitably difficult. The most instructive statement on this issue is currently provided by the

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[71] Helen Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the 'War on Terror' (2010) 63(1) Current Legal Problems 153, 167.
[72] (1981) 3 EHRR 333.
[73] The Court held by 10 votes to 8 that the restrictions imposed upon Guzzardi, 'cumulatively and in combination', amounted to a deprivation of liberty in violation of Article 5(1) ECHR.
[74] *Guzzardi* (n 72) para 92.
[75] ibid para 93.

Guzzardi judgment, wherein the Court concluded that, 'the difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity, and not one of nature or substance.'[76]

viii. Permissible Deprivations of Liberty

The right to liberty and security of person, whilst regarded as fundamental in a liberal democracy, does not enjoy absolute status under the ECHR.[77] Article 5 specifies a range of state interests, pursuant to which an individual may legitimately be deprived of their liberty. The six permissible grounds for deprivation of liberty set out under paragraph 1 comprise:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.[78]

The list of circumstances set out under (a)-(f) is exhaustive, as indicated by Article 5(1)'s use of the prefatory phrase 'save in the following circumstances', and confirmed by ECtHR jurisprudence.[79] Any deprivation of liberty not justified by reference to one of the Article 5(1) subparagraphs will therefore be deemed unlawful under the Convention.[80] Furthermore, the

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[76] ibid.
[77] Unlike, for example, the right to protection against subjection to torture or inhuman and degrading treatment or punishment embodied within Article 3 ECHR.
[78] For a detailed survey of the different grounds for deprivation of liberty under Article 5(1) and associated case law, see Macovei (n 55).
[79] *Engel* (n 56) para 57; *Guzzardi* (n 72) para 96; *Bouamar v Belgium* (1989) 11 EHRR 1, para 43.
[80] See, for example, the case of *Riera Blume and others v Spain* (2000) 30 EHRR 632. Here, six members of a religious group, the *Centro Esotérico de Investigaciones,* were, by court order, released

ECtHR has consistently asserted that the enumerated exceptions are to be given a strict interpretation.[81]

In addition to falling within one of the recognised grounds for deprivation, the arrest or detention must also be 'lawful' and imposed 'in accordance with a procedure prescribed by law'.[82] These criteria essentially require the deprivation of liberty to be carried out in compliance with the procedural and substantive rules of the state's national law. Further, as was emphasised by the court in *Winterwerp v The Netherlands*:[83]

> [T]he domestic law itself must be in conformity with the Convention, including the general principles expressed therein. The notion underlying the term in question is one of fair and proper procedure, namely, that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.[84]

Thus, not only must the deprivation of liberty be carried out in full compliance with domestic legal procedures, but those procedures themselves must satisfy the standard of lawfulness set by the Convention, entailing that the applicable provisions of national law be formulated with sufficient precision to permit citizens to foresee, to a reasonable degree, the consequences a given action may involve.[85]

III. Control Orders: Impact on Liberty

Measures that impose restrictions on liberty of movement for the purposes of preventing the future commission of unlawful acts are, as the JCHR has acknowledged, 'not in principle

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into the custody of their families who, with the assistance of the Catalan police, then confined the applicants to a hotel for nine days for the purpose of 'deprogramming' by a psychiatrist and psychologist. The Court held that 'deprogramming' did not fall within the exceptions provided for under subparagraphs (a)-(f), and that there had therefore been a violation of Article 5(1) of the Convention.

[81] See, for example, *Labita v Italy* (2000) 46 EHRR 1228, para 170; *Lexa v Slovakia* [2008] ECHR 886, para 119.

[82] Article 5(1) ECHR.

[83] *Winterwerp* (n 59). The case involved a challenge to the applicant's compulsory detention under the Mentally Ill Persons Act 1884.

[84] ibid para 45.

[85] See *Steel and others v United Kingdom* (1998) 28 EHRR 603, para 54.

contrary to the Convention.'[86] Indeed, that preventive measures which restrict a person's freedom of movement are capable of Article 5 compatibility has been recognised by the ECtHR in a number of cases concerning Italy's use of 'special supervision' measures against suspected Mafia members.[87] Whilst Strasbourg jurisprudence unequivocally establishes that 24-hour house arrest represents a deprivation of liberty,[88] whether lesser restraints, such as curfews, residence requirements, and exclusion zones, engage Article 5, or instead constitute restrictions on freedom of movement, which are governed by Protocol 4, Article 2, is a complex matter. As discussed above, the precise parameters of these two provisions is somewhat uncertain, the absence of any readily identifiable bright-line between restrictions on movement and deprivation of liberty often rendering it difficult to predict whether particular measures are likely to cross the Article 5 threshold.

Despite not being covered by any of the specified exceptions to Article 5,[89] the PTA's control order provisions were, *prima facie*, compatible with Article 5, a statement of compatibility with Convention rights being made by the Home Secretary under HRA, s 19(1)(a) at the time the legislation was introduced.[90] Although a control order could include a potentially unlimited range of obligations,[91] pursuant to PTA, s 1(2), obligations that were incompatible with an individual's Article 5 right to liberty could only be imposed by a derogating control order.[92] However, as the UK has not ratified Article 2 of Protocol 4, non-derogating orders could lawfully restrict freedom of movement and impose any obligations short of a deprivation of liberty the Home Secretary considered necessary for purposes connected with

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[86] JCHR, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (n 17) para 27.
[87] See *Guzzardi* (n 72) para 92; *Raimondo v Italy* (1994) 18 EHRR 237, para 39; *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000), paras 193-195. See also the Commission's decision in *Ciancimino v Italy* (1991) 70 DR 103, 122-123.
[88] *NC v Italy* App no 24952/94 (ECtHR, 11 January 2001), para 33; *Mancini v Italy* App no 44955/98 (ECtHR, 2 August 2001), para 17; *Vachev v Bulgaria* App no 42987/98 (ECtHR, 8 October 2004), para 64; *Niklova v Bulgaria* (No. 2) App no 40896/98 (ECtHR, 30 December 2004), para 60; *Pekov v Bulgaria* App no 50358/99 (ECtHR, 30 June 2006), para 73.
[89] Articles 5(1)(a)-(f). See *viii. Permissible Deprivations of Liberty* above.
[90] The Prevention of Terrorism HC Bill (2004-05) was accompanied by a statement from Charles Clarke that, in his view, the provisions of the Prevention of Terrorism Bill were compatible with Convention rights.
[91] PTA, s 1(3). See also ss 1(1), 1(4), 1(5).
[92] ibid ss 1(2)(a), (b). See further discussion in chapter 3 of this thesis.

preventing or restricting the controlee's involvement in terrorism-related activity.[93] While the 'derogating'/'non-derogating' nomenclature appeared to suggest that the use of non-derogating orders would not trigger Article 5, the Act's lack of clarity regarding the distinction between the two types of order, and the consequent possibility that orders purporting to be non-derogating in character could in fact involve obligations which deprived the controlee of their liberty, quickly emerged as one of the principal sources of concern in relation to the regime.[94]

From the outset, control orders' impact on liberty was identified as a key human rights issue by the JCHR. In its 2006 report, the Committee expressed disquiet about the system's potential incompatibility with Article 5, suggesting that the non-derogating control order powers were, in practice, 'likely to be exercised ... in a way which amounts to a "deprivation of liberty"'.[95] Significant concerns relating to the regime's compatibility with Article 5 were similarly reiterated by the JCHR in its subsequent reports,[96] and were also echoed by the Council of Europe Commissioner for Human Rights.[97] Details of the obligations imposed on 'most but not quite all' of the controlees during the first ten months of the regime were provided in the 2006 annual review of the Act.[98] In his report, Lord Carlile described the

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[93] ibid ss 1(2)(b), 1(3).

[94] See Lucia Zedner, 'Preventive Justice or Pre-Punishment? The case of Control Orders' (2006) 60 Current Legal Problems 174, 178.

[95] JCHR, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (n 17) para 26. See also paras 36-42.

[96] See JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007* (2006-07, HL 60, HC 365) paras 21-29; *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008* (2007-08, HL 57, HC 356) paras 35-49; *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2009* (2008-09, HL 37, HC 282) paras 10, 43; *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (2009-10, HL 64, HC 395) 3.

[97] Council of Europe, Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom 4-12th November 2004* (CommDH, 2005) para 17.

[98] Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) para 42. The obligations included an 18 hour curfew, electronic tagging, twice daily reporting requirements, limitation of visitors and meetings to persons approved in advance by the Home Office, a requirement to allow the police to enter the controlee's residence at any time, conduct searches, and remove any item, prohibitions on mobile phones and the use of the internet, and restrictions on movement to within a defined area. A proforma of the full Schedule of Obligations imposed under the orders is contained in Annex 2 (pp 28-35) of the report.

obligations as 'extremely restrictive',[99] stating that they inhibited normal life considerably, and fell 'not very short of house arrest.'[100]

During the lifetime of the regime, no derogating control orders were issued, all of the orders made between 2005-2011 being of the non-derogating variety.[101] Whilst non-derogating orders were ostensibly Article 5 compliant, they were frequently subject to legal challenge on the grounds that, in practice, the package of obligations they involved amounted to a deprivation of liberty. On 31 October 2007, the House of Lords handed down judgments in a trio of important cases, *JJ*,[102] *E*,[103] and *MB and AF*,[104] common to all of which were claims that the non-derogating orders that had been imposed deprived the controlees of their liberty in violation of Article 5.[105] The decisions in these cases, and their impact upon the operation of the control order regime, are examined in detail below.

i. Non-Derogating Control Orders: The Article 5 Litigation

JJ, which represents the key judgment with respect to Article 5, concerned six respondents, all of whom were non-nationals.[106] Each was subject to a control order that was in 'more or less standard form.'[107] The orders imposed on the controlees an 18-hour curfew (16:00-10:00), during which they were confined to their designated one-bedroom flats. Their residences were subject to spot searches by the police, and all visitors had to receive prior

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[99] ibid.
[100] ibid para 43.
[101] David Anderson, *Final Report* (n 14) para 3.3.
[102] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
[103] *Secretary of State for the Home Department v E* [2007] UKHL 47.
[104] *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46.
[105] These cases have been the subject of extensive academic commentary. See Ed Bates, 'Anti-Terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29(1) Legal Studies 99; David Feldman, 'Deprivation of Liberty in Anti-Terrorism Law' (2008) 67(1) Cambridge Law Journal 4; Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process in Counterterrorism Law and Beyond' (2011) 56(4) McGill Law Journal 863; Clive Walker, 'Terrorism: Prevention of Terrorism Act 2005 ss 2 and 3 – Non-derogating Control Order – Whether "Deprivation of Liberty" Under European Convention on Human Rights Art 5' (2008) 6 Criminal Law Review 486.
[106] Five of the respondents were Iraqi nationals, whilst the sixth was either an Iraqi or Iranian national. Three had been granted leave to remain and three had temporary admission. All were suspected by the Home Secretary of having been involved in terrorism-related activities and were assessed to pose a threat to the public within the United Kingdom or overseas.
[107] *Secretary of State for the Home Department v JJ* [2007] UKHL 45 [20] (Lord Bingham).

clearance from the Home Office.[108] During the six hours they were permitted to leave their residences, the controlees were restricted to defined urban areas of up to seventy-two square kilometres,[109] and were forbidden from meeting anyone by prearrangement. They were also required to wear an electronic tag and had to report to the monitoring company twice daily. In addition, aside from one fixed landline, the ownership or use of communications equipment was prohibited.[110]

In the High Court,[111] after surveying the relevant Strasbourg jurisprudence, Sullivan J concluded that he was, 'left in no doubt whatsoever that the cumulative effect of the obligations has been to deprive the respondents of their liberty',[112] describing the controlees' situation as 'the antithesis of liberty, and ... more akin to detention in an open prison.'[113] As the orders imposed obligations that were incompatible with Article 5, they had been made by the Home Secretary in breach of the powers conferred by the PTA.[114] It was ultimately held that, as the orders were made without jurisdiction and were therefore nullities, the proper course of action was to quash them pursuant to s 3(12)(a) of the Act.[115] Sullivan J's decision, whilst criticised by the Home Secretary,[116] was upheld by the Court of Appeal,[117] who agreed that the orders clearly fell 'on the wrong side of the dividing line', the obligations imposed on the controlees amounting to 'a deprivation of liberty contrary to article 5'.[118]

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[108] Visitors were required to supply their name, address, date of birth and photographic identification.
[109] Each area contained a mosque, a hospital, primary health care facilities, shops and entertainment and sporting facilities.
[110] See *Secretary of State for the Home Department v JJ, KK, GG, HH, NN, LL* [2006] EWHC 1623 (Admin).
[111] ibid.
[112] ibid [73].
[113] ibid [74].
[114] ibid [93].
[115] ibid [92], [99].
[116] Alan Travis, 'Judge "Misunderstood" Anti-Terror Legislation' *The Guardian* (London, 4 July 2006) <www.guardian.co.uk/uk/2006/jul/04/terrorism.politics> accessed 20 July 2012.
[117] *Secretary of State for the Home Department v JJ and others* [2006] EWCA Civ 1141.
[118] ibid [23].

By a majority of three to two,[119] the House of Lords rejected the Home Secretary's subsequent appeal, upholding the lower courts' findings that, due to the cumulative impact of the obligations, the orders deprived the controlees of their liberty in breach of Article 5. Giving the leading judgment, Lord Bingham stated that, whilst 'in ordinary parlance a person is taken to be deprived of his or her liberty when locked up in a prison cell',[120] the concept is not limited to this, and 'deprivation of liberty may take numerous forms other than classic detention in prison or strict arrest.'[121] Relying on *Engel*[122] and *Guzzardi*,[123] he explained that the court's task was to consider the individual's 'concrete situation',[124] and, taking into account the whole range of factors, such as the nature, duration, and manner of execution or implementation of the measures in question,[125] to assess their impact on the individual subject to them in terms of their effect 'on the life the person would have been living otherwise.'[126]

Observing that the lengthy curfew and effective exclusion of visitors meant that the controlees were 'in practice in solitary confinement' for much of the day, Lord Bingham concluded that they had been deprived of their liberty, their lives being 'wholly regulated by the Home Office'.[127] Baroness Hale concurred with this assessment, emphasizing the extent to which the regime cut the controlees' off from normal society,[128] and stating that the reality was that 'every aspect of their lives was severely controlled.'[129] Whilst both Lord Bingham and Baroness Hale were reluctant to suggest an upper limit in terms of the length of curfew that would be compatible with Article 5,[130] Lord Brown opined that although 18 hours was

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[119] *JJ* (n 102). Lord Bingham, Baroness Hale and Lord Brown in the majority, Lord Hoffmann and Lord Carswell dissenting.
[120] ibid [12].
[121] ibid [15].
[122] *Engel* (n 56).
[123] *Guzzardi* (n 72).
[124] *JJ* (n 102) [15].
[125] ibid [16].
[126] ibid [18]. See Fenwick, 'Recalibrating ECHR Rights' (n 71) 173.
[127] ibid [24].
[128] ibid [60].
[129] ibid [62].
[130] ibid. See [16] (Lord Bingham); [63] (Baroness Hale). See also the comments of Lord Carswell at [84].

'simply too long to be consistent with the retention of physical liberty',[131] he believed a 16-hour curfew would normally be acceptable.[132] He did, however, go on to stress that 16 hours 'should be regarded as the absolute limit.'[133]

In contrast to the majority, the dissentients, Lord Hoffmann and Lord Carswell, advocated adopting a very narrow conception of deprivation of liberty.[134] Lord Hoffmann, for example, submitted that it was 'essential not to give an over-expansive interpretation to the concept of deprivation of liberty',[135] stating that it was 'clear from the unqualified nature of the [Article 5] right to liberty ... that it deals with literal physical restraint.'[136] He went on to declare that the concept should be confined to 'actual imprisonment or something which is for practical purposes little different from imprisonment', insisting that to interpret it otherwise would 'place too great a restriction on the state to deal with serious terrorist threats'.[137] As Lord Hoffmann found it impossible to say that the controlees were 'for practical purposes in prison',[138] he believed that the orders did not violate Article 5, but instead constituted restrictions on freedom of movement.[139] Lord Carswell, whilst conscious of the majority's concerns, agreed with Lord Hoffmann, concluding that, on balance, even the extensive curfews imposed on the controlees did not take the cases 'over the line of deprivation of liberty.'[140]

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[131] ibid [105].
[132] ibid. Lord Brown went on to state that: 'leaving the suspect with eight hours (admittedly in various respects controlled) liberty a day. ... in my opinion, can and should properly be characterised as ... [a regime] which restricts the suspect's liberty of movement rather than actually deprives him of his liberty' [105]. See also [108].
[133] ibid [105].
[134] See Dominic McGoldrick, 'Terrorism and Human Rights Paradigms: The United Kingdom after 11 September 2001' in Andrea Bianchi and Alexis Keller, *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008) 172.
[135] *JJ* (n 102) [44].
[136] ibid [36].
[137] ibid [44].
[138] ibid [45]. Lord Hoffmann went on to state that to describe the controlees as such would be 'an extravagant metaphor' [45].
[139] ibid.
[140] ibid [84].

In *Secretary of State for the Home Department v E,*[141] the courts were required to determine whether a non-derogating order imposing less onerous obligations than those which applied to the controlees in *JJ* amounted to a deprivation of liberty. E's[142] control order included electronic tagging, residence at a specified address, a 12-hour curfew (19:00-7:00), twice daily reporting, restrictions on visitors to, and on pre-arranged meetings outside of, the residence, and the prohibition of any mobile phone or equipment capable of connecting to the internet.[143] In the High Court, Beatson J concluded that, although 'more finely balanced than the *JJ* cases',[144] the cumulative effect of the obligations did deprive E of his liberty in breach of Article 5. This decision was, however, reversed by the Court of Appeal.[145] In light of the fact that E was living with his family in his own home, was not subject to any geographical restrictions during non-curfew hours, could engage in a numerous everyday activities, and was able to maintain a wide range of social contacts, the Court held that the degree of restraint was 'far from a deprivation of liberty in Article 5 terms.'[146] This decision was subsequently upheld by the House of Lords,[147] Lord Bingham commenting that a 12-hour curfew as 'the core element of confinement' was 'insufficiently stringent' for there to be a deprivation of liberty.[148]

The Article 5 challenge in the third case, *MB and AF,*[149] specifically related to the control order imposed upon AF.[150] The order included a 14-hour curfew (18:00-8:00), residence at the flat he occupied with his father, electronic tagging, reporting requirements, and a range

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[141] [2007] EWHC 233 (Admin); *Secretary of State for the Home Department v E and another* [2007] EWCA Civ 459; *Secretary of State for the Home Department v E* [2007] UKHL 47.
[142] E, a Tunisian national who had arrived in the UK in 1994, was one of the individuals certified by the Home Secretary under s 21 of Anti-terrorism, Crime and Security Act 2001, and had been detained in Belmarsh between 2001 and 2005.
[143] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin) [49]. In addition, the order imposed obligations requiring E to permit police searches of his residence and notify the Home Office of any intended departure from the UK, and also involved restrictions on E's bank account and on the transfer of money, documents or goods to destinations outside the UK.
[144] ibid [242].
[145] *Secretary of State for the Home Department v E and another* [2007] EWCA Civ 459.
[146] ibid [63] (Pill LJ).
[147] *Secretary of State for the Home Department v E* [2007] UKHL 47.
[148] ibid [11]. See [23] (Lord Hoffmann); [25] (Baroness Hale); [30]-[31] (Lord Carswell); [36] (Lord Brown).
[149] *MB and AF* (n 104).
[150] AF was a dual UK/Libyan national.

of other ancillary obligations.[151] In addition, during non-curfew hours, AF was restricted to an urban area of approximately nine square-miles. Disagreeing with the High Court's decision,[152] the House of Lords unanimously held that there had been no deprivation of liberty.[153] Lord Brown, referring to his decision in *JJ*, stated that he did not regard a 14-hour curfew as 'involving a sufficient degree of physical confinement to constitute a deprivation of liberty',[154] whilst Lord Hoffmann asserted that the restrictions imposed on AF did not 'come anywhere near amounting to a deprivation liberty in the sense contemplated by the Convention.'[155]

In some respects, the House of Lords' decision in *JJ* may be regarded as an important assertion of the courts' role in safeguarding human rights in the national security context.[156] In *JJ*, it was submitted by the Home Secretary that, due to the prevailing security climate, the concept of deprivation of liberty should be given an especially narrow interpretation.[157] The majority, however, refused to accede to this argument, Lord Brown forcefully proclaiming that:

> The borderline between deprivation of liberty and restriction of liberty of movement cannot vary according to the particular interests sought to be served by the restraints imposed. The siren voices urging that it be shifted to accommodate today's need to combat terrorism ... must be firmly resisted. ... Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here.[158]

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[151] The additional obligations comprised: permitting the police to enter and search his residence, restrictions on visitors, banking facilities, and on money, documents and goods transfers abroad. AF was also limited to attending a specified mosque and was prohibited from using mobile phones or the internet. See *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) [5].
[152] ibid [89 (Ouseley J). Ouseley J granted a 'leapfrog certificate' allowing direct appeal to the House of Lords.
[153] *MB and AF* (n 104)..
[154] ibid [89].
[155] ibid [47].
[156] Bates (n 105) 106.
[157] ibid, citing JUSTICE, *Written Submission on behalf of Justice* (intervening in *MB* and *AF* before the House of Lords) available at <www.justice.org.uk>.
[158] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 [107]. Lords Hoffmann and Carswell, however, appeared to express some degree of support for the Home Secretary's contention, Lord Hoffmann opining that, 'it is essential not to give an over-expansive interpretation to the concept of deprivation of liberty. ... Otherwise the law would place too great a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens' [44]. See also the comments of Lord Carswell at [70].

Despite *JJ*'s apparent, if somewhat qualified, vindication of the controlees' right to individual liberty, as Foster notes, the House of Lords' judgments in this trio of linked cases retained 'an air of uncertainty',[159] in that, aside from confirming that orders imposing an 18-hour curfew were in breach of Article 5, they provided scant guidance on when the cumulative effect of multiple control order obligations would amount to a deprivation of liberty. Further, as Ewing and Tham observe, the decisions were, in a sense, 'remarkably paradoxical',[160] as they ultimately proved to be 'more important for what they appeared to permit rather than what they purported to prohibit.'[161]

Although *JJ* foreclosed the possibility of imposing 18-hour curfews under non-derogating orders,[162] the House of Lords' judgments were nevertheless heralded by the government as a 'positive endorsement of the principles of control orders.'[163] Indeed, Lord Brown's statement on the permissibility of 16-hour curfews was treated as providing definitive clarification as to the locus of the dividing line between derogating and non-derogating orders.[164] One immediate consequence of *JJ*, therefore, was that four existing control orders were modified so as to increase their curfew periods from 12 to 16 hours.[165] The decisions were also used as the basis upon which to resist the JCHR's recommendation that the PTA

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[159] Steve Foster, 'Control Orders, Human Rights and the House of Lords' (2007) 12(2) Coventry Law Journal 27, 35. See also Adam Sandell, 'Liberty, Fairness and the UK Control Order Cases: Two Steps Forward, Two Steps Back' (2008) 1 European Human Rights Law Review 120, 124.

[160] Keith D Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] Public Law 668, 669.

[161] ibid.

[162] The finding that 18-hour curfews amounted to a breach of Article 5 was said to have 'disappointed' the Home Secretary, who, in certain cases, considered such extensive curfews as 'necessary' to protect national security. See HC Deb 12 December 2007, vol 469, col 39WS (Tony McNulty).

[163] *Replies to the list of issues (Ccpr/C/Gbr/Q/6) to be taken up in connection with the consideration of the Sixth Periodic Report of the Government of the United Kingdom of Great Britain and Northern Ireland* (Ccpr/C/Gbr/6), 13 June 2008, para 124 <www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.GBB.Q.6.Add.1.doc> accessed 21 November 2012. See also Home Office, *Government Reply to the Tenth Report from the Joint Committee on Human Rights Session 2007-08* (Cm 7368, 2008) 1.

[164] HC Deb 12 December 2007, vol 469, col 39WS (Tony McNulty). See also JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008* (2007-08, HL 57, HC 356) para 39; Home Office, *Government Reply to the Tenth Report from the Joint Committee on Human Rights Session 2007-08* (Cm 7368, 2008) 4.

[165] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008* (2007-08, HL 57, HC 356) para 43. The curfews imposed by these orders had previously been reduced, first from 18 to 14 hours, and then from 14 to 12 hours, in response to the earlier lower court judgments. See, for example, *Secretary of State for the Home Department v AF* [2008] EWCA Civ 117.

be amended so as to statutorily limit daily curfews to 12 hours, the government asserting that in *JJ* the majority had 'effectively indicated that a control order with obligations including a 16-hour curfew would not breach Article 5',[166] and further, that, as a result of the House of Lords' judgments, the legislation was 'fully compliant' with the ECHR, thus rendering amendment unnecessary.[167]

Whilst Lord Brown's lone pronouncement in *JJ* was said by the JCHR to be a 'very slender legal basis'[168] for the view that orders containing 16-hour curfews were Article 5 compliant, non-derogating orders imposing curfews of this length were subsequently upheld in a number of cases.[169] As was emphasised in *AE*,[170] however, 16-hour curfews would not necessarily be lawful in all instances. Here, whilst upholding the order made against AE,[171] Silber J stated that, 'although a 16-hour curfew will not infringe the article 5 rights of some of those who are subject to control orders, that conclusion most certainly does not mean that a 16-hour curfew is permissible in every case'.[172] Indeed, as both the Strasbourg and domestic court decisions make clear, whilst curfew length may be the starting point, or 'core element', when it comes to assessing compatibility with Article 5,[173] it is not the sole determinant of legality.

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[166] Home Office, *Government Reply to the Tenth Report from the Joint Committee on Human Rights Session 2007-08* (Cm 7368, 2008) 4. It was submitted that: introducing a maximum curfew of 12 hours for controlled individuals would significantly damage the Government's ability to protect the public from the threat of terrorism.

[167] ibid 1.

[168] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008* (2007-08, HL 57, HC 356) para 41.

[169] See, for example, *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin); *AU and AV v Secretary of State for the Home Department* [2008] EWHC 1895 (Admin).

[170] *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin).

[171] ibid. AE, who the Home Secretary assessed to be a 'well-known figure Iraqi Kurdish community' and 'a leading figure in Islamist extremist circles' in the town in which he lived, was suspected of providing support for the 'Jihadist insurgency in Iraq', radicalising individuals in the UK, and was believed to have received terrorist training and to have taken part in terrorist activities [62]. AE's control order, following modification by the Home Secretary on 31 October 2007, imposed a range of restrictions, including a 16-hour curfew and a ban on visitors to AE's residence.

[172] ibid [86].

[173] See *Engel* (n 56) para 59; *Guzzardi* (n 72) para 92; *Secretary of State for the Home Department v JJ* [2007] UKHL 45 [16], [58], [91]; *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin) [21]..

ii. Control Order Curfews

As is clear from the foregoing discussion, a central concern in assessing whether a control order breached the Article 5 right to liberty was the length of the curfew imposed. Initially, 18 hours was the norm, curfews of this length being imposed on 'most' of the 18 controlees made subject to orders in 2005.[174] However, following the determination that control orders including an 18-hour curfew amounted to a deprivation of liberty in *JJ*,[175] no curfews of longer than 16 hours were imposed. Table 4.1 sets out the number of control orders with curfews of each particular duration that were in existence at the end of each year from 2006-2011.

Table 4.1 Control Orders: Duration of Curfews 2006-2011[176]

Year	Curfew: Number of Hours									Average Curfew Duration[177]
	16	14	13	12	10	9	8	3	0[178]	
2006	-	8	-	2	-	-	-	-	8	**7.5**
2007	5	1	-	2	-	1	3	1	2	**10**
2008	5	1	-	7	1	-	1	-	-	**13**
2009	1	2	-	5	-	-	2	-	2	**12**
2010	-	2	1	3	1	-	1	-	-	**11.9**
2011	-	1	-	5	-	2	1	-	-	**11.1**

[174] Lord Carlile, *First Report* (n 98) para 42. Unlike in subsequent reports, Lord Carlile did not specify the duration of the curfews imposed on each of the controlees in his *First Report*. He did, however, state that 'Male 12' was under 'no curfew or tag' (p 5), and commented that the control orders of 'most but quite not all controlees' made subject to orders in 2005, included an 18-hour curfew (paras 42-43).
[175] *Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin); [2006] EWCA Civ 1141; [2007] UKHL 45.
[176] The information in Table 4.1 is compiled from the annual reports of the independent reviewers of the Prevention of Terrorism Act 2005. See Lord Carlile, *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2007) 5; *Third Report* (2008) 37; *Fourth Report* (2009) 33; *Fifth Report* (2010) 65; *Sixth Report* (2011) 64; David Anderson, *Final Report* (n 14) 85; David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) 52. See also Adrian Hunt, 'From Control Orders to TPIMs: Variations on a Number of Themes in British Legal Responses to Terrorism' (2013) Crime, Law and Social Change, 26 <http://ssrn.com/abstract=2235805> accessed 21 April 2014.
[177] This column displays the average curfew duration (in hours) for each year.
[178] Orders which did not include a curfew, and which imposed a limited range of obligations which were designed to prevent or restrict travel abroad, were sometimes referred to as 'light touch' control orders. These orders were generally used against 'less obviously dangerous targets', such as those individuals in relation to whom the Home Secretary's main ground for suspicion was that they intended to travel abroad for terrorist training or other terrorism-related purposes: David Anderson, *Final Report* (n 14) para 3.28.

As Table 4.1 shows, whilst 16-hour curfews were imposed on a number of controlees, they were not the norm.[179] Instead, as Hunt observes, post-2007, there was 'general tendency towards using curfews of 12 h, or below, as the standard duration when a lengthy curfew [was] thought to be required.'[180] This trend away from the imposition of long curfews is also manifest in the annual average curfew duration, which decreased year-on-year between 2008 and 2011, the average length of curfew in the regime's final year of operation being 11.1 hours.

iii. Control Orders, Relocation and Social Isolation

In post-*JJ* cases, one factor that emerged as being particularly significant in respect of the courts' assessment of compatibility with Article 5 was the extent to which the individual was socially isolated as a result of being subject to a control order. Faced with the inability to impose curfews in excess of 16 hours under non-derogating orders,[181] the government began to make increasing use of conditions compelling the controlee to relocate and reside at a designated residence in a specific town or city. Forced relocation, said by the government to be necessary in certain cases in order to remove the controlee from their 'network of extremist contacts',[182] was regarded by many as an especially troubling aspect of the scheme. For example, in its 2010 report,[183] the JCHR expressed extreme disquiet at the practice of requiring British citizens to uproot themselves - and in some cases, also their families[184] - from their community and move to an unfamiliar location, characterising

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[179] In 2007 and 2008, one-third of the control orders (5 out of 15) in force at the end of the year included a curfew of 16 hours, and in 2009, only one control order out of the eight in force at the end of the year imposed a 16-hour curfew. In 2006, 2010, and 2011, no controlees were subject to 16-hour curfews at the end of the year, the longest curfew periods in each of these years being 14 hours.
[180] Hunt, 'From Control Orders to TPIMs' (n 176) 27. For further useful analysis of the trends observed in the use of curfews under control orders see 26-28 of the same article.
[181] *JJ* (n 102) [105]-[106].
[182] Home Office, *Government Reply to the Ninth Report from the Joint Committee on Human Rights Session 2009-10* (Cm 7856, 2010) 3.
[183] JCHR, *Annual Renewal of Control Orders Legislation 2010* (n 96) paras 41, 45-46.
[184] The Committee noted that the impact of relocation on the controlled person's families was said to be 'extraordinary', with the female partners of controlees being 'treated with complete contempt', and their children being 'uprooted from the schools they have been attending': ibid para 41.

relocation as a 'form of internal exile',[185] and concluding that they had 'very grave reservations about the use of such historically despotic executive orders'.[186] The use of relocation was similarly decried by Liberty, who described it as 'perhaps the most sinister' of the conditions imposed under control orders.[187]

Despite attracting trenchant criticism, extensive use was made of relocation during the lifetime of the regime, the Independent Reviewer's 2011 Report revealing that 23 controlees out of the total of 52 were relocated 'for national security or practical reasons'.[188] As with other control order obligations, the necessity, impact, and legality of relocation conditions had to be assessed on a case-by-case basis. In *AH*,[189] the issue of social isolation, and whether relocation, in combination with other obligations, created a deprivation of liberty, was addressed by the High Court. Here, the control order, which had been made following AH's acquittal of charges under the Terrorism Act 2000,[190] imposed a number of restrictions, including a 14-hour curfew (18:00-8:00),[191] electronic tagging, and geographical restrictions on movement.[192] In addition, AH was required to reside at a flat in Norwich, his removal from London being designed to distance him from his extremist associates.[193] Distilling the key principles from the judgment in *JJ*, Mitting J identified that, in assessing compatibility with Article 5, social isolation represents a significant factor, 'especially if it approaches solitary

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[185] ibid.
[186] ibid para 45. The JCHR's reference to 'historically despotic executive orders' was rejected as 'misplaced' by the Government in its reply to the Committee's Report. Home Office, *Government Reply to the Ninth Report from the Joint Committee on Human Rights Session 2009-10* (Cm 7856, 2010) 4.
[187] Liberty, *Liberty's Briefing on the Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Draft Order 2011* (2011) 6. See also Liberty, *Liberty's Briefing on the Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Draft Order 2010* (2010) 3; Scotland Against Criminalising Communities (SACC), *Year 10: Six Extraordinary State Powers at the Close of the First Decade of the War on Terror* (2010) 10.
[188] This figure does not include voluntary moves. The controlees relocated were AE, AH, AM, AN, AP, AS, AU, AY, BF, BG, BM, BX, CA, CB, CC, CD, CE, CF, GG, HH, JJ, KK and NN. See David Anderson, *Final Report* (n 14) 23, para 3.34 and footnote 81.
[189] *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin).
[190] AH had been charged with possessing documents likely to be useful to a person committing or preparing an act of terrorism under s 58 of the Terrorism Act 2000.
[191] The curfew was reduced to 10 hours on 17 April 2008.
[192] *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin) [19].
[193] AH, an Iraqi national, was suspected of collecting funds for the insurgency in Iraq; having used anti-surveillance techniques; being an associate of BC, an Islamist extremist; and having knowingly facilitated the travel of others to Pakistan for terrorist-related purposes.

confinement during curfew periods.'[194] Whilst finding that relocation to an unfamiliar city meant that AH experienced a high degree of social isolation,[195] he nevertheless held that Article 5 was not engaged. It was, however, noted that the case was 'very close to the borderline and well into the realm of "pure opinion".'[196]

As was established in *AP*,[197] the effect of relocation on the controlee's private and family life could also prove critical in respect of whether Article 5 had been breached. AP, an Ethiopian national,[198] became subject to a control order in January 2008.[199] The order imposed a range of conditions, including a 16-hour curfew (18:00-10:00), a requirement to wear an electronic tag, daily reporting obligations, and a number of other restrictions on association and communication.[200] Under the terms of the order, AP was also forbidden from leaving the local area, and was required to reside at a designated flat in Tottenham,[201] which could be searched by the police at any time, and to which his mother and brothers were the only authorised visitors. In April 2008, the Home Secretary modified the order so as to require AP to move to a town in the Midlands, some 150 miles away from his address in London.[202] This modification was subsequently challenged by AP,[203] who claimed that exclusion from his

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[194] *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin) [21].
[195] ibid [23].
[196] ibid [22]. See also [24].
[197] *Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin); *Secretary of State for the Home Department v AP* [2010] UKSC 24.
[198] AP, along with members of his family, came to the UK in 1992 and claimed asylum. In October 1999, AP, his siblings, and their mother, were granted indefinite leave to remain.
[199] He had previously been detained under immigration powers and then released on bail under stringent conditions.
[200] AP was required to report to the local police station every day and to telephone the monitoring company twice daily. Whilst he was permitted to have a fixed telephone line at his flat and to use a mobile, he was banned from accessing the internet. The order also prohibited AP from arranging to meet anyone aside from his mother and brother outside his flat and from attending pre-arranged meetings or gatherings without prior Home Office approval, and he could only visit one Mosque, which had been approved in advance by the Home Office. See *Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin) [17].
[201] The specified area covered approximately twenty-five square kilometres.
[202] Aside from the necessary adjustment to the geographical limits of the local area to which AP was restricted, the rest of the obligations under the control order remained unchanged.
[203] AP also appealed against the Home Secretary's refusal to vary the obligations prohibiting his attendance at pre-arranged meetings and at more than one mosque.

family and friends resulted in a level of social isolation that he perceived to be 'worse than going to prison.'[204]

In the High Court,[205] it was accepted that there were reasonable grounds for suspecting that AP had been involved in terrorism-related activity,[206] Keith J observing that 'the many parts of the jigsaw to which the analysis of the evidence' related, combined to 'create a worrying profile of AP.'[207] Giving 'due, but not undue, deference' to the Home Secretary's assessment, he therefore concluded that the control order was necessary.[208] In reviewing the necessity of AP's relocation, Keith J asserted that the justification for the move had to balance the need to make it more difficult for him to see his extremist associates with the 'the incontestable hardship for AP in being isolated from his mother and brother.'[209] Whilst acknowledging the considerable, though not insuperable, practical difficulties AP's family encountered in visiting him,[210] and the 'undoubted hardship' he experienced due to not knowing anyone in the area, he found that the interference with AP's rights to private and family life under Article 8 was justified and proportionate in the interests of national security, removing AP from London being the most effective way of reducing his chances of maintaining personal contact with extremists.[211] Acknowledging that in borderline cases, whether a control order constitutes a restriction on movement or a deprivation of liberty is a 'matter of "pure opinion"', Keith J found that AP's order breached Article 5.[212] Here, 'the combination of the equivalent of house arrest up to the maximum period [of 16 hours]', and

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[204] *Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin) [69].
[205] ibid.
[206] The Home Secretary's suspicions that AP had been involved in terrorism-related activity were founded on three core features of his activities over the preceding few years: AP's attendance at what was assessed to be a terrorist training camp in Cumbria in 2004; his visit to Somalia, where it was believed he had undergone paramilitary or terrorist training; and AP's connection with people associated with Islamist extremism: ibid [23]-[65].
[207] ibid [65].
[208] ibid [72].
[209] ibid [87].
[210] AP's evidence was that his mother and brother had visited him about twice a week when he was located in Tottenham, but since the move, his brother had visited him just twice, and his mother had not visited him at all. Keith J, however, found that AP's family could visit him on certain days, and could conceivably travel at times that would allow them to take advantage of off-peak fares.
[211] *Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin) [93].
[212] ibid [97].

the 'equivalent of internal exile which makes AP so socially isolated during the relatively few hours of the day' when not under curfew, 'coupled with his inability to make even social arrangements because pre-arranged meetings ... are prohibited', led Keith J to conclude that the obligations imposed upon AP 'fell on the side of the line which involves a deprivation of liberty',[213] and that the residence obligation should therefore be quashed.[214]

Upon appeal by the Home Secretary, the High Court's decision that AP's control order involved an unlawful deprivation of liberty was reversed by the Court of Appeal.[215] Here, it was held by the majority that Keith J, having found that the interference with AP's Article 8 rights was justified on the grounds of national security, had erred in then treating the effect of relocation on family visits as decisive in respect of Article 5.[216] Kay LJ, rejecting the contention that a 16-hour curfew could never amount to a deprivation of liberty, affirmed that in cases where the length of curfew is not determinative, 'the test must embrace other aspects of the factual matrix,' one potentially relevant factor being social isolation.[217] However, as it had been concluded that the core element of confinement - the 16-hour curfew - was otherwise compatible with Article 5, he found that Keith J had therefore been 'wrong in law to permit the issue of family visits to tip the balance. ... [and] allow the failed Article 8 case to prove decisive' in relation to Article 5.[218] The majority, reasoning that AP's isolation was mitigated by the fact that his family could still visit him,[219] and viewing the interference with his private and family life as purely an Article 8 issue, subsequently held that AP's right to liberty had not been violated.[220]

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[213] ibid [97]. Keith J, however, made clear that, had AP remained in London where he could still be visited by his family, his decision would have been different.
[214] ibid [99].
[215] *AP v Secretary of State for the Home Department* [2009] EWCA Civ 731. See also *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin).
[216] ibid [31] (Kay LJ); [35]-[37] (Wall LJ). Lord Carnwath dissenting.
[217] ibid [27].
[218] ibid [32] (Kay LJ).
[219] ibid [31] (Kay LJ); [40] (Wall LJ).
[220] ibid [32] (Kay LJ); [39] (Wall LJ).

In the Supreme Court, the Court of Appeal's decision was, however, overturned.[221] Of the three main issues considered by the Court, two are of particular relevance here, firstly, whether conditions which were proportionate restrictions upon Article 8 rights could have a determinative impact in relation to Article 5; and, second, whether the judge could take into account subjective and/or person-specific factors, such as the particular difficulties faced by the controlee's family in visiting him, when considering whether a control order amounted to a deprivation of liberty.[222] In relation to the first issue, the Court answered in the affirmative, holding that, if an Article 8 restriction was a relevant consideration in determining whether a control order breached Article 5, then 'by definition it ... [was] capable of being a decisive factor'.[223] Applying the decisions in *Guzzardi*[224] and *JJ*,[225] Lord Brown elucidated that in the 'grey area' between 14 and 18-hour curfews, restrictions other than confinement could tip the balance in deciding whether the restrictions, in combination, deprived the controlee of their liberty.[226] Whilst it was noted that the weight to be given to a relevant consideration was always a question of fact and entirely a matter for the decision-maker, Lord Brown nonetheless averred that:

> [F]or a control order with a 16-hour curfew (*a fortiori* one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living.[227]

With regard to the second issue, the Court rejected the Home Secretary's submission that the particular circumstances of the controlee's family should be ignored when assessing the

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[221] *Secretary of State for the Home Department v AP* [2010] UKSC 24. On 2 July 2009, the Home Secretary had revoked the control order, having decided that AP should be deported on national security grounds. After being detained under immigration powers until 20 July 2009, AP was then released on bail pending deportation. Under his bail conditions, AP was required to reside in the Midlands and was subject to an 18-hour curfew. Despite the fact that the outcome would no longer directly affect AP, the Supreme Court gave leave to appeal as the challenge raised points of law that were of general importance with regard to control orders.

[222] ibid [4]. The third issue addressed by the Supreme Court was whether it was permissible for the Court of Appeal to interfere with the first instance judgment where there were inconsistencies between the judge's findings of fact in respect of Article 5 and Article 8.

[223] ibid [12] (Lord Brown).

[224] *Guzzardi* (n 72).

[225] *JJ* (n 102).

[226] *AP* (n 221) [2].

[227] ibid [4].

effect of relocation. Thus, the fact that AP's relocation to the Midlands significantly disrupted contact with his family, who remained in London, was deemed a material factor when assessing the impact of the residence obligation on AP's social isolation.[228] While it was plain that the family could not be permitted to thwart an otherwise appropriate residence requirement, there was no suggestion that the family had behaved unreasonably in failing to overcome the difficulties they faced in visiting AP more regularly.[229] As explained by Lord Dyson:

> The focus of the article 5 inquiry is on the actual effect of the measures on the controlee ... *Prima facie*, the actual isolating effect resulting from choices made by the controlee, his family and friends in response to the measures should [therefore] be taken into account.[230]

In light of these findings, and the high degree of isolation to which AP was subject, the appeal was unanimously allowed and the decision of the High Court restored.

Whilst the 'more holistic approach'[231] adopted by the Supreme Court in *AP* may be welcomed in terms of its rigour in assessing the impact of control orders, as Walker suggests, the judgment 'is troubling not only because it restricts discretion but also because it reintroduces uncertainty into the Article 5 litigation, moving away from a quantitative argument about hours into qualitative arguments about social life.'[232] This uncertainty obviously renders it exceptionally difficult to foresee what combination of conditions is likely to be regarded as amounting to a breach of Article 5. In *AU*,[233] for example, Mitting J held that there had been no deprivation of liberty due to the fact that the social isolation of AU, his wife, and their children, was deemed not to result from the obligations imposed by the

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[228] ibid [15]. The particular difficulties highlighted included fact that AP's mother had never left London alone; that, due to the children, Sunday was the only day the family could travel during term time; and financial limitations, which prevented rail travel [13].
[229] ibid [15].
[230] ibid [29].
[231] Helen Fenwick and Gavin Phillipson, 'UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in Victor V Ramraj and others, *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 488.
[232] Clive Walker, *Terrorism and the Law* (OUP 2011) 318. For further comment on the decision, see Steve Foster, 'Human Rights: Anti-terrorism - Control Orders' (2011) 16(1) Coventry Law Journal 74; Ben Middleton, 'Drawing a (Not-So-Bright) Line Under Control Order Liberty Challenges' (2010) 74(5) Journal of Criminal Law 405.
[233] *Secretary of State for the Home Department v AU* [2009] EWHC 49 (Admin).

control order, but instead from the unwillingness of AU's mother, friends, and associates to seek Home Office approval to visit them.[234]

According to the *Final Report* of the Independent Reviewer, over the regime's lifetime, relocation conditions were struck down as disproportionate in at least three cases,[235] whilst in a fourth, *BM*,[236] the High Court ordered that the obligation requiring the controlee to relocate to Leicester be revoked on the grounds of insufficient disclosure. In the majority of cases, however, relocation was upheld as necessary and proportionate,[237] and, even where combined with a curfew and other measures restricting movement and association, was adjudged not to give rise to a violation of Article 5.[238] Also, where relocation conditions were imposed, steps were routinely taken to ameliorate the impact of the move,[239] and to allow the controlee's wife and children to relocate with them.[240]

Relocation, although controversial,[241] and whilst objectionable from a human rights standpoint, can be seen to possess certain virtues from the perspective of curbing involvement in terrorism-related activity. Relocation may be an effective means of limiting a suspect's interaction and communication with their extremist associates, thereby restricting their ability to engage in planning or facilitation activities.[242] Removing a key individual from

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[234] ibid [19].
[235] These were *BF, AN* and *CA*. David Anderson, *Final Report* (n 14) para 3.35. See also *BH v Secretary of State for the Home Department* [2009] EWHC 3319 (Admin).
[236] *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin).
[237] In *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin), however, Simon J held that, in order to abate the interference with CD's Article 8 rights, it was necessary for Home Secretary to reimburse a proportion of the travel costs incurred by CD's family in visiting him at the specified location, this being a 'proportionate and appropriate way of reducing the onerous and isolating effect of the relocation obligation' [55].
[238] See, for example, *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin), which involved relocation from London to the West of England and a 12-hour curfew. See also *Secretary of State for the Home Department v CE* [2011] EWHC 3159, where CE was relocated away from London and required to reside at a specified address where he was subject to a 12-hour curfew.
[239] For example, a furnished property of sufficient size to accommodate the controlee and their family, and information about the area, including details of schools and places of worship, was provided. The controlee was also usually given up to seven days' notice of the relocation. See Home Office, *Government Reply to the Ninth Report from the Joint Committee on Human Rights Session 2009-10* (Cm 7856, 2010) 3.
[240] David Anderson, *Final Report* (n 14) para 3.35.
[241] David Anderson (ibid para 3.36) describes relocation as 'the most controversial feature' of the control order regime.
[242] See *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin) [24].

an extremist group or network through relocation could help disrupt its 'operational tempo' and degrade its capabilities.[243] Separating an individual from their associates may help reduce the risk of them absconding, and make it more difficult for them to arrange travel abroad for terrorism-related purposes.[244] Distancing a suspect from a social milieu populated by other extremists could also conceivably encourage disengagement from terrorism.[245] In addition, relocation is said to give rise to certain operational advantages for the police charged with monitoring suspects, 'surveillance in some areas ... [being] far easier than in others.'[246]

In spite of its usefulness as a tool for controlling the risk posed by some terrorist suspects, and despite its efficacy being endorsed by the police,[247] the Independent Reviewer,[248] and by members of the judiciary,[249] the practice of relocation was discontinued following the abolition of the control order regime. Although relocation conditions were included in a number of the orders issued under the Coalition government,[250] their *Review of Counter-Terrorism and Security Powers* nonetheless concluded that there should 'be an end to the use of forced relocation'.[251] As discussed more fully elsewhere,[252] involuntary relocation is

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[243] See *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin) [9], [15].
[244] See also *Secretary of State for the Home Department v CE* [2011] EWHC 3159 [98]
[245] David Anderson, *Final Report* (n 14) para 6.10.
[246] DAC Osborne in oral evidence to the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill. Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Oral Evidence* (2012-13) 15 (Q 42). See also Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (2012-13, HL 70, HC 495) para 62.
[247] Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (2012-13, HL 70, HC 495) para 62.
[248] David Anderson, *Final Report* (n 14) paras 5.21 and 6.63.
[249] See *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin) [9], [15] (Collins J); *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin) [53] (Simon J);*Secretary of State for the Home Department v CE* [2011] EWHC 3159 [103] (Lloyd Jones J).
[250] See *Secretary of State for the Home Department v BF* [2011] EWHC 1878 (Admin); *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin); *Secretary of State for the Home Department v CE* [2011] EWHC 3159 (Admin); *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin).
[251] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) para 23.
[252] See chapter 5 (pp 169-170) of this thesis.

not therefore one of the 'measures' that can be imposed under a TPIM notice.[253] The power to relocate could, however, be reinstated under Enhanced TPIMs,[254] should the government decide to enact these contingency measures in the future.

iv. Non-Derogating Control Orders: Renewal, Duration and Associated Issues

A non-derogating control order lasted for 12 months,[255] but could be renewed on one or more occasions.[256] The absence of a statutorily stipulated maximum duration, and the resultant possibility that control orders could be imposed for long, potentially indefinite, periods, gave rise to understandable concern. The Institute of Race Relations, for example, described control orders' unlimited duration as 'their worst feature',[257] whilst the ICJ Panel found the lack of a definite time-limit to be one of a number of 'important safeguards' missing from the control order system.[258] Gearty, meanwhile, warned that the indefinitely renewable nature of control orders created:

> a real danger ... of a drift towards a casual, bureaucratic kind of authoritarianism, with individuals lost to public view by non-derogating control orders which are maintained in perpetuity as much by repressive momentum combined with over-cautious risk assessments as by any genuine and continuing societal need.[259]

Motivated by such concerns, various commentators argued that control orders should be subject to specific time limits. The European Commissioner for Human Rights, for instance, recommended a limit of twelve months on the basis that failure to find sufficient evidence to bring charges within this 'generous' time frame, 'ought to ... constitute grounds for lifting the

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[253] TPIMA, sch 1.
[254] Draft Enhanced Terrorism and Investigation Measures Bill, sch 1, para 1(3).
[255] PTA, s 2(4)(a). Pursuant to s 2(5), the control order had to specify the date on which it would cease to have effect.
[256] ibid s 2(4)(b).
[257] Frances Webber, 'Five Years of Control Orders' (Institute of Race Relations, 2010) <www.irr.org.uk/2010/february/ha000031.html> accessed 27 May 2013.
[258] International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) 121.
[259] Conor Gearty, *Civil Liberties* (OUP 2007) 119. Gearty's concerns mirrored those of the European Commissioner for Human Rights, who expressed disquiet at the prospect that, 'the indefinitely renewable nature of control orders ... [risked] elevating the exceptional to the permanent by obviating the need ever to prove suspicions the restrictions are supposed to counter': *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* CommDH (2005) 6, para 25.

restrictions'.[260] A twelve month limit was also advocated by Walker, who suggested that this could 'transform the situation by turning a control order into a kind of a provisional-charge or provisional-deportation bail order.'[261]

The duration of control orders was an issue that was also addressed at some length by both the Independent Reviewers and the JCHR in their annual reports on the operation and renewal of the regime. In his *First Report* on the PTA, Lord Carlile expressed his 'anxiety' about control orders' duration, stating that it would be unacceptable for 'significant restrictions on liberty to continue for years on end'.[262] The view that controlees' orders could not be maintained indefinitely, along with concerns regarding the 'endgame' in each case,[263] was subsequently reiterated in each of Lord Carlile's subsequent reports.[264] In his 2008, 2009 and 2010 reports, he consequently recommended that, save in genuinely exceptional circumstances, there should be a presumption against a control order being extended beyond two years, on the grounds that, 'after that time ... the immediate utility of even a dedicated terrorist will seriously have been disrupted.'[265] Although recognising that the question of whether there should be a time limit on control orders was a difficult one, the JCHR similarly endorsed imposing a maximum limit on their duration as an 'important safeguard of the liberty and mental health' of controlees.[266]

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[260] European Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* CommDH (2005) 6, para 25.
[261] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd edn, OUP 2009) 241.
[262] Lord Carlile, *First Report* (n 98) para 72.
[263] In his 2007 Report, Lord Carlile cautioned that: As a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now whether on a case-by-case basis or by legislation (if appropriate) would be short-sighted. Lord Carlile, *Second Report* (n 177) para 43.
[264] See *Second Report* (n 176) para 43; *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2008) paras 49-51; *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2009) paras 57-59; *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2010) paras 121-123; *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2011) para 115.
[265] *Third Report* (n 264) paras 50-51; *Fourth Report* (n 264) paras 58-59; *Fifth Report* (n 264) paras 122-123.
[266] JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2007-08, HL 57, HC 356) para 87. See also JCHR, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* (2008-09, HL 37, HC 282) para 32. Rather than specifying a maximum limit, the JCHR concluded that Parliament should debate what time limit ought to be imposed.

Whilst the government accepted that control orders 'should not continue indefinitely',[267] and should be imposed 'for as short a time as possible, commensurate with the risk posed' by each individual,[268] they steadfastly opposed the notion that orders should be subject to 'an arbitrary end date'.[269] The government asserted that the statutory test for renewal provided for 'rigorous external judicial scrutiny'[270] of the necessity for each order's continuation, and that setting a definite end date would create the possibility that controlees may simply disengage from involvement in terrorism-related activity during the currency of their order, knowing that they could re-engage once it had expired.[271] Further, potential 'exit strategies' from control orders, comprising, prosecution, deportation, modification of the obligations imposed, and revocation or non-renewal,[272] were said to be formally considered as an 'integral and significant part' of the CORG's quarterly reviews of each extant order.[273]

The judicial position on the permissible duration of control orders, as expressed in cases such as *Rideh,*[274] *GG and NN,*[275] and also *AM,*[276] was that they could be maintained for as

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[267] Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7194, 2007) 5.
[268] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC: Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7367, 2008) 4.
[269] ibid. See also Home Office, *Government Reply to the Tenth Report from the Joint Committee on Human Rights Session 2007-08 HL Paper 57, HC 356* (Cm 7368, 2008) 10; HL Deb 10 March 2010, col WS18-WS21.
[270] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC: Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7367, 2008) 4. See also Home Office, *Government Reply to the Fifth Report from the Joint Committee on Human Rights Session 2008-09 HL Paper 37, HC 282* (Cm 7625, 2009) 2.
[271] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC: Third Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7367, 2008) 4.
[272] Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7194, 2007) 4-5.
[273] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC: Third Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7367, 2008) 4.
[274] In *Rideh*, Ousley J asserted: I reject the submission that a control order cannot continue indefinitely if there is evidence of continuing terrorism-related activity which warrants it. I see no reason why a controlled person should be able to eliminate controls which continue to be justified by his continuing activity, by virtue of his persistence in that activity. *Rideh v Secretary of State for the Home Department* [2008] EWHC 2019 (Admin) [24].
[275] *Secretary of State for the Home Department v GG and NN* [2009] EWHC 142 (Admin) [50].
[276] *Secretary of State for the Home Department v AM* [2009] EWHC 3053 (Admin) [194], [211].

long as there was evidence of continuing terrorism-related activity. In some cases, however, the passage of time did prove decisive in relation to the court's decision regarding the need for the control order.[277] In *Al-Saadi*,[278] for example, the fact that there had been no allegation of terrorist-related activity against the controlee for seven and a half years, during which time any terrorist links were thought to have 'substantially atrophied', led Wilkie J to hold that the control order should be revoked.[279] Similarly, that during the three years of his control order NN had not shown any inclination to continue his involvement in terrorism-related activity, strongly influenced Collins J's decision to quash the order on the grounds that it was no longer necessary.[280]

According to the Independent Reviewer's final report, between March 2005 and December 2011, the shortest period for which an individual was subject to a control order was two months, with the longest period being in excess of 55 months.[281]

Table 4.2 Control Orders: Duration[282]

0-1 years	1-2 years	2-3 years	3-4 years	4-5 years
16	14	8	4	3

As Table 4.2 shows, 15 individuals were subject to a control order for more than two years, the time limit proposed by Lord Carlile, and now, absent any evidence of 'new' terrorism-related activity,[283] the maximum duration of a TPIM notice.[284] Thus, in respect of at least

[277] Walker (n 232) 327.
[278] *Secretary of State for the Home Department v Al-Saadi* [2009] EWHC 3390 (Admin).
[279] ibid [186]-[187].
[280] *GG and NN* (n 275) [23].
[281] David Anderson, *Final Report* (n 14) para 3.47.
[282] The total number of control orders included in Table 4.2 is 45. The data excludes the control orders of the seven controlees who absconded. This data is taken from David Anderson, *Final Report* (n 14) para 3.47.
[283] TPIMA, s 3(6)(c).
[284] ibid s 5. The concerns relating to the two-year limit on TPIMs are discussed in chapter 5 of this thesis.

one-third of controlees,[285] the government regarded it as necessary to maintain their control order beyond two years, an assessment upheld by the courts in each case. During the lifetime of the regime, consideration of 'exit strategies' from control orders was said to be 'regular and meaningful',[286] and although no former controlees were successfully prosecuted for a terrorist offence, ten were served with notices of intention to deport,[287] and a number of orders were either revoked or not renewed by the government.[288]

Limiting the duration of measures like control orders and TPIMs may conceivably produce certain benefits, such as preventing the 'warehousing' of suspects for lengthy periods,[289] and ensuring vigilance in the pursuit of exit strategies. It may also be seen to render them slightly more palatable in human rights terms.[290] However, unless a way is found to improve the prospects of prosecuting those suspects against whom these measures are used, a two-year limit could potentially prove inimical to protecting the public from a risk of terrorism. As each order is designed to address 'individual risk', there are obvious dangers in assuming that all suspects will cease to pose a threat within an identical time frame.[291] Indeed, as the length of some control orders indicates, and as Lord Carlile acknowledged, in the case of certain suspects, their capacity to engage in terrorism-related activity and determination to

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[285] As Hunt notes, 'this figure may undercount those who were subject to restrictions for longer than a two year period': Adrian Hunt, 'From Control Orders to TPIMs' (n 176) 20. Indeed, it is possible that a number of the seven abscondees may have had their control orders renewed beyond two years, though all absconded before that point was reached. Further, four individuals who had been under a control order for less than two years had their control order converted into a TPIM in January 2012, and therefore 'had the potential to stay subject to the two regimes for more than two years in total': David Anderson, *Final Report* (n 14) para 3.48.

[286] *Secretary of State for the Home Department v BF* [2011] EWHC 1878 (Admin) [52] (Davis J). This view was subsequently endorsed by the Independent Reviewer: David Anderson, *Final Report* (n 14) para 3.46. See also Lord Carlile, *Fourth Report* (n 264) para 57.

[287] As of 14 December 2011, six of these ten had been deported: David Anderson, *Final Report* (n 14) para 3.46.

[288] 20 controlees had their orders revoked, 4 orders were not renewed, 3 were quashed by the High Court, 5 expired after the controlee had absconded, 1 individual absconded after his order had been quashed but before a new order was served, and 9 orders were superseded by TPIMs in 2011-2012. For further details, see David Anderson, *Final Report* (n 14) para 3.49.

[289] See Lord Macdonald, *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003, 2011) para 11; Clive Walker, 'The Threat of Terrorism and the Fate of Control Orders' [2010] Public Law 3, 16.

[290] See chapter 5 of this thesis.

[291] See Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7624, 2009) 9.

'become operational in the future' endures beyond two years.[292] Thus, there is a very real prospect that individuals who are deemed to constitute a threat to security, and who would in the past have remained subject to a control order, will now become free of constraint after two years due to a TPIM reaching its maximum duration.[293]

v. Recidivism and the Threat of Re-engagement in Terrorist Activity

Critical to the debate concerning the duration of preventive measures like control orders and TPIMs is the issue of 'recidivism'.[294] Whether a suspect is likely to 're-engage' in terrorist activity once the restrictions imposed by the order are removed represents a key concern in relation to determining the appropriate temporal limit for preventive counter-terrorism measures.[295] Assessing whether an individual is liable to re-engage in terrorist activity following the discontinuation of an order is, however, inherently problematic, as any assessment will necessarily be based upon a prediction of their potential future conduct.

At present, there is unfortunately a dearth of material on the recidivism rates of terrorists, especially jihadist terrorists, which may help inform this particular debate. Indeed, the paucity of research on this important issue means that, as Horgan and Taylor note, 'Regrettably, we know very little about recidivism and terrorism.'[296] Whilst there have been no adequately

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[292] Lord Carlile, *Fourth Report* (n 264) para 58.

[293] Indeed, the TPIM notices imposed on AM, AY, BF, BM, CD, CE and CF all expired between 2 January and 10 February 2014 due to reaching their two-year limit: David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2014) para 4.20. See chapter 5 of this thesis.

[294] Recidivism, in general terms, 'is the tendency of those who have been convicted once to re-offend': Shadd Maruna, 'Recidivism' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008). Pluchinsky, examining the issue of recidivism in the context of global jihadist terrorism, explains that a recidivist may be defined as 'one who, after release from custody for having committed a crime, is not rehabilitated', going on to state that, 'In most cases, the terrorist recidivist may return to participating in terrorist operations': Dennis A Pluchinsky, 'Global Jihadist Recidivism: A Red Flag' (2008) 31 Studies in Conflict & Terrorism 182, 186.

[295] As control orders did not involve the conviction or incarceration of the suspect, the term 're-engagement', denoting a resumption of the suspect's engagement in terrorism-related activity, is to be preferred to 'recidivism' in relation to control orders, and, for the same reasons, TPIMs.

[296] John Horgan and Max Taylor, 'Disengagement, De-radicalization and the Arc of Terrorism: Future Directions for Research' in Rick Coolsaet (ed), *Jihadi Terrorism and the Radicalisation Challenge: European and American Experiences* (2nd edn, Ashgate 2011) 177.

comprehensive studies of jihadist terrorist recidivism to date, a number of sources have suggested that jihadist terrorists do exhibit a strong propensity towards recidivism.[297]

According to information released by various US government agencies, including the Department of Defense,[298] the House Armed Services Committee,[299] and the Director of National Intelligence (DNI), a significant percentage of the detainees formerly held at Guantánamo Bay have re-engaged in terrorist or insurgent activities following their release.[300] The DNI's 2013 Report, for example, claimed that, as of January 2013, 97 of 603 (16.1 per cent) former detainees were 'confirmed of re-engaging', with a further 72 (11.9 per cent) being suspected of re-engaging.[301] The accuracy of these 'official' figures has, however, been forcefully disputed. Denbeaux, in successive reports, has asserted that the government's various lists of Guantánamo recidivists are 'rife with errors, inconsistencies, and inflated statistics.'[302] Bergen, meanwhile, calculates that the number of confirmed or

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[297] See Neil Ferguson, 'Disengaging from Terrorism' in Andrew Silke (ed), *The Psychology of Counter-Terrorism* (Routledge, 2011) 112; Pluchinsky (n 294) 184.

[298] The Department of Defense's 2009 'Fact Sheet', for example, claims that, as of mid-March 2009, of more than 530 former detainees, 27 were confirmed and 47 were suspected of re-engaging in terrorist activity. United States Department of Defense, 'Fact Sheet' (04/07/2009) 1 <www.defense.gov/news/returntothefightfactsheet2.pdf> accessed 9 May 2013.

[299] The House Armed Services Committee reported that, as of September 2011, the US government believed that 27 per cent of former *Guantánamo detainees 'were confirmed or suspected to have been engaged in terrorist or insurgent activities': Leaving Guantanamo: Policies, Pressures, and Detainees Returning to the Fight* (HASC 112-4, 2012) 10.

[300] In 2012, the DNI reported that, as of 19 July 2012, of 602 former detainees, 95 (15.8 per cent) were confirmed and 73 (12.1 per cent) were suspected of re-engaging: Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (2012) 1 <www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/ Reports%20and%20Pubs%202012/Summary%20of%20the%20Reengagement%20of%20Detainees%20Formerly%20Held%20at%20GTMO.pdf> accessed 9 May 2013.

[301] Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (2013) 1 <www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf> accessed 9 May 2013. According to the *DNI's most recent figures, as of 15 July 2014,* 107 of 620 (17.3 per cent) former detainees are 'confirmed of re-engaging', with a further 77 (12.4 per cent) being suspected of re-engaging: Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (2014) 1 <www.dni.gov/index.php/newsroom/ reports-and-publications/204-reports-publications-2014/1107-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay,-cuba-2014> accessed 8 September 2014.

[302] Mark P Denbeaux and others, 'Revisionist Recidivism: The Analysis of Government's Representations of Alleged "Recidivism" of the Guantanamo Detainees' (2009) 2 <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/GTMO_Final_Final_Recidivist_6-5-09-3.pdf> accessed 13 May 2013. See also 'Justice Scalia, the Department of Defense, and the Perpetuation of an Urban Legend: The Truth About the Alleged Recidivism of Released Guantánamo Detainees' (2008); 'Released Guantánamo Detainees and the Department Of Defense: Propaganda by the Numbers?' (2009); 'National Security Deserves Better: "Odd" Recidivism Numbers

suspected former detainees to have re-engaged in terrorist or militant activity by 2013 was actually 53, constituting a recidivism rate of 8.8 per cent, rather than the 28 per cent cited by the DNI.[303] Denbeaux's and Bergen's claims, along with the narrow scope of the US government's reports,[304] and the lack of detailed evidence provided in support of their statistics, therefore suggest that a healthy degree of caution is necessary in formulating any conclusions regarding the likelihood of jihadist terrorist recidivism based upon these sources.

Whilst the absence of comprehensive analyses poses problems in terms of identifying any general trends in respect of jihadist terrorist recidivism, Pluchinsky submits that the available anecdotal evidence does demonstrate a 'tendency for released imprisoned global jihadist terrorists ... to return to terrorist activity.'[305] Although the evidence surveyed indicates that jihadist terrorists have a propensity to re-engage in terrorist activity post-incarceration,[306] as Pluchinsky acknowledges, 'there have not [yet] been a sufficient number of global jihadist terrorists released from prison ... to deduce a trend toward recidivism or not.'[307] Indeed, given that those who are successfully prosecuted for terrorism-related offences are often given lengthy prison sentences,[308] it may not be possible to develop a detailed, empirically grounded understanding of jihadist terrorist recidivism for a number of years to come.

Focusing specifically on those individuals who were subject to control orders, the available evidence indicates that at least three former controlees did re-engage in terrorist activity

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Undermine the Guantanamo Policy Debate' (2012) <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm> accessed 9 May 2013.

[303] Peter Bergen, 'Terror Threat from Gitmo Prisoners is Exaggerated' *CNN* (8 May 2013) <http://edition.cnn.com/2013/05/07/opinion/bergen-gitmo-terror-threat/index.html> accessed 10 May 2013. See also Peter Bergen, Katherine Tiedemann and Andrew Lebovich, 'How Many Gitmo Alumni Take Up Arms?' *Foreign Policy* (January 11, 2011) <www.foreignpolicy.com/articles/2011/01/11/how_many_gitmo_alumni_take_up_arms> accessed 10 May 2013.

[304] The figures released by the US government have focused solely upon recidivism rates amongst former *Guantánamo detainees.*

[305] Pluchinsky (n 294) 182.

[306] ibid 182-183.

[307] ibid 184.

[308] For a detailed discussion of the penology of terrorism and the sentencing of terrorists in the UK, see Walker, *Terrorism and the Law* (n 232) 283-291. See also Ali N Bajwa, 'Sentencing Terror Offences' 174(33) CL & J (2010) 500.

once free of their control orders. After a series of legal challenges,[309] Mahmoud Abu Rideh's control order was lifted after the Home Office granted him permission to leave the UK for Syria in July 2009.[310] According to a number of sources, Rideh was then subsequently killed, along with other militants, by an airstrike in Afghanistan in December 2010.[311] Two other controlees, Ibrahim and Lamine Adam, who absconded from their orders in May 2007,[312] were assessed to have subsequently travelled to Pakistan and 'engaged in extremist fighting in the Federally Administered Tribal Areas.'[313] It was later reported that Ibrahim was killed by a US drone strike in South Waziristan in November 2011.[314]

The three examples discussed above provide some, although admittedly limited, evidence that the type of jihadist terrorist suspects against whom preventive orders have been used to date, do have a propensity toward re-engagement.[315] Indeed, this tendency, and the enduring threat these individuals potentially pose, has been commented upon in both the literature on recidivism,[316] by Lord Carlile,[317] and also in a number of UK terrorism

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[309] *Secretary of State for the Home Department v Mahmoud Abu Rideh* [2007] EWHC 804 (Admin); *Secretary of State for the Home Department v Abu Rideh & Another* [2007] EWCA Civ 441; *Mahmoud Abu Rideh v Secretary of State for the Home Department* [2007] EWHC 2237 (Admin); *Secretary of State for the Home Department v Abu Rideh* [2008] EWHC 1993 (Admin); *Abu Rideh v Secretary of State for the Home Department* [2008] EWHC 2019 (Admin).

[310] Nigel Morris, 'Terror Suspect Wins Battle to Leave Britain' *The Independent* (4 July 2009) <www.independent.co.uk/news/uk/home-news/terror-suspect-wins-battle-to-leave-britain-1731260.html> accessed 10 May 2013.

[311] The Arabic jihadi web forum which reported Rideh's death described him as having become a 'martyr in Afghanistan'. Robin Simcox and others, *Islamist Terrorism: The British Connections* (2nd edn, The Henry Jackson Society 2011) 431-432; Duncan Gardham and Parveen Swami, 'British Al-Qaeda Refugee Killed in Afghanistan' *The Telegraph* (16 December 2010) <www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8207784/British-al-Qaeda-refugee-killed-in-Afghanistan.html> accessed 10 May 2013.

[312] Robin Simcox and others, *Islamist Terrorism: The British Connections* (2nd edn, The Henry Jackson Society 2011) 29.

[313] *Secretary of State for the Home Department v BF* [2011] EWHC 1878 (Admin) [27] (Davis J).

[314] Ian Cobain, 'Two British Terror Suspects Killed in US Drone Strikes in Pakistan' *The Guardian* (18 November 2011) <www.guardian.co.uk/world/2011/nov/18/british-terror-suspects-killed-drone-pakistan> accessed 10 May 2013.

[315] Whilst the cases of Abu Rideh and the Adam brothers provide dramatic examples of re-engagement by former controlees, given the varied profiles of the suspects who have been made subject to control orders and TPIMs since 2005, other instances of re-engagement may involve more subtle forms of terrorism-related activity, such as planning or reconnaissance, fund-raising, or other facilitative acts.

[316] See Pluchinsky (n 294) 187; Neil Ferguson, 'Disengaging from Terrorism' in Andrew Silke (ed), *The Psychology of Counter-Terrorism* (Routledge, 2011) 112.

[317] In his 2010 report, for example, Lord Carlile stated that, 'at least some persons discharged from [control] orders would resume terrorist activities': Lord Carlile, *Fifth Report* (n 264) paras 41.

judgments. In *E*,[318] for example, the assessment that the suspect had, 'a high degree of commitment to the extremist cause', and that there was therefore a 'material risk that he would re-engage in terrorism-related activity', was deemed relevant to the Court's decision regarding E's control order,[319] whilst in *R v Barot*,[320] it was remarked that, 'A terrorist who is in the grip of idealistic extremism ... is likely to pose a serious risk for an indefinite period if he is not confined.'[321]

Whilst assessing whether a particular suspect is likely to re-engage in terrorist activity will necessarily involve an individualised risk assessment, the nature of the threat some suspects are seen to pose, in combination with the nascent evidence on jihadist terrorist recidivism, further suggests that the imposition of restrictive time limits on preventive measures may be ill-advised when viewed from a security perspective.

vi. Control Orders and Liberty: Conclusions

The lengthy curfews and other severe restrictions on movement routinely imposed on suspects under control orders inevitably meant that they 'sat unhappily with ... individual liberty.'[322] Nonetheless, unlike the scheme of detention without trial that preceded it,[323] the control order regime was capable of functioning in an Article 5-compliant manner.[324] During the initial phase of the regime's operation, however, the lack of certainty regarding the cut-off point between non-derogating and derogating control orders clearly proved problematic, resulting in a number of unlawful *de facto* derogating orders being imposed by the Home Secretary.[325] Fenwick and Phillipson consequently contend that, as the obligations contained

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[318] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin).
[319] Ibid [89] (Beatson J). See also *Secretary of State for the Home Department v Mahmoud Abu Rideh* [2007] EWHC 804 (Admin) [65].
[320] [2007] EWCA Crim 1119.
[321] ibid [37] (Lord Phillips CJ).
[322] David Anderson, *Final Report* (n 14) para 2.13.
[323] ATCSA, Part 4. See chapter 3 of this thesis.
[324] See Home Office, *Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (Cm 7797, 2010) para 63.
[325] As discussed in chapter 3 of this thesis, the power to make derogating control orders was vested in the court under PTA, s 1(2)(b), with the power to impose an order containing 'derogating obligations'

in some of the early control orders could not be reconciled with the right to liberty, in these cases, the executive's use of the powers conferred under the PTA 'depended in effect on a covert derogation'[326] from Article 5.

Several of the key court decisions discussed above, however, served to provide a greater degree of clarity as to the maximum levels of constraint that non-derogating orders could lawfully impose on a controlee's liberty.[327] Although these judgments failed to provoke any amendments to the PTA itself, they did compel some important changes to government practice in relation to configuring the obligations contained in control orders,[328] thereby ensuring that the regime subsequently operated in a way that was generally consistent with Article 5. The courts' approach to assessing control orders' compatibility with the right to liberty has, nevertheless, been criticised for placing excessive focus 'on the idea of restriction of physical liberty analogous to arrest',[329] and paying insufficient regard to 'the long *duration* of the interference with liberty in many control order cases.'[330] Indeed, as 'duration' was one of the factors specifically identified in *Guzzardi*[331] as being relevant to determining whether a deprivation of liberty has occurred,[332] it is arguable that it should have received significantly greater emphasis from the domestic courts when considering the matter of a control order's compliance with Article 5, particularly where the suspect's order had been renewed multiple times.[333]

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only being exercisable if a designated derogation from the whole or part of Article 5 ECHR was in place at the time (PTA, s 4(3)(c)).

[326] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference' (n 105) 877. See also Fenwick, 'Recalibrating ECHR Rights' (n 71) 180.

[327] In particular, the House of Lord's judgment in *Secretary of State for the Home Department v JJ* [2007] UKHL 45, and the Supreme Court's decision in *Secretary of State for the Home Department v AP* [2010] UKSC 24.

[328] Most notably in respect of the curfews imposed on controlees under non-derogating orders.

[329] Helen Fenwick and Gavin Phillipson, 'UK Counter-terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in Victor V Ramraj et al, *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 489.

[330] ibid. See also Bates (n 105) 106.

[331] *Guzzardi* (n 72).

[332] ibid para 92.

[333] See Fenwick, 'Recalibrating ECHR Rights' (n 71) 187-190; Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference' (n 105) 886.

IV. Control Order Proceedings and Article 6 ECHR

Another aspect of the regime that was heavily litigated was whether 'control order proceedings'[334] were compliant with the fair trial requirements of Article 6 ECHR. The right to a fair trial constitutes 'a cardinal requirement of the rule of law',[335] and is considered, 'one of the fundamental guarantees of human rights',[336] being essential to the protection of individual rights and liberties against abuses of state power.[337] Due process and the right to a fair trial are principles which are central to both the common law[338] and international human rights law.[339] Key to the protection of the right to a fair trial in the UK is Article 6 of the ECHR,[340] which provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[341] Due to the importance of the principles it enshrines,[342] Article 6 is deemed to have a 'position of pre-eminence within the Convention'.[343] Indeed, the ECtHR has insisted that the right to a fair trial 'holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) restrictively.'[344]

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[334] PTA, s 11(6) provided that, for the purposes of the PTA, 'control order proceedings' were those under ss 3, 5 and 10 of the Act.
[335] Tom Bingham (n 28) 90.
[336] UNGA, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (A/63/223, 2008) (Fair trial guarantees while countering terrorism) para 7. See also Ian Langford, 'Fair Trial: The History of an Idea' (2009) 8(1) Journal of Human Rights 37, 37.
[337] Clayton and Tomlinson, for example, describe the right to a fair trial as the 'foundation stone for substantive protection against state power': Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (OUP 2001) 2.
[338] See the Magna Carta, chapter 39 (n 42); *R v University of Cambridge* (1723) 1 Str 557. See also Clayton and Tomlinson (n 337) 26-73; JUSTICE, *Secret Evidence* (2009) 14-31.
[339] See Universal Declaration of Human Rights 1948, Article 10; ICCPR 1966, Art 14(1).
[340] HRA, s 1(1)(a), sch 1, pt 1.
[341] Article 6(1) ECHR. For detailed discussion of the content and implementation of Article 6 of the Convention see Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights* (2nd edn, Council of Europe 2006).
[342] In *Salabiaku v France* (1991) 13 EHRR 379, for example, the ECtHR (para 48) noted that, in protecting the right to a fair trial, the 'object and purpose' of Article 6 is 'to enshrine the fundamental principle of the rule of law.' See also *Golder v United Kingdom* (1975) 1 EHRR 524, para 34.
[343] David Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 201.
[344] *Perez v France* (2005) 40 EHRR 39, para 64. See also *Delcourt v Belgium* (1970) 1 EHRR 355, para 25.

Although the right to a fair trial itself is absolute, 'the various elements which support [it] ... may be qualified by proportionate steps to meet a legitimate objective.'[345] In terrorism cases, it is therefore legally permissible for certain rights usually afforded to suspects, for example, access to inculpatory evidence[346] and trial by jury,[347] to be curtailed in the interests of national security. In this context, the principal reasons advanced to justify the adoption of procedures which deviate from commonly applicable fair trial standards are the need to protect witnesses, judges and juries against intimidation and retaliation,[348] and, of particular relevance to control orders, the need to ensure the safety of informants, and prevent the exposure of surveillance techniques or the harmful disclosure of security-sensitive information.[349]

i. Proceedings under the Prevention of Terrorism Act 2005

Control orders were imposed on suspects based on an intelligence case which typically comprised a combination of 'open' and 'closed' material. Whilst the 'open material', which generally consisted of facts relating to the suspect's movements, activities, and meetings, was revealed to the individual,[350] 'closed material' was that which the Home Secretary 'object[ed] to disclosing' to the controlee, their legal representative, or other relevant parties.[351] In order for closed evidence - which could include material such as intercept data,[352] intelligence assessments, and statements from foreign and domestic security

[345] Richard Stone, *Textbook on Civil Liberties and Human Rights* (10th edn, OUP 2014) 181.
[346] See, for example, PTA, sch, para 3 and CPR 76.28; TPIMA, sch 4, para 4 and CPR 80.24.
[347] See Northern Ireland (Emergency Provisions) Act 1973, s 2; Justice and Security (Northern Ireland) Act 2007, s 5. See also John Jackson, 'Vicious and Virtuous Cycles in Prosecuting Terrorism: The Diplock Court Experience' in *Fionnuala Ní Aoláin* and Oren Gross (eds), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press 2013).
[348] See Sottiaux (n 7) 323; Gus Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13(1) International Journal of Evidence and Proof 1, 4.
[349] See David Anderson, *Final Report* (n 14) para 3.69.
[350] 'Open material' was defined by CPR 76.1(3)(f) as 'any relevant material that the Secretary of State [did] not object to disclosing to a relevant party'.
[351] According to CPR 76.1(3)(b), 'closed material' was 'any relevant material that the Secretary of State object[ed] to disclosing to a relevant party'. PTA, sch, para 11 provided that, in relation to control order proceedings, a 'relevant party' was 'any party to the proceedings other than the Secretary of State'.
[352] PTA, sch, para 9; CPR 76.26(4).

sources[353] - to be utilised in control order cases, the Act's schedule, and the special rules of court made pursuant to it,[354] provided for a system of 'closed hearings' and Special Advocates to be used in proceedings under the PTA.

The court rules applicable to control order proceedings were contained in Part 76 of the Civil Procedure Rules.[355] In respect of PTA proceedings, CPR 76.2(2) required the court, in giving effect to the CPR's overriding objective of enabling cases to be dealt with justly,[356] to ensure that information was not disclosed contrary to the 'public interest'.[357] Where it was considered necessary to prevent such disclosure, or 'for any other good reason',[358] CPR 76.22 allowed the court to conduct 'closed' hearings in private, from which the controlee and their legal representative would be excluded. Modified rules of evidence and disclosure also applied to control order proceedings, CPR 76.26 authorising the court to receive evidence that would not otherwise be admissible.[359] With regard to 'closed material', it was specified by CPR 76.28 that the Home Secretary was required to apply to the court for permission to withhold such material from the controlee or their legal representative,[360] and also file a statement explaining his reasons for withholding the material.[361] The closed material would then be considered by a Special Advocate, who could subsequently challenge the need for all or any of the material to be withheld.[362]

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[353] Walker, *Terrorism and the Law* (n 232) 311.
[354] CPR Part 76: Proceedings under the Prevention of Terrorism Act 2005.
[355] These were introduced using the rule making power conferred by PTA, sch, paras 1, 3. See Civil Procedure (Amendment No 2) Rules 2005, SI 2005/656.
[356] CPR 1.1(1).
[357] See also PTA, sch, para 2(b). Under CPR 76.1(4), it was specified that disclosure would be considered contrary to the public interest if it was made 'contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure [would be] likely to harm the public interest.'
[358] CPR 76.22(2).
[359] CPR 76.26(4).
[360] CPR 76.28(1)(a).
[361] CPR 76.28(2)(b).
[362] CPR 76.29. Where the Special Advocate did challenge the withholding of any of the closed material, the court was required to arrange a hearing to determine the matter (CPR 76.29(2)), unless the Home Secretary and Special Advocate consented to the court deciding the issue without a hearing (CPR 76.29(2)(c)).

Special Advocates - security-cleared lawyers[363] - were appointed under PTA, sch 7 and CPR 76.23 to 'represent the interests of' controlees in control order proceedings.[364] Aside from their crucial role in challenging the Home Secretary's withholding of specific material from the suspect, the Special Advocate's functions, as delineated by CPR 76.24, included making submissions, adducing evidence, and cross-examining witnesses in closed sessions, and also making written submissions to the court.

Whilst the Special Advocate's involvement was intended to mitigate the potential unfairness created by 'the difficult circumstances where, in the public interest, material cannot be disclosed'[365] to the suspect, their ability to do so was significantly impeded by the fact that communication with the controlee was generally only allowed prior to the Special Advocate being served with the closed material.[366] Once they had seen this material, the Special Advocate was unable to communicate with or take instructions from the controlee about any matter connected with the proceedings unless authorized to do so following an application to the court.[367] Though designed to prevent any inadvertent disclosure of sensitive information,[368] as Forcese and Waldman observe, these strict limitations on communication constitute a 'dramatic departure from conventional fair trial standards and the most controversial aspect of the UK special advocate system.'[369]

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[363] See Alexander Horne, *House of Commons Standard Note: Special Advocates and Closed Material Procedures* SN/HA/6285 (2012).

[364] CPR 76.23(3). The Special Advocate was not, however, responsible to the controlee whose interests they were appointed to represent (PTA, sch, para 7(5)).

[365] Home Office, *Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (n 324) para 64.

[366] CPR 76.25(1), (2).

[367] CPR 76.25(4)-(5).

[368] See Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7855, 2010) 20-22.

[369] Craig Forcese and Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand in the Use of "Special Advocates" in National Security Proceedings* (Canadian Centre for Intelligence and Security Studies, 2007) 36. This view is echoed by McGarrity and Santow, who state that, 'the prohibition on communication places considerable hurdles in the way of a fair trial, as it makes it virtually impossible for the appellant to give effective instructions regarding the conduct of his or her case': Nicola McGarrity and Edward Santow, 'Anti-terrorism Laws: Balancing National Security and a Fair Hearing' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (2nd edn Cambridge University Press 2012) 146. See also Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (HC 2004-05, 323-I) para 52.

Whether, as claimed by the Government, the Special Advocate scheme and disclosure process used in control order proceedings provided controlees with 'a measure of procedural justice'[370] sufficient to satisfy the ECHR's fair trial requirements, is examined in the following section, which considers the leading cases in which the regime was challenged on the grounds of incompatibility with Article 6.

ii. Article 6 ECHR Challenges

Whether, in discharging its supervisory role under PTA, s 3(10), the court was able to give the controlee a fair hearing for the purposes of Article 6, was first addressed by the High Court in *Secretary of State for the Home Department v MB*.[371] Here, the material delivered to the court included 'open' and 'closed' statements,[372] along with an application for permission to withhold the closed material and an accompanying outline summary of the reasons why the Home Secretary contended that the closed material should be withheld.[373] In the open statement it was asserted that MB was an Islamic extremist whom the Security Service believed was involved in terrorism-related activities, it being alleged that, prior to the authorities preventing him from travelling, MB intended to go to Iraq to fight against the coalition forces.[374] Although the open statement was admitted to be 'relatively thin',[375] it was assessed that providing MB with even a summary of the closed evidence against him would be contrary to the public interest.[376] Thus, as the justification for imposing his control order was based on evidence that was 'wholly contained in the closed material',[377] Sullivan J found that, without access to that material, it was 'difficult to see how ... [MB] could make any

[370] Home Office, *Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (n 324) para 64. See also para 61.
[371] [2006] EWHC 1000 (Admin).
[372] Supporting documents were also provided in respect of both the open and closed statements.
[373] *MB* (n 371) [20].
[374] ibid [20]. MB had been prevented by the police from travelling to Syria on 1 March 2005, and then to Yemen on 2 March 2005.
[375] ibid [66] quoting counsel for the Home Secretary, Mr Burnett.
[376] ibid [24]. Having read the closed material, Sullivan J endorsed counsel's view that it would not be possible to serve a summary which would be capable of complying with the requirement under CPR 76.29(6)(b) that any such summary must not contain 'information or other material the disclosure of which would be contrary to the public interest'.
[377] ibid [67].

effective challenge to what [was], on the open case before him, no more than a bare assertion.'[378] In light of this, despite concluding that the proceedings were 'civil' rather than 'criminal',[379] and therefore fell within the 'less demanding ... limb of Article 6(1)',[380] Sullivan J held that the procedure under PTA, s 3 was incompatible with MB's right to a fair hearing,[381] issuing a declaration to that effect under s 4 of the HRA.

On appeal, the High Court's decision was, however, reversed and the declaration of incompatibility set aside.[382] Affirming that proceedings under PTA, s 3 did not amount to the determination of a criminal charge for ECHR purposes,[383] the Court of Appeal found that Sullivan J had erred in holding that the provisions for the review of the making of non-derogating control orders by the court breached Article 6.[384] While remarking that to deny a party to legal proceedings the right to know the case against them was, 'on the face of it, fundamentally at odds with the requirements of a fair trial',[385] the Court of Appeal noted that both Strasbourg[386] and the UK courts[387] had nevertheless recognised that there were circumstances where the use of closed evidence would not necessarily contravene Article 6.[388] In line with these precedents, the Court determined that, in control order cases, Article 6 could not be seen to automatically require disclosure of the evidence of the grounds for the Home Secretary's suspicion.[389] As regards closed material,[390] Lord Phillips explained that its

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[378] ibid.
[379] ibid [38].
[380] Walker, *Terrorism and the Law* (n 232) 319. The additional guarantees contained in Article 6(2) and (3) are only applicable in respect of criminal charges. For further discussion of the guarantees contained in paragraphs (2) and (3), see Robin CA White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 278-296.
[381] *Re MB* (n 371) [104]. See also [103].
[382] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.
[383] ibid [53].
[384] ibid [87] (Lord Phillips). See also [48].
[385] ibid [70] (Lord Phillips).
[386] ibid [71]-[74], citing *Chahal v United Kingdom* (1996) 23 HER 413, paras 131, 144; *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, para 78; *Rowe v United Kingdom* (2000) 30 EHRR 1, para 61. See also *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52; *Fitt v United Kingdom* (2000) EHRR 480, para 45.
[387] ibid [75]-[77], citing *R v H* [2004] UKHL 3 [23]; *A v Secretary of State for the Home Department* [2004] EWCA Civ 1202 [57]; *A v Secretary of State for the Home Department (No 2)* [2004] EWCA Civ 1123 [51]-[52], [235]; *R (Roberts) v Parole Board* [2005] UKHL 45.
[388] ibid [70]. See also [80].
[389] ibid [85]. In justifying this conclusion, it was reasoned by Lord Phillips that, were this not the case, the Home Secretary would be in the 'invidious position' of having to choose between disclosing

use was deemed permissible providing 'appropriate safeguards against the prejudice that this may cause to the [controlee]'[391] were in place. In conclusion, the Court of Appeal held that, as the Act's provision for the involvement of the Special Advocate and the disclosure rules contained in CPR Pt 76 were considered appropriate safeguards,[392] the procedure under the PTA for the court review of the making of non-derogating orders was therefore compliant with Article 6.[393]

In the House of Lords, the case of *MB* was joined with that of *AF*.[394] As with MB,[395] the essence of the Home Secretary's case against AF, who was suspected of having links with the proscribed Libyan Islamic Fighting Group, lay in the closed material.[396] Confronting the matter of whether control order proceedings should be classified as 'civil' or 'criminal' for Article 6 purposes, the Law Lords unanimously held that non-derogating control order proceedings did not involve the determination of a criminal charge, as there was 'no assertion of criminal conduct, only a foundation of suspicion', and 'no identification of any specific criminal offence', the order itself being 'preventative in purpose, not punitive or retributive'.[397] It was however accepted that where the individual was 'at risk of an order containing [stringent] obligations',[398] the application of the civil limb of Article 6(1) entitled controlees to a measure of procedural protection that was 'commensurate with the gravity of the potential consequences'[399] of their control order.

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information which could be damaging to security operations against terrorists, or refraining from imposing restrictions on a suspect which were regarded as necessary in order to protect members of the public from the risk of terrorism (see [85]).

[390] ibid [70]. The impact of the PTA's provisions for the use of closed material was said to be the aspect of the case that caused the Court the most concern.

[391] ibid [86].

[392] ibid [86] (Lord Phillips).

[393] ibid [87].

[394] *MB and AF* (n 104). AF's appeal was against the decision of Ouseley J in *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin).

[395] ibid [39]-[40].

[396] ibid [49]. See also *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) [131], [146].

[397] ibid [24] (Lord Bingham). See also [48] (Lord Hoffmann); [65] (Baroness Hale); [79] (Lord Carswell); [90] (Lord Brown).

[398] ibid [24] (Lord Bingham).

[399] ibid. See also [56] Baroness Hale; [90] (Lord Brown).

On the key issue of whether proceedings under the PTA were compatible with Article 6, although the Law Lords' were not confident that the ECtHR would hold that every control order hearing in which the Special Advocate procedure was used would be sufficient to comply with the Article's requirements,[400] they considered that, with 'strenuous efforts from all', it would usually be possible to accord the controlee 'a substantial measure of procedural justice.'[401] By a majority, the Law Lords concluded that it was possible, under HRA, s 3, to interpret - or 'read down' - the relevant provisions in the PTA's schedule and in CPR Pt 76 so that they could be operated compatibly with the right to a fair hearing.[402] In order to ensure compliance with Article 6, these provisions were therefore to be read and given effect 'except where to do so would be incompatible with the right of a controlled person to a fair trial'.[403]

In confirming that control order proceedings were capable of functioning in an Article 6-compliant manner, the House of Lords' decision in *MB and AF* represented a 'qualified endorsement'[404] of the PTA's procedural regime. Differences in their Lordships' reasoning,[405] however, meant that the guidance provided to the lower courts regarding the level of disclosure required in order to satisfy Article 6(1) was somewhat opaque. As a result, application of the judgment proved difficult, with varying interpretations of the ruling being

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[400] ibid [66] (Baroness Hale). See also [90] (Lord Brown). See, however, the less equivocal view of Lord Hoffmann on the Special Advocate procedure's ability to satisfy the requirements of Article 6 ([54]).

[401] ibid [66] (Baroness Hale). See also [35] (Lord Bingham); [54] (Lord Hoffmann); [84] (Lord Carswell); [90] (Lord Brown).

[402] ibid [44] (Lord Bingham); [72] (Baroness Hale); [92] (Lord Brown).

[403] ibid [72] (Baroness Hale). In light of their Lordships' decision, both cases were remitted back to the High Court for the matter of whether MB and AF had received an Article 6 compliant hearing to be reconsidered. See *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin).

[404] John Ip, 'The Supreme Court and the House of Lords In the War on Terror: *Inter Arma Silent Leges*?' (2010-11) 19(1) Michigan State Journal of International Law 1, 25. The Government, however, viewed the decision as confirming that the 'control orders legislation, including the special advocate system, as supplemented by this judgment', was therefore 'fully compliant with Article 6': Home Office, *Government Response to the Report by Lord Carlile of Berriew QC: Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7367, 2008) 5.

[405] *MB and AF* (n 104) [44] (Lord Bingham); [72]-[74] (Baroness Hale); [84] (Lord Carswell); [90] (Lord Brown). For a useful discussion of the approaches taken by each of the Law Lords, see Fenwick, 'Recalibrating ECHR Rights' (n 71) 209-212.

adopted by High Court judges in subsequent cases.[406] Despite consideration by the Court of Appeal in *Secretary of State for the Home Department v AF, AM and AN; AE*,[407] the issue of whether disclosure to the controlee of an irreducible minimum of information was necessary in order for the proceedings to comply with Article 6 would not be conclusively resolved until the House of Lords' decision in *Secretary of State for the Home Department v AF and others (AF (No 3))*.[408]

In *AF (No 3)*, the House of Lords were required to revisit the minimum disclosure issue in light of the ECtHR's recently delivered judgment in *A v United Kingdom*.[409] In *A*, the Grand Chamber held that where full disclosure was not possible due to countervailing national security interests, there would not be a fair trial unless any difficulties this caused were counterbalanced in such a way that the applicant still had the possibility of effectively challenging the allegations against them.[410] Whilst Special Advocates could provide an important safeguard, 'counterbalancing the lack of full disclosure' by testing the evidence and putting arguments on behalf of the suspect during closed hearings,[411] they could not perform this function in any useful way unless the suspect was given sufficient information about the allegations to enable them to give effective instructions to the Special Advocate.[412] Though it was not necessary for the suspect to be provided with the 'detail or sources of the

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[406] See, for example, *Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin); *Secretary of State for the Home Department v AH* [2008] EWHC 1045; *Secretary of State for the Home Department v AR* [2008] EWHC 2789 (Admin): *Secretary of State for the Home Department v Rideh* [2008] EWHC 1993 (Admin).

[407] [2008] EWCA Civ 1148. Here, by a majority, it was held that the House of Lords' decision in *MB and AF* had not established the principle that a hearing would be unfair in the absence of disclosure to the controlee of an irreducible minimum of information ([64], [91]). Sedley J, dissenting, stated that he was unable to adopt the view of the majority, as it appeared 'to reject the notion that there is an irreducible minimum of disclosure without which a control order case cannot proceed, when the House, as I understand the *MB* case, has held otherwise' ([120]).

[408] [2009] UKHL 28.

[409] (2009) 49 EHRR 29. The 11 applicants in this case, who had been detained under Part 4 of the ATCSA, complained of breaches of Articles 3, 5(1), 5(4), 13 and 14 of the ECHR. The applicants' contended that the procedures under the ATCSA, which allowed for the use of closed material, were incompatible with Article 5(4) ECHR, which, it was claimed, 'imported the fair trial guarantees of art.6(1) commensurate with the gravity of the issue at stake' (para 195).

[410] ibid paras 205, 218.

[411] ibid para 220.

[412] ibid. See also para 219.

evidence which formed the basis of the allegations' against them,[413] where the open material consisted purely of general assertions and the case against the suspect was based solely or to a decisive degree on closed material, the requirements of a fair trial would not be met.[414]

The Grand Chamber's judgment in *A* was regarded by the Law Lords as having provided 'definitive resolution' of the critical question concerning the minimum level of open disclosure necessary to satisfy Article 6.[415] In *AF (No 3)*, it was therefore determined that, in line with the ECtHR's decision, the test applicable in respect of control order proceedings was that, no matter how cogent the case based on the closed materials may be, the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions to the Special Advocate.[416] This was 'the core irreducible minimum'[417] that could not be compromised without violating the controlee's Article 6 rights.[418]

Despite stating that the ruling in *AF (No 3)* placed it in an 'invidious position'[419] whereby it would be forced to 'balance the importance of protecting the public from the risk posed by the individual against the risk of disclosing sensitive material',[420] the Government nevertheless maintained that the control order regime remained viable.[421] As a result of the *AF (No 3)* disclosure obligation the Home Secretary was, however, forced to revoke control

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[413] ibid.
[414] ibid.
[415] *AF (No 3)* (n 371) [50] (Lord Phillips); [84] (Lord Hope); [96] (Lord Scott); [98] (Lord Rodger); [99] (Lord Walker); [103] (Baroness Hale); [121] (Lord Brown). Whilst stating that he viewed the ECtHR's decision as 'wrong', Lord Hoffmann nevertheless accepted that their Lordships had 'no choice but to submit', even though this may entail the destruction of the control order system, which was 'a significant part of the [UK's] defences against terrorism' ([70]).
[416] ibid [59] (Lord Phillips). See also [81] (Lord Hope); [166] (Lord Brown).
[417] ibid [81] (Lord Hope).
[418] For a detailed analysis of the *AF* decision, see Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) MLR 836.
[419] Home Office, *Memorandum to the Home Affairs Committee* (n 324) para 65.
[420] ibid. As the Government explained in its *Memorandum* to the Home Affairs Committee: disclosing this material could 'potentially [reduce] the Government's ability to protect the public from a risk of terrorism. Where the disclosure required by the court cannot be made because the potential damage to the public interest is too high (for example if disclosure could put the life of an informant at risk), we may be forced to revoke control orders even where we consider those orders to be necessary to protect the public from a risk of terrorism' (para 66).
[421] HC Deb 16 September 2009, vol 496, col 153WS (Alan Johnson). See also Home Office, *Memorandum to the Home Affairs Committee* (n 324) para 72. This assessment of the regime's continuing viability was confirmed by Lord Carlile, who concluded that the effect of the decision on disclosure in *AF (No 3)* did not make control orders 'impossible': *Fifth Report* (n 264) para 98.

orders in at least five cases.[422] Further, whilst it was argued in *Secretary of State for the Home Department v BC and BB*[423] that the disclosure requirement did not apply to control orders imposing 'light obligations',[424] this contention was rejected, Collins J asserting that the decision in *AF (No 3)* compelled him to hold that the approach to disclosure was the same for any control order, irrespective of the stringency of the obligations it contained.[425]

Whilst the *AF (No 3)* disclosure obligation inevitably inhibited the use of control orders in some cases,[426] it did not render the system unsustainable, and a number of orders were upheld following the House of Lords' pivotal 2009 judgment.[427] That 'something resembling a fair litigation procedure'[428] was fashioned by the courts over the course of the regime's lifetime is, from a human rights perspective, clearly to be welcomed.[429] Indeed, as was observed by Lord Brown in *MB and AF*,[430] the right to a fair trial enshrined in Article 6 is 'one of altogether too great importance to be sacrificed on the altar of terrorism control.'[431]

V. Other Legal Challenges to Control Orders

Control orders, aside from entailing restrictions on the rights contained in Articles 5 and 6, typically also impacted upon a range of other Convention rights and freedoms. Obligations

[422] In three of these cases, the orders were revoked and not replaced as the Government concluded that the *AF (No 3)* disclosure obligation could not be met because of potential damage to the public interest (Lord Carlile, *Sixth Report* (n 264) para 15). In the other two cases, the orders against controlees BB and BC were revoked and subsequently replaced by orders imposing 'significantly reduced obligations' (Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7855, 2010) 8).
[423] [2009] EWHC 2927 (Admin).
[424] It was argued by the Home Secretary that the obligations imposed under these 'light touch control orders' were 'light enough' not to engage the controlees' 'civil rights' under Article 6(1) (ibid [2]).
[425] ibid [55].
[426] See HC Deb 16 September 2009, vol 496, cols 152-155WS (Alan Johnson).
[427] See, for example, *Secretary of State for the Home Department v CD* [2011] EWHC 2087 (Admin); *AM v Secretary of State for the Home Department* [2011] EWCA Civ 710.
[428] David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) para 11.20. See also David Anderson, *Final Report* (n 14) para 6.3.
[429] See, for example, JCHR, *Annual Renewal of Control Orders Legislation 2010* (n 96) paras 52-53. Despite criticising the Government for its 'minimalist and passive' approach to complying with the enhanced disclosure obligation in practice, the JCHR concluded that the decision in *AF (No 3)* had gone 'some way to addressing one of the main sources of unfairness of the control order regime' (para 53).
[430] *MB and AF* (n 104).
[431] ibid [91].

stipulating that controlees were only permitted to attend a single, Home Office approved, mosque, and could not lead group prayers,[432] for example, inhibited a controlee's exercise of their Article 9 right to freedom of religion.[433] Other 'obligations' commonly imposed, such as those banning the ownership or use of certain types of communications equipment,[434] prohibiting attendance at pre-arranged meetings, and forbidding communication or association with specified individuals,[435] involved interferences with a controlee's rights to freedom of expression under Article 10,[436] and assembly and association under Article 11.[437] Whilst challenges on these grounds were not pursued,[438] it is likely that in most cases such infringements would have been considered justified as necessary in a democratic society in the interests of national security or public safety.[439] However, the main legal challenges to control orders outside those relating to Articles 5 and 6, instead concerned their impact on the rights guaranteed by Article 8 and Article 3 of the ECHR.

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[432] See *Secretary of State for the Home Department v JJ, KK, GG, HH, NN, LL* [2006] EWHC 1623 (Admin) Annex I, obligation 5 and obligation 10.

[433] Article 9(1) ECHR provides: Everyone has the right to freedom of thought, conscience and religion; this right includes ... [the] freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

[434] Controlees were often prohibited from owning or using any communications equipment capable of connecting to the internet, such as mobile phones, fax machines, pagers, and computers. See Lord Carlile, *First Report* (n 98) 32-33 (obligation 9).

[435] See *Secretary of State for the Home Department v JJ, KK, GG, HH, NN, LL* [2006] EWHC 1623 (Admin) Annex I. See also Lord Carlile, *First Report* (n 98) 27-35: Annex I: Example Control Order Pro Forma.

[436] Article 10(1) ECHR provides: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Further, the ECtHR has observed that the right to receive information under Article 10, 'prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him': *Leander v Sweden* (1987) 9 EHRR 433, para 74.

[437] Article 11(1) EHCR provides: Everyone has the right to freedom of peaceful assembly and to freedom of association with others ... .

[438] Claims that the restrictions E's control order imposed on the communications equipment (computers and telephones [49]) that could be brought into their home violated his wife and children's Article 10 rights were included in the skeleton argument of the family's legal representative, but were not pursued. See *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin) [13].

[439] Interferences with the conditional rights to freedom of religion, expression, and assembly and association, are permitted provided that they are in accordance with law and necessary in a democratic society in pursuit of one of the legitimate aims listed in Articles 9(2), 10(2), and 11(2).

VI. Article 8 ECHR Challenges

Article 8 ECHR provides that everyone has the right to respect for their private and family life, home and correspondence.[440] Due to the nature of the obligations imposed, control orders not only curtailed the controlee's own rights, but frequently also impacted upon the human rights of third parties, in particular, the controlee's immediate family. As a consequence, in addition to being invoked as a basis on which to challenge the practice of relocation,[441] Article 8 issues were often also raised in relation to the collateral effects control orders had upon the rights of controlees' family members.

During the lifetime of the regime, the impact of the orders on controlees' wives and children was identified as a matter of some concern by a range of parties. The UN Special Rapporteur on Terrorism, for instance, remarked on the significant 'direct and indirect impacts' orders had on family members' human rights,[442] whilst the JCHR described their effect as 'devastating',[443] and expressed concern that control orders 'unjustifiably ... [interfered] with the human rights of other members of the [controlee's] family'.[444] The effect of the orders on the lives of controlees' families[445] was also the subject of strong criticism from a number of pressure groups, Liberty asserting that control orders 'devastatingly

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[440] Article 8(1) ECHR. Article 17 of the International Covenant on Civil and Political Rights 1966 similarly provides that, 'No one shall be subjected to arbitrary or unlawful interference with ... [their] privacy, family, home or correspondence ...'.

[441] See the discussion of the Article 8 issues associated with the forced relocation of controlees at pp 121-129 above.

[442] *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,* Martin Scheinin, UN Doc A/64/211, 3 August 2009, para 40.

[443] JCHR, *Annual Renewal of Control Orders Legislation 2010* (n 96) 3.

[444] JCHR, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (n 17) para 85.

[445] For first-hand accounts of the impact of control orders on the wives and children of controlees, see: Dina Al Jnidi, 'Life With a Control Order: A Wife's Story' *The Independent* (London, 3 July 2009) <www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html> accessed 6 June 2013; Harmit Athwal, 'Families Speak Out on Control Orders' March 30 2006 <www.irr.org.uk/news/families-speak-out-on-control-orders/> accessed 6 June 2013.

undermined' the rights and freedoms of family members,[446] and CAMPACC characterising them as a form of 'collective punishment'.[447]

The collateral effects of control orders on family members' Article 8 rights were most fully considered by the High Court in *Secretary of State for the Home Department v E*.[448] Here, Beatson J examined the impact of the control order on family life, paying particular regard to the extent to which the restrictions interfered not only with the rights of E, but also those of his wife, S, and their four young children.[449] Statements were submitted detailing the order's impact upon the family's social networks and the degree of isolation experienced by S and her children,[450] as well as the various other effects the conditions imposed by the order had upon the lives of the couple's children.[451] Having reviewed the evidence, Beatson J accepted that the control order constituted a 'significant interference with the private and family life of E, S and their children.'[452] However, in light of the risk E was assessed to pose,[453] it was held that the weight of the state's interest in safeguarding national security and preventing or restricting E's involvement in terrorism-related activity was such that the 'serious interference with the rights of E's innocent wife and children' was justified pursuant to Article 8(2).[454] The

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[446] Liberty, *From War to Law* (2010) para 15; David Anderson, *Final Report* (n 14) paras 3.39-3.40.
[447] Campaign Against Criminalising Communities submission to the Joint Committee on Human Rights, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2006* (2005-06, HL 122, HC 356) 38. See also Amnesty International, *Five Years On: Time to End the Control Orders Regime* (2010) 10-11.
[448] *E* (n 43). The obligations imposed by E's control order are discussed in detail on p 116 (above).
[449] It was argued on behalf of S and the children that their Article 8 and Article 3 rights had been violated. The couple's children were aged between seven years and 10/11 months at the time.
[450] *E* (n 43) [155]. This social isolation was in part attributable to the inhibiting or 'chilling effect' (Beatson J [155]) of the requirement that any visitors to the family home above the age of 10 had to obtain prior approval from the Home Office.
[451] ibid [133]-[149]. For example, due the curfew, E was unable to take his children to evening activities, whilst the obligation prohibiting the use of certain forms of communications equipment in E's residence also meant that the children were unable to access the internet at home, which had begun to become as issue in relation to the children's ability to do their school homework.
[452] ibid [267].
[453] ibid [82]. Beatson J found that there were substantial grounds for believing E to be 'a senior terrorist recruiter and facilitator, with a wide range of contacts'.
[454] ibid [280]. Article 8(2) ECHR provides that any interference with the right to family life must be accordance with law and necessary in a democratic society and must pursue one of the legitimate aims listed in paragraph (2), which include, *inter alia*, national security, public safety, and the prevention of crime. See Ursula Kilkelly, *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights* (Council of Europe Publishing, 2003) 6, 25.

conclusion that the control order did not involve a disproportionate interference with the rights of E's family was subsequently upheld by the Court of Appeal, who deemed Beatson J's decision in respect of Article 8 'impossible to impugn'.[455]

VII. Article 3 ECHR Challenges

The direct and collateral impact of control orders on the mental health of controlees and their family members, and the possible contravention of the Article 3 prohibition on the infliction of inhuman or degrading treatment,[456] was another ground of challenge raised in some of the litigation.[457] The potential psychological effects of control orders was repeatedly highlighted by Lord Carlile as being a relevant consideration in relation to the proportionality of the obligations imposed,[458] and was also emphasised by the JCHR,[459] the European Committee for the Prevention of Torture,[460] and various other parties.[461] Further, it was claimed by Gareth Peirce[462] that control orders had a 'serious' effect on both controlees and their families, especially children,[463] whilst Dr Korzinski[464] reported that their psychological impact

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[455] *E* (n 145) [120].

[456] Article 3 ECHR provides: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. In *Ireland v United Kingdom* (1978) 2 EHRR 25, it was determined that degrading treatment which violates Article 3 is that which arouses in its victim, 'feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance' (para 167).

[457] See *E* (n 143); *Secretary of State for the Home Department v Mahmoud Abu Rideh* [2007] EWHC 804 (Admin); *Mahmoud Abu Rideh v Secretary of State for the Home Department* [2007] EWHC 2237 (Admin); *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin).

[458] See Lord Carlile, *First Report* (n 98) para 44; *Second Report* (n 176) para 41; *Third Report* (n 264) para 44; *Fourth Report* (n 264) para 53.

[459] In its 2006 report, the JCHR suggested that, due to the restrictions they imposed, their potentially indefinite duration, and the limited opportunity to challenge the basis for their imposition, control orders carried a 'very high risk' of subjecting controlees to inhuman or degrading treatment contrary to Article 3 ECHR: JCHR, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (n 17) para 84.

[460] Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 November 2005*, CPT/Inf (2006) 28, paras 45-48.

[461] See Amnesty International, *Five Years On* (n 447) 9; Victoria Brittain, 'Besieged in Britain' (2008) 50(3) Race and Class 1.

[462] Pierce was the solicitor for a number of the controlees.

[463] JCHR, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (n 17): Annex 3: 'Redacted Witness Statement by Gareth Peirce Explaining How, in Practice, Control Orders Have Affected Her Clients and Other Wives and Families in Similar Positions', 75 (para 31).

[464] Dr Korzinski, a trauma and psychosocial expert, was co-founder and clinical director of the Helen Bamber Foundation.

on the controlees that he had worked with had been 'catastrophic'.[465] Indeed, the possible impact of control orders on the mental health of controlees and their families was said to be taken 'extremely seriously' by the government,[466] and, in compliance with ECtHR case law,[467] was subject to regular monitoring, and was a matter routinely considered at the CORG's quarterly meetings.[468]

Whether control orders' adverse impact on the mental health of the controlee or their children was of sufficient severity to breach Article 3 was examined in detail by the courts in relation to both E and Abu Rideh. In *E*,[469] it was accepted by the Court that the long-term effect of the situation on the children's mental health was 'likely to be significant and detrimental'.[470] Whilst acknowledging that, according to *Selmouni v France*,[471] the children's age and vulnerability must be taken into account, Beatson J concluded that Article 3 was not engaged as the restrictions did not pose such a risk to their mental health that they were 'humiliating and debasing them and ... breaking their moral resistance'.[472] The Article 3 challenges relating to the order's impact on both the controlee and his children was also unsuccessful in the case of *Rideh*.[473] Here, although there was evidence that the children lived with a high level of anxiety,[474] it was held that their Article 3 rights had not been breached.[475] Similarly, in respect of the controlee himself, the High Court concluded that while mental health considerations were important and did justify the courts exercising

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[465] PBC Deb (Bill 193) 21 June 2011, col 43.
[466] Home Office, *Memorandum to the Home Affairs Committee* (n 324) para 79.
[467] As Lord Carlile observed in his 2007 Report: 'There is support in case law for the proposition that, where the State takes coercive measures that could affect the physical or mental well-being of the individual, it is under a duty to monitor effectively the impact of those measures': *Second Report* (n 176) para 41. See, for example, *Keenan v United Kingdom* (2001) 33 EHRR 38.
[468] Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7194, 2007) 3-4.
[469] *E* (n 143). See *E* (n 145) [121].
[470] *E* (n 143) [155].
[471] (1999) 29 EHRR 403. In *Selmouni*, the ECtHR held that whether Article 3 has been violated, 'depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc' (para 100).
[472] *E* (n 143) [309].
[473] *Secretary of State for the Home Department v Abu Rideh* [2007] EWHC 804 (Admin).
[474] ibid [159]
[475] ibid [161].

'particularly close scrutiny'[476] over the justification for each condition imposed, Abu Rideh's mental health problems,[477] despite being exacerbated by the order, did not trump the national security case against him.[478]

Despite the severe nature of obligations they imposed, no control order was ever held to have crossed Article 3's 'high threshold'.[479] The UK courts did, however, rule that an individual's psychological state could have a sufficiently important impact upon the severity of the effect of certain control order obligations to necessitate their modification or substitution.[480] Thus, whilst mental health concerns were assessed not to obviate the need for Abu Rideh to be subject to a control order, the Home Secretary was nevertheless ordered to lift the requirements that he wear an electronic tag and report to the police station due to the severe effects these obligations had on his mental stability.[481] In addition, the risk that a suspect's Article 3 rights could be infringed due to the possibility that, if identified, he may be subjected to racist abuse and physical violence,[482] was also central to the Supreme Court's decision to maintain a former controlee's anonymity in the case *of AP (No 2).*[483]

VIII. Personal Search Obligations

During the regime's lifetime, legal challenges were frequently made in respect of specific obligations imposed by control orders.[484] Of particular note was the appeal in *GG* and *NN*

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[476] ibid [143]. Abu Rideh was reported to suffer from depression and an 'abnormally extreme' reaction to stress.
[477] ibid [177].
[478] ibid.
[479] ibid [143] (Beatson J). See also *A v United Kingdom* (2009) 49 EHRR 29, para 134.
[480] See *E* (n 145) [55]; *Mahmoud Abu Rideh v Secretary of State for the Home Department* [2007] EWHC 2237 (Admin) [60].
[481] *Abu Rideh v Secretary of State for the Home Department* [2008] EWHC 2019 (Admin) [6]-[7]. [32], [42].
[482] The town where AP had to live was one where there were considerable community tensions and organised racist activity, and there had also been previous racist attacks against members of the Muslim community.
[483] *Secretary of State for the Home Department v AP (No 2)* [2010] UKSC 26 [13]-[14].
[484] See, for example, *AE v Secretary of State for the Home Department* [2008] EWHC 1743 (Admin); *Secretary of State for the Home Department v AR* [2008] EWHC 3164 (Admin); *Secretary of State for the Home Department v M* [2009] EWHC 572 (Admin).

against a requirement that the controlee submit to personal searches.[485] Whilst accepting that the list of obligations in s 1(4) was not definitive,[486] Collins J nevertheless held that, in the absence of 'clear and unambiguous authorisation' in the 2005 Act, the Home Secretary did not have the power to impose such an obligation.[487] This decision was affirmed by the Court of Appeal,[488] which determined that s 1(3) could not be read as permitting the inclusion of a personal search obligation in control orders, Sedley LJ declaring it to be 'axiomatic that the common law rights of personal security and personal liberty prevent any official search of an individual's clothing or person without explicit statutory authority.'[489] Following these decisions, Lord Carlile recommended that, 'as a compliance tool and to ensure police and public safety', a power of personal search should be added to the legislation as soon as possible.[490] Section 7D, providing for new powers of search and seizure, was therefore subsequently inserted into the PTA by s 56 of Crime and Security Act 2010. Whilst s 7D was not commenced prior to the Coalition's repeal of control orders, similar search powers are now contained in Sch 5 of TPIMA.[491]

IX. Conclusion

In its *Post-Legislative Assessment*[492] of the PTA, it was proclaimed by the Labour government that 'various House of Lords' judgments' had confirmed that the 2005 Act

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[485] *GG and NN* (n 275). Prior to the decision in this case, control orders routinely included an obligation requiring the controlee to submit to personal searches in his residence.

[486] Collins J noted that the words, 'These obligations may include, in particular ...' indicated that the list of obligations in s 1(4) was, 'clearly not intended to represent a limitation on what may be properly included in an order': ibid [56].

[487] ibid [59]. As Collins J explained, at [58], 'a search of the person is a trespass and, unless authorised, an unlawful act'. The personal search obligation was therefore quashed under the Prevention of Terrorism Act 2005, s 10(7)(b).

[488] *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786.

[489] ibid [12]. See also *BH v Secretary of State for the Home Department* [2009] EWHC 2938 (Admin) [4].

[490] Lord Carlile, *Fifth Report* (n 264) paras 4, 108, 148. See also Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC: Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 7855, 2010) 6.

[491] TPIMA, sch 5 confers powers of entry, search, seizure and retention on constables in connection with the imposition of measures under TPIM notices.

[492] Home Office, *Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (n 324) para 64. This assertion was also made by the Coalition government, see Home Office, *Terrorism*

functioned 'in a manner fully compliant with the ECHR.'[493] Whilst essentially true, as discussed in this chapter, the system's compatibility with particular ECHR rights - most notably Articles 5 and 6 - was only achieved through the government significantly modifying its approach with respect to the imposition of curfews[494] and the level of open disclosure made to controlees[495] following certain adverse court decisions. Indeed, as David Anderson observes, over the scheme's lifetime the courts produced a body of jurisprudence that 'moderated the legal climate in which control orders operated, and reconciled their operation with the requirements of the [ECHR] and [HRA]'.[496] Further, the principles established by the case law on the PTA not only had a considerable impact on the control orders regime itself, but, as is detailed in the following chapter, also strongly influenced the design of the Coalition's replacement for control orders, Terrorism Prevention and Investigation Measures.

Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum by the Home Office (2011) para 3.

[493] ibid para 61

[494] The imposition of 18-hour curfews under non-derogating control orders being discontinued as a result of the House of Lords' decision in *JJ* (n 102).

[495] The judgment in *AF (No 3)* (n 371) compelling the government to disclose a 'core irreducible minimum' of information to controlees.

[496] David Anderson, *Final Report* (n 14) para 1.4

Chapter 5

The Counter-Terrorism Review and Terrorism Prevention and Investigation Measures

I. The Review of Counter-Terrorism and Security Powers and the Repeal of Control Orders

Following the May 2010 general election, the New Labour Government, which had held power since 1997, was replaced by the Conservative-Liberal Democrat Coalition Government.[1] Whilst in opposition, both Coalition parties had been highly critical of control orders, the Liberal Democrat's 2010 election manifesto pledging to abolish them,[2] and the Conservatives stating that they would review the system with a view to replacing it.[3] The Coalition's programme for government therefore subsequently promised that there would be an urgent review of control orders 'as part of a wider review of counter-terrorist legislation, measures and programmes.'[4]

On 13 July 2010, the new Home Secretary, Theresa May, announced to Parliament that a rapid review of the 'most controversial and sensitive' counter-terrorism powers would be carried out.[5] The review was tasked with examining issues of security and civil liberties in relation to six key powers,[6] with the aim, where possible, of providing 'a correction in favour of liberty.'[7] Originally due to report in November 2010, the review's publication was,

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[1] The Coalition Government was formed on 10 May 2010.
[2] Liberal Democrat Manifesto 2010, 94.
[3] The Conservative Party, *A Resilient Nation: National Security Green Paper* (Policy Green Paper No. 13) (2010) 23.
[4] HM Government, *The Coalition: Our Programme for Government* (2010) 24.
[5] HC Deb 13 July 2010, vol 513, col 797. See also Home Office, 'Press Release: Rapid Review of Counter-Terrorism Powers' (13 July 2010) <www.gov.uk/government/news/rapid-review-of-counter-terrorism-powers> accessed 14 June 2013.
[6] The powers considered by the review were: the pre-charge detention of terrorist suspects; the TA 2000, s 44 'stop and search' powers; local authorities' use of the RIPA 2000 and access to communications data; measures to deal with organisations that promote hatred or violence; deportation with assurances; and control orders. See Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 4.
[7] ibid.

however, repeatedly delayed due to 'political wrangling'[8] between the Coalition parties regarding the fate of control orders and the features of their proposed replacement.[9] The outcome of the review was eventually revealed on 26 January 2011,[10] the Government issuing a report detailing its findings and recommendations,[11] along with an accompanying report by Lord Macdonald.[12] In the *Review's* foreword, the Home Secretary emphasised that, whilst national security is the primary duty of government, it was necessary to 'correct the imbalance that has developed between the State's security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary.'[13] The *Review* concluded that, in some areas, the UK's counter-terrorism powers were 'neither proportionate nor necessary',[14] and therefore set out various recommendations designed to restore civil liberties and to regain public confidence in the country's anti-terrorism laws.[15]

In relation to control orders, the review considered whether the regime should be 'retained, removed, reformed or replaced.'[16] It was reported that the majority of contributions to the review from external parties submitted that control orders should be repealed on the basis that they were 'ineffective and against open and fair justice.'[17] For example, JUSTICE and Liberty both called for control orders to be scrapped, the former stating that they were

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[8] See 'Cooper Attacks 'Shambolic' Counter-Terrorist Review' BBC News (24 January 2011) <www.bbc.co.uk/news/uk-politics-12267920> accessed 14 June 2013. See also HC Deb 26 January, vol 522, col 312 (Yvette Cooper).

[9] See Alexander Horne, *House of Commons Standard Note: The Counter-Terrorism Review* SN/HA/5852 (2011) 1. See also Nigel Morris, 'Tories Fear 'Car Crash' Over Control Orders' *The Independent* (10 November 2010) <www.independent.co.uk/news/uk/politics/tories-fear-car-crash-over-control-orders-2121835.html> accessed 15 June 2013.

[10] HC Deb 25 January 2011, vol 552, cols 306-309 (Theresa May).

[11] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6).

[12] Lord Macdonald, *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003, 2011). Lord Macdonald was appointed by the Government to provide independent oversight of the review process to ensure that it was 'conducted properly' and that its recommendations were 'not only fair but seen to be fair': HC Deb 13 July 2010, vol 513, col 797 (Theresa May).

[13] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 3.

[14] ibid 5.

[15] ibid.

[16] ibid 37

[17] Home Office, *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation* (Cm 8005, 2011) 14.

'unnecessary, ineffective and offensive to basic principle',[18] the latter describing them as a 'blot on the [UK's] human rights record'[19] and 'perhaps the most shameful legislative legacy of Britain's domestic 'War on Terror'.'[20] Having examined the operation, effectiveness, and legal viability of control orders, along with considering the principal arguments against them,[21] the *Review* ultimately recommended that control orders should be repealed.[22] It was, however, recognised that there was a 'continuing need to control the activities of terrorists who can neither be successfully prosecuted nor deported'.[23] This conclusion was echoed by Lord Macdonald, who accepted that it was appropriate for such individuals to be subject to state-imposed restrictions, providing they were proportionate and, unlike control orders, '[did] not impede or discourage evidence gathering with a view to conventional prosecution'.[24] It was consequently determined that control orders should be replaced by a 'less intrusive, more clearly and tightly defined' system, that would eliminate the use of forced relocation and lengthy curfews[25] and be better designed to facilitate the continuing investigation of the suspect with a view to prosecution, as well as preventing them from engaging in terrorist activity.[26] It was further concluded that there may be circumstances in the future where more stringent, 'exceptional emergency measures', would be needed to manage an especially serious terrorist risk,[27] and that the Government would therefore publish, but not introduce, additional draft legislation to prepare for this possibility.[28]

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[18] JUSTICE, *Home Office Review of Counter-Terrorism and Security Powers: Written Submissions of JUSTICE* (2010) 8, 15.
[19] Liberty, *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (2010) 11. See also Amnesty International, *United Kingdom: Submission for the Review of Counter-Terrorism and Security Powers* (2010) 11.
[20] Liberty, *From 'War' to Law* (n 19) 11.
[21] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 36-39.
[22] ibid 41.
[23] ibid 39.
[24] Lord Macdonald, *Report* (n 12) 11. Lord Macdonald observed that the evidence obtained by the Review 'plainly demonstrated' that control orders acted as an impediment to prosecution, as by relocating controlees and banning their use of telephones and the internet, they imposed restrictions that 'precisely prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment' (p 9).
[25] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41.
[26] ibid.
[27] ibid 43.
[28] ibid. See also HC Deb 26 January 2011, vol 522, col 309 (Theresa May).

II. Terrorism Prevention and Investigation Measures

Following the Coalition's decision to repeal the control order regime, so as to ensure that there would be 'no gap in public protection'[29] pending its replacement, the PTA powers were renewed until 31 December 2011.[30] The Terrorism Prevention and Investigation Measures Bill[31] was introduced in the House of Commons on 23 May 2011,[32] and received Royal Assent on 14 December 2011, after being subjected to thorough, and uncharacteristically unhurried, parliamentary scrutiny.[33] The PTA was subsequently repealed by the new Act,[34] which abolished control orders and replaced them with a system of Terrorism Prevention and Investigation Measures (TPIMs).[35]

The Terrorism Prevention and Investigation Measures Act 2011 - TPIMA - comprises 31 sections and eight schedules. Pursuant to s 2(1) of the Act, a 'TPIM notice' imposing specified terrorism prevention and investigation measures may be made by the Home Secretary where certain conditions, labelled A to E by s 3,[36] are met.[37] Although permission from the High Court must normally be obtained prior to a TPIM notice being made,[38] as the

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[29] Theresa May, 'New Regime for Terrorism Suspects' (Home Office, 23 May 2011) <www.gov.uk/government/news/new-regime-for-terror-suspects> accessed 5 September 2013. See also Explanatory Notes to Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011, SI 2011/716, para 7.10.

[30] Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011, SI 2011/716, which came into force on 11 March 2011. See HC Deb 1 March 2010, vol 506, col 747; HL Deb 3 March 2010, vol 717, col 1546.

[31] Terrorism Prevention and Investigation Measures HC Bill (2010-12) [193].

[32] HC Deb 23 May 2011, vol 528, col 656.

[33] See Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 Melbourne University Law Review 143, 148. This is in contrast with the expedited parliamentary timetable which applied to the Prevention of Terrorism Bill in 2005 (see chapter 2 of this thesis).

[34] TPIMA, s 1.

[35] Pursuant to TPIMA, Sch 8, the nine control orders in existence at the time of the Act's commencement on 15 December 2011, remained in force for a 'transitional period' of 42 days, unless revoked or quashed by the end of that period. All nine individuals were subsequently made subject to TPIM notices. See HC Deb 19 December 2011, vol 537, col 143WS (Theresa May); HC Deb 26 March 2012, vol 542, col 94WS (Theresa May).

[36] TPIMA, ss 3(1)-(5).

[37] ibid s 2(1). Section 2(2) provides that, for the purposes of the Act, 'terrorism prevention and investigation measures' means those 'requirements, restrictions and other provision which may be made in relation to an individual by virtue of Schedule 1'.

[38] TPIMA, ss 3(5)(a), 6. Where the Home Secretary reasonably believes that it is necessary for measures to be imposed urgently, s 3(5)(b) permits a TPIM notice to be made without first obtaining

Home Secretary commands the lead role in their issuance, like control orders, TPIMs can be classed as 'executive' measures.[39] Also like control orders, TPIMs are considered by the Government to be a measure of 'last resort',[40] only to be used against 'suspected terrorists who pose a real threat', but who cannot be successfully prosecuted, or, in the case of foreign nationals, deported.[41] Further similarities between the two regimes are also found in their shared definition of 'terrorism-related activity',[42] the Home Secretary's statutory duty to consult the police regarding the prospects of prosecuting the suspect in advance of either measure being imposed,[43] and the use of closed proceedings and Special Advocates.[44] In addition, whilst the 2011 Act provides for a more 'tightly defined' set of restrictions,[45] a number of the measures that can be imposed under a TPIM notice strongly resemble the obligations that were typically included in control orders, with the same sanction also being applicable in respect of their breach.[46]

Given their degree of similarity, various critics have argued that TPIMs are simply 'control orders by another name'.[47] Indeed, some have suggested that the replacement of control orders with TPIMs was little more than a politically-motivated rebranding exercise.[48] The following section will therefore discuss the key features of the TPIM Act, and will critically

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the High Court's permission. In such cases, permission may be obtained retrospectively: see s 7 and Sch 2 of the Act.

[39] See chapter 2 of this thesis.

[40] Home Office, *Government Reply to the Sixteenth Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432: Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (Cm 8167, 2011) 1.

[41] ibid. See also Theresa May, 'New Regime for Terrorism Suspects' (Home Office, 23 May 2011) <www.gov.uk/government/news/new-regime-for-terror-suspects> accessed 5 September 2013.

[42] See PTA, s 1(9); TPIMA, s 4(1).

[43] See PTA, s 8; TPIMA, s 10.

[44] See the Schedule to the PTA; TPIMA, sch 4.

[45] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41. See TPIMA, sch 1.

[46] See PTA, s 9; TPIMA, s 23.

[47] JUSTICE, *Terrorism Prevention and Investigation Measures Bill: Briefing for House of Commons Second Reading* (2011) para 6. See also Joshua Rozenburg, 'Rebranding Exercise' (2011) 22 Law Society Gazette 8, 8; Amnesty International, *The Terrorism Prevention and Investigation Measures Bill 2011: Control Orders Redux* (2011) 5; HC Deb 26 January 2011, vol 522, col 311 (Yvette Cooper).

[48] See Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: The Counter-Terrorism Review 2011' (2011) 75(3) Journal of Criminal Law 225, 230; Amnesty International, *The Terrorism Prevention and Investigation Measures Bill 2011: Control Orders Redux* (2011) 5.

compare the two regimes in order to assess whether TPIMs are merely 'control orders lite',[49] or, as the Coalition claims, the new scheme represents 'a fundamental change'[50] and embodies a 'better balance [between] the priorities of prosecution and public protection'[51] than its much criticised predecessor.

III. The TPIM Regime

A TPIM notice may be made by the Home Secretary where the five conditions set out in s 3 are satisfied.[52] These conditions are:

> A: the Home Secretary reasonably believes that the individual is, or has been, involved in 'terrorism-related activity';[53]
>
> B: some or all of the relevant activity is 'new';[54]
>
> C: the Home Secretary reasonably considers that the TPIM notice is necessary for purposes connected with protecting members of the public from a risk of terrorism;[55]
>
> D: the Home Secretary reasonably considers that it is necessary for the specified measures to be imposed on the individual to prevent or restrict their involvement in terrorism-related activity;[56]
>
> E: either the High Court has given its permission for the TPIM notice to be imposed, or the Home Secretary reasonably considers that it is necessary for the measures to be imposed urgently without the obtaining such prior permission.[57]

Under TPIMA, the 'reasonable suspicion' standard which applied in respect of non-derogating control orders[58] has thus been replaced by a test of 'reasonable belief'.[59]

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[49] Ian Dennis, 'Terrorism Prevention and Investigation Measures Bill' (2011) 10 Criminal Law Review 741, 741; Liberty, 'Terrorism Prevention and Investigation Measures' <www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php> accessed 5 September 2013.
[50] PBC Deb (Bill 193) 23 June 2011, col 87 (James Brokenshire).
[51] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 39.
[52] TPIMA, s 3.
[53] ibid s 3(1). 'Involvement in terrorism-related activity' is defined under s 4 of the Act.
[54] ibid s 3(2). 'New terrorism-related activity', as defined under s 3(6), is any terrorism-related activity which has occurred since the most recent TPIM notice made against the individual came into force. If no TPIM notice has previously been issued against the individual, then any terrorism-related activity will be classed as 'new': s 3(6)(a).
[55] ibid s 3(3).
[56] ibid s 3(4).
[57] ibid s 3(5).
[58] PTA, s 2(1)(a).
[59] TPIMA, s 3(1).

Commenting on the difference between these two standards in *A*,[60] the Court of Appeal explained that, 'Belief and suspicion are not the same ... Belief is a state of mind by which the person in question thinks that X *is* the case. Suspicion is a state of mind by which the person in question thinks that X *may be* the case.'[61]

In *CD*,[62] Ouseley J described the raising of the evidential threshold for imposing TPIMs as 'the most notable change in the new legislative regime',[63] going on to state that reasonable belief is 'undoubtedly ... a higher test: belief is required, and the grounds must reasonably support that belief rather than merely suspicion.'[64] Whilst reasonable belief is therefore clearly a more demanding legal test,[65] since according to Lord Carlile all of the control orders confirmed by the courts since the PTA was introduced would have satisfied this higher standard,[66] the change may make relatively little difference in practice.

The raising of the threshold for making a TPIM notice to reasonable belief was initially welcomed by the JCHR as one of a number of the new scheme's improvements on the control order regime.[67] In its *Second Report* on the TPIM Bill, the Committee nonetheless argued that, in view of the intrusive measures that could be imposed, the standard of proof should be increased to the balance of probabilities.[68] In response, the Government asserted that it believes the reasonable belief test 'strikes the right balance' between protecting the

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[60] *A and Others v Secretary of State for the Home Department* [2004] EWCA Civ 1123.
[61] ibid [229] (Laws LJ). See also *R v Saik* [2004] EWCA Crim 2936 [20] (Lord Brown); *HM Treasury v Ahmed* [2010] UKSC 2 [199] (Lord Brown).
[62] *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin).
[63] ibid [8].
[64] ibid. See also *Secretary of State for the Home Department v BF* [2012] EWHC 1718 (Admin) [15] (McCombe J); *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin) [24] (Lloyd Jones LJ).
[65] David Anderson describes the change from reasonable suspicion under the PTA to reasonable belief under s 3 of TPIMA as being 'one of real significance': *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) para 5.11.
[66] Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2011) para 29. Lord Carlile's successor, David Anderson, further confirmed that his own examination of the relevant files also pointed to 'a similar conclusion' in relation to the control orders made in 2011: *Final Report* (n 65) para 5.12.
[67] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-2012, HL 180, HC 1432) paras 1.8-1.9.
[68] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571) para 1.14.

public and 'ensuring that there is an appropriate safeguard' for the proper use of the TPIM powers.[69] Indeed, imposing a higher threshold on TPIMs may serve to limit their utility as preventive measures, and could therefore potentially prove detrimental to national security.[70] David Anderson, the independent reviewer of the TPIM Act's operation,[71] has, however, recommended that the feasibility of requiring involvement in terrorism-related activity to be proved to the civil standard should be kept under careful review, with a view to possible future legislative amendment.[72]

i. Schedule 1: 'Terrorism Prevention and Investigation Measures'

The Government claims that one of the 'significant improvements'[73] of TPIMs over control orders is that the new regime involves a 'clearly defined, less intrusive and more focused' set of restrictions.[74] PTA, s 1(4) specified 16 obligations that could be imposed under control orders. This list, however, was only illustrative, and it was reported by Lord Carlile that up to 25 types of measures were actually used under non-derogating orders.[75] In contrast, the 12 types of 'measure' that can be imposed by a TPIM notice are exhaustively listed in sch 1 to the 2011 Act.[76]

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[69] Government response to *Joint Committee on Human Rights, Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571), letter from James Brokenshire to Dr Hywel Francis (14 November 2011) 6.

[70] For example, in his 2012 Report on the PTA, David Anderson, stated that it was his 'firm impression' that the balance of probabilities test would not have been met in all control order cases, and that to impose the civil standard on TPIMs would therefore have carried 'a tangible cost in terms of damage to national security': *Final Report* (n 65) para 5.14.

[71] TPIMA, s 20.

[72] David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) 101 and paras 11.47-11.52. See also Home Office, *Government Response to the Report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2012* (Cm 8614, 2013) 8; David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2014) paras 6.16-6.18.

[73] Home Office, *Government Reply to the Sixteenth Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432: Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (Cm 8167, 2011) 1.

[74] ibid. See also Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41.

[75] See Lord Carlile, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2010) para 21; Lord Carlile, *Sixth Report* (n 66) para 19.

[76] TPIMA, sch 1, pt 1.

Whilst there are strong similarities between many of the restrictions contained in sch 1 and those that were normally included in control orders, in respect of certain key measures, there are some important differences. The first notable change relates to the 'overnight residence measure'.[77] This provision, which replaces the 'curfew' power which existed under the PTA,[78] delivers on the *Counter-Terrorism Review's* promise to end the use of forced relocation and lengthy curfews.[79] Under this measure, an individual may be required to reside at their own residence, or, if they do not have one, premises in an 'appropriate'[80] or 'agreed'[81] locality, and can be required to remain there 'overnight'.[82] The Act itself does not stipulate what period 'overnight' extends to,[83] however, in *BM*,[84] Collins J held that it would be appropriate to treat it as being the hours between which most people would regard it as reasonable to think that people might be at home, thus 'overnight' would not stretch beyond the period 21:00-07:00.[85] Contrary to this pronouncement, a 12:00-8:00 residence requirement was subsequently approved by Mitting J in *AM*,[86] suggesting that there remains some flexibility in how 'overnight' can be interpreted in this context.[87] The case law to date therefore indicates that any 'overnight residence measure' in a TPIM notice may not exceed 10 hours and is restricted to the hours of 'night', whereas a 16-hour curfew, capable of operating in daytime, could be imposed under a non-derogating control order. However, as the average control

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[77] ibid sch 1, para 1.
[78] PTA, s 1(5).
[79] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41.
[80] TPIMA, sch 1, para 1(4) provides that an 'appropriate locality' is: (a) a locality in the United Kingdom in which the individual has a residence; (b) if the individual has no such residence, a locality in the United Kingdom with which the individual has a connection; (c) if the individual has no such residence or connection, any locality in the United Kingdom that appears to the Secretary of State to be appropriate.
[81] ibid Sch 1, para 1(5): An "agreed locality" is a locality in the United Kingdom which is agreed by the Secretary of State and the individual.
[82] TPIMA, sch 1, para 1.
[83] During the parliamentary debates on the TPIM Bill, Theresa May stated that a period of 8-10 hours was considered to be a 'normal overnight residence': HC Deb 26 January 2011, vol 522, col 324.
[84] *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin).
[85] ibid [52]. See also *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin) [64] (Lloyd Jones LJ).
[86] *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (Admin) [26].
[87] See *Secretary of State for the Home Department v BF* [2012] EWHC 1718 (Admin). The overnight residence measure imposed by BM's TPIM notice required him to remain at his home between 23:00-5:20.

order curfew in the years 2009-2011 was 12 hours or less,[88] and normally applied during night time, and the average for overnight residence requirements under TPIMs in 2012 and 2013 were 9.4 hours[89] and 9.2 hours[90] respectively, the actual contrast between the regimes in terms of 'curfews' appears to be quite modest.

A more substantive difference between TPIMs and control orders results from the termination of the Home Secretary's power to forcibly relocate suspects.[91] Relocation, though highly controversial, was said by the police to be one of the most useful measures available for managing the risk posed by suspects under control orders,[92] and was assessed by David Anderson to have been 'effective in disrupting terrorist networks ... and [reducing] the risk of abscond'.[93] Having been condemned by Lord Macdonald as 'thoroughly offensive'[94] and 'utterly inimical to traditional British norms',[95] the decision was taken on civil liberties grounds to exclude the power from the TPIM regime.[96] Ensuing concerns regarding a possible increase in risk due to the loss of the ability to relocate were,[97] however, partially assuaged by the promise of substantial additional funding for the police and security service to enhance their surveillance capabilities.[98] Another noteworthy difference between the regimes relating to geographical restrictions is that, whilst controlees could be confined to a designated area through the imposition of geographical boundaries on their movement,[99] under a TPIM notice, an individual can only be excluded from entering specified places or

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[88] See chapter 4 of this thesis.
[89] David Anderson, *First Report* (n 72) para 5.18. See also Annex 3 (p 114).
[90] David Anderson, *Second Report* (n 72) 70.
[91] TPIMA, sch 1, paras 1(3), (4) and (5).
[92] PBC Deb (Bill 193) 21 June 2011, col 6 (Deputy Assistant Commissioner, Stuart Osborne).
[93] David Anderson, *First Report* (n 72) para 5.7. See also David Anderson, *Final Report* (n 65) para 5.21.
[94] Lord Macdonald, *Report* (n 12) 12 (para 22).
[95] ibid .
[96] See Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 39; David Anderson, *Final Report* (n 65) para 11.32.
[97] See PBC Deb (Bill 193) 21 June 2011, cols 9-10 (Deputy Assistant Commissioner, Stuart Osborne); HL Deb 5 October 2011, vol 730, col 1176 (Lord Carlile).
[98] See HC Deb 5 September 2011, vol 532, col 57 (James Brokenshire); David Anderson, *First Report* (n 72) para 5.10.
[99] See PTA, ss 1(4)(f), (g).

areas. An 'exclusion measure'[100] may, for example, impose restrictions on an individual entering particular streets or localities where their associates live, or types of areas or places, such as airports, ports, and international railway stations, or internet cafes or mosques.[101]

Certain other measures imposable under TPIM notices are also somewhat less stringent than the comparable obligations that were available under control orders. Restrictions on association and communication with others, for example, are relaxed. Pursuant to PTA, s 1(4)(d), contact with all 'other persons' could be restricted by a control order.[102] In practice, obligations tended to prohibit all visitors to the controlee's home, and all pre-arranged meetings with non-approved persons outside their residence, without prior Home Office authorisation. In contrast, under an 'Association measure' in a TPIM notice,[103] requirements for prior permission or notification in respect of an individual's association or communication with others must be formulated in more limited terms by reference to 'specified persons' or 'specified descriptions of persons'.[104]

Where control orders could impose a ban on all electronic communications, controlees often being prohibited from using or possessing mobile phones, computers, or any other equipment capable of connecting to the internet,[105] a minimum level of permitted access is mandatory under the 2011 Act.[106] Therefore, whilst an 'Electronic communications device measure' may restrict a suspect's possession or use of electronic devices,[107] they must be

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[100] TPIMA, sch 1, para 3.
[101] See Explanatory Notes to the Terrorism Prevention and Investigation Measures Act 2011, para 47; HL Deb October 5 2011, vol 730, col 1201 (Lord Henley).
[102] PTA, s 1(4).
[103] TPIMA, sch 1, para 8.
[104] ibid sch 1, para 8(2). The 'specified descriptions of persons' may, however, be defined in broad terms, for example, 'persons living outside the UK'. See Explanatory Notes to the Terrorism Prevention and Investigation Measures 2011, para 53.
[105] PTA, s 1(4)(a).
[106] TPIMA, sch 1, para 7(3).
[107] ibid sch1, para 7(1). Sch 1, para 7(5)(a) provides that an 'electronic communication device' is (a) device that is capable of storing, transmitting or receiving images, sounds or information by electronic means; (b) a component part of such a device; or (c) an article designed or adapted for use with such a device (including any disc, memory stick, film or other separate article on which images, sound or information may be recorded).

allowed to possess and use a fixed-line telephone, a computer with access to the internet by fixed-line connection, and a mobile phone that does not provide internet access.[108] Although it may be hoped that this change could enhance opportunities for evidence gathering,[109] as Walker and Horne suggest, it is likely that 'suspects will remain circumspect in their communications in the expectation of ongoing surveillance.'[110]

As regards the remaining 'measures' set out in Sch 1 - headed, 'travel',[111] 'movement directions',[112] 'financial services',[113] 'property',[114] 'work or studies',[115] 'reporting',[116] 'photographs',[117] and 'monitoring'[118] - these provide for restrictions which are, for the most part,[119] remarkably similar to those that were often included in control orders. So, whilst some of the measures that can be applied under TPIM notices appear less onerous than the equivalent control order obligations, there is nevertheless considerable continuity between the regimes in terms of the restraints the Home Secretary may impose on a suspect for purposes connected with preventing or restricting their involvement in terrorism-related activity.

ii. The 'Investigation' Element of TPIMs

One of the *Counter-Terrorism Review's* principal criticisms of control orders was that they made the prospect of prosecuting and convicting controlees 'less not more likely'.[120] Indeed, as discussed in chapter 3, control orders proved to be manifestly ineffective as an aid to the

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[108] ibid sch 1, para 7(3).
[109] See Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41 (para 24).
[110] Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigation Measures Act 2011: One Thing But Not Much the Other?' (2012) 6 Criminal Law Review 421, 425. See also PBC Deb (Bill 193) 23 June 2011, col 64 (Tom Brake).
[111] TPIMA, sch 1, para 2.
[112] ibid sch 1, para 4.
[113] ibid sch 1, para 5.
[114] ibid sch 1, para 6.
[115] ibid sch 1, para 9.
[116] ibid sch 1, para 10.
[117] ibid sch 1, para 11.
[118] ibid sch 1, para 12.
[119] The financial services measure, for example, provides for a greater degree of freedom in relation specified financial services, such as bank accounts, than was often the case under control orders. See Walker and Horne, 'The Terrorism Prevention and Investigation Measures Act 2011' (n 110) 426.
[120] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 37. See also Lord Macdonald, *Report* (n 12) 9.

investigation and prosecution of suspects for terrorist offences.[121] Whilst retaining the preventive function of control orders, the TPIM regime is said to be more firmly 'based on investigation'[122] than its predecessor. Despite TPIMs being expressly designated as investigative measures, as Walker and Horne comment, 'the amendments in favour of investigation in the TPIM Act are limited.'[123]

As with control orders,[124] before imposing, or applying for the making of, a TPIM notice, the Home Secretary is under a statutory duty to consult the Chief Officer of the appropriate police force about the prospects of prosecuting the individual concerned for an offence relating to terrorism.[125] In relation to the consultation duty, the only noteworthy modification to that which existed under the PTA is contained in s 10(5), whereby the Chief Officer is now required to report to the Home Secretary on the ongoing review of the prospects of prosecuting the individual.[126] Alternative schemes designed to ensure a closer link between TPIMs and criminal investigation were put forward by the Lord Macdonald[127] and the JCHR,[128] both of whom expressed concerns that the new regime did not go far enough to 'bring the restrictions back into the domain of criminal due process.'[129] These proposals were, however, rejected by the Government, which maintained that the commitment to

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[121] David Anderson, *Final Report* (n 65) para 3.52
[122] PBC Deb (Bill 193) 23 June 2011, cols 87 (James Brokenshire). See also Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41.
[123] Walker and Horne, 'The Terrorism Prevention and Investigation Measures Act 2011' (n 110) 429.
[124] See PTA, s 8(2).
[125] TPIMA, ss 10(1), (2). See also ss 10(4), (6).
[126] ibid s 10(5)(b). See also Explanatory Notes to the Terrorism Prevention and Investigation Measures Act 2011, para 25.
[127] See Lord Macdonald, *Report* (n 12) 10-11 (para 12).
[128] The JCHR recommended that the preconditions for imposition of TPIMs should be that 'the DPP (or relevant prosecuting authority) is satisfied that: (a) a criminal investigation into the individual's involvement in terrorism-related activity is justified; and (b) none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation.' JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) para 1.24.
[129] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) para 1.21. See Lord Macdonald, *Report* (n 12) 10-11.

prosecution as the overriding priority when dealing with suspected terrorists was 'properly reflected' in s 10 of the Act.[130]

Whilst the greater levels of freedom of communication and association permitted to individuals under TPIMs may mean that the potential for evidence-gathering is slightly improved, the suspect's awareness of the fact that their actions will be closely monitored means that they are unlikely to engage in any significant terrorism-related activity whilst subject to a TPIM notice.[131] Thus, despite the purported shift in emphasis, as David Anderson suggests, like control orders before them, 'it is likely that the chief value of TPIMs ... will ... lie in the "prevention" rather than the "investigation" of terrorism.'[132] Indeed, in its 2014 report, the JCHR concluded that 'epithet "TPIMs" is a misnomer',[133] their inquiry having failed to find any evidence that, in practice, the measures were 'investigative' in any meaningful sense.[134]

iii. Court Proceedings

The court proceedings involved in the imposition[135] and review[136] of TPIMs closely mirror those which applied to non-derogating control orders. Once made, TPIM notices become the subject of a review hearing under s 9,[137] at which the Home Secretary's decisions that the conditions for imposing measures on the individual were and continue to be met are

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[130] Home Office, *Government Reply to the Sixteenth Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432: Legislative Scrutiny: Terrorism Prevention And Investigation Measures Bill* (Cm 8167, 2011) 3-4.

[131] As Deputy Assistant Commissioner, Stuart Osborne, explained in his evidence to the House of Commons' Public Bill Committee, 'individuals who know they are being watched may not readily offer up incriminating evidence': PBC Deb (Bill 193) 21 June 2011, col 13. See also David Anderson, *First Report* (n 72) para 8.15.

[132] David Anderson, *Final Report* (n 65) para 3.52. To date, other than for breaches of certain measures under s 23 of the TPIM Act, no individual has been prosecuted on the basis of evidence discovered during the currency of their TPIM notice: See David Anderson, *First Report* (n 72) para 11.9; *Second Report* (n 72) para 6.3.

[133] JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) para 35.

[134] ibid. The Committee consequently recommended that TPIMs should be referred to as 'Terrorism Prevention Orders', so at to 'reflect the reality that their sole purpose is preventive' (para 35).

[135] See TPIMA, ss 6, 8; PTA, ss 3(1)-(8).

[136] See TPIMA, s 9; PTA, ss 3(10)-(12).

[137] TPIMA, s 9. Pursuant to s 9(3), the review hearing may, however, be discontinued at the subject's request (s 9(3)(a)), or where, after hearing representations, the court decides to discontinue the review (ss 9(3)(b), (4)).

reviewed by the court.[138] In reviewing these decisions, the court 'must apply the principles applicable on an application for judicial review.'[139] This replicates the 'formula' used in s 3 of the PTA,[140] in respect of which it was determined that the High Court, while paying a 'degree of deference'[141] to the Home Secretary's decisions, should give 'intense scrutiny' to the necessity of the obligations imposed by the control order.[142] It is thus accepted that the same high level of scrutiny will be applied by the court when reviewing the Home Secretary's decisions as to the necessity for TPIM notices and their constituent measures under s 9 of the 2011 Act.[143]

As with control orders, the decision to impose a TPIM notice will typically be based on an intelligence case which includes both 'open' and 'closed' material. The use of closed material procedures and Special Advocates in the context of TPIM proceedings are consequently provided for under s 18 and sch 4 of the Act,[144] and in the accompanying procedural rules contained in CPR 80.[145] Though the level of disclosure required to satisfy the individual's right to a fair hearing is not specified by the Act,[146] it was acknowledged by the Government that the 'gisting' requirement articulated in *AF (No 3)*[147] in relation control orders would also

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[138] Section 9(8) specifies that the 'relevant conditions' to be reviewed by the court are conditions A to D which are set under s 3 of the Act.
[139] TPIMA, s 9(2).
[140] PTA, s 3(11). See Walker and Horne, 'The Terrorism Prevention and Investigation Measures Act 2011' (n 110) 434.
[141] *Secretary for State for the Home Department v MB* [2006] EWCA Civ 1140 [64] (Lord Phillips).
[142] ibid [65]. See also *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366.
[143] See Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011) paras 27-28; Explanatory Notes to the Terrorism Prevention and Investigation Measures Act 2011, paras 79-80.
[144] TPIMA, s 18 and sch 4. The appointment of a Special Advocate to represent the interests of the suspect in closed proceedings is provided for under sch 4, para 10.
[145] Civil Procedure Rules, pt 80: Proceedings Under the Terrorism Prevention and Investigation Measures Act 2011.
[146] In their two reports on the TPIM Bill, it was asserted by the JCHR that the legislation should be amended so as to expressly provide that the individual on whom the measures are imposed is entitled to be given the level of information required by the *AF (No 3)* disclosure obligation. See JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) paras 1.33-1.41; *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571) paras 1.18-1.21.
[147] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 [59] (Lord Phillips). The *AF (No 3)* disclosure obligation is discussed in detail in chapter 4 of this thesis.

apply to TPIMs.[148] The application of the disclosure obligation derived from *AF (No 3)* to determining the Article 6 compliance of TPIM proceedings has subsequently been unequivocally confirmed by the High Court in both *BM*[149] and *CF*.[150]

iv. TPIMs and Human Rights

As discussed above, in certain respects, the restrictions that can be imposed under TPIM notices are appreciably less severe than those that could be included in control orders. In the ECHR Memorandum[151] which accompanied the legislation, it is therefore asserted that, as control orders 'operated compatibly'[152] with the Convention, the Government accordingly considers the TPIM regime, which includes a greater range of safeguards and provides for the imposition of less intrusive measures,[153] to be ECHR compliant.[154]

While control orders were frequently challenged on the basis that they infringed the controlee's right to liberty, due to a residence requirement under a TPIM being limited to 'overnight',[155] it is very unlikely to engage Article 5.[156] Indeed, in light of the case law on curfews under non-derogating orders,[157] being confined to a specified residence for a maximum of 10-hours[158] will, as the ECHR Memorandum states, 'fall well short of the "grey

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[148] See Government response to *Joint Committee on Human Rights, Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571), letter from James Brokenshire to Dr Hywel Francis (14 November 2011) 7-8; HC Deb 5 September 2011, vol 532, cols 105-106 (Lord Henley). See also Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011) para 38.

[149] *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin) [21] (Collins J).

[150] *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin) [27] (Wilkie J).

[151] Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011).

[152] ibid para 2.

[153] ibid para 2. These safeguards include a time limit on TPIMs and also a higher threshold for imposing the restrictions (para 2).

[154] ibid paras 2, 18. A statement under HRA, s 19(1)(a) was accordingly signed by the Home Secretary declaring that, in her view, the provisions contained in the TPIM Bill were compatible with the Convention rights.

[155] TPIMA, sch 1, para 1.

[156] See Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011) para 20.

[157] See *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E* [2007] UKHL 47; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; and *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin). For further discussion, see chapter 4 of this thesis.

[158] See *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin) [52] (Collins J).

area" ... identified in the control order context'.[159] Whilst it is possible that the cumulative impact of an overnight residence measure, along with other restraints on movement, association and communication, could amount to a deprivation of liberty,[160] given the reduced stringency of the restrictions available under sch 1, it appears doubtful that, even in combination, the measures imposed by a TPIM notice will breach Article 5.[161]

Although the Government has expressed its commitment to ensuring that TPIM proceedings operate compatibly with Article 6,[162] given the regime's reliance on closed evidence, it is anticipated that challenges relating to the level of disclosure will be a prominent feature of future litigation on TPIMs.[163] In addition to those concerning whether there has been sufficient 'gisting' to satisfy Article 6, the nature of the restrictions that can be imposed under TPIMs means that challenges focusing on their impact on the qualified rights contained in Articles 8-11 ECHR,[164] and the necessity and proportionality of particular measures,[165] are also likely to be raised in many of the cases that arise under the regime.

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[159] Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011) para 23. In *Secretary of State for the Home Department v AP* [2010] UKSC 24, Lord Brown explained that, in the context of control orders, a "grey area" existed between 14-hour and 18-hour curfew cases, where restrictions other than mere confinement are to be taken into account in determining whether there is a deprivation of liberty [2].

[160] Pursuant to *Secretary of State for the Home Department v AP* [2010] UKSC 24, these restrictions may be factored into a holistic evaluation of whether a deprivation of liberty arises.

[161] See Home Office, *Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR Memorandum* (2011) para 23. See also David Bonner, 'Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience' (2013) 19(1) European Public Law 97, 115-116.

[162] See, for example, Home Office, *Government Response to the Report by David Anderson QC: Seventh Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Cm 8443, 2012) 7.

[163] Walker, for example, suggests that the level of gisting is likely to constitute 'a prime bone of contention' in relation to TPIMs: Walker, 'The Reshaping of Control Orders in the United Kingdom' (n 33) 168. See also *Mohamed Ahmed Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559.

[164] See, for example, *BF v Secretary of State for the Home Department* [2013] EWHC 2329 (Admin) [27].

[165] See *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin), in which the 'association measure' contained in a TPIM notice was held by Wilkie J to be disproportionate, as whilst the restrictions imposed had a 'chilling effect' on CF's participation in student life, they lacked 'any, apparent, beneficial effect on national security' [97]. See also *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (Admin) [30].

v. TPIMs: Duration and Expiry

In contrast to control orders,[166] TPIM notices are subject to a maximum time-limit of two years.[167] According to the *Counter-Terrorism Review*, this limit is designed to emphasise that the measures constitute 'a short term expedient',[168] rather than a long term or adequate alternative to prosecution.[169] Pursuant to s 5,[170] a TPIM notice will initially remain in force for a year,[171] and can be extended for an additional year only once.[172] At the expiry of this two year period, a subsequent TPIM notice can be made against an individual only where 'new' terrorism-related activity has occurred since the imposition of the original notice.[173]

The decision to restrict the duration of TPIM notices to two years has received the support of both Lord Carlile[174] and David Anderson,[175] the latter describing this limit as 'the boldest and most significant aspect of the change from control orders to TPIMs'.[176] The principal benefits which are perceived to accompany the two-year maximum are that it precludes the indefinite 'warehousing' of suspects under preventive orders,[177] and gives 'a number of healthy incentives to the authorities ... to devote serious and constructive thought to TPIM exit strategies',[178] such as prosecution, deportation or de-radicalisation.[179]

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[166] Although non-derogating control orders lasted for a period of 12 months (PTA, s 2(4)(a)), providing the criteria in s 2(6) of the PTA were met, there was no limit on the number of times an order could be renewed by the Home Secretary. For further discussion, see chapters 3 and 4 of this thesis.
[167] TPIMA, s 5(3)(b).
[168] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41 (para 24).
[169] ibid.
[170] TPIMA, s 5.
[171] ibid s 5(1)(b).
[172] ibid s 5(3). Section 5(3)(a) provides that a TPIM notice may be extended for a second year if conditions A, C and D under s 3 of the Act are met.
[173] ibid ss 3(2), (6)(c). See also Explanatory Notes to the Terrorism Prevention and Investigation Measures Act 2011, para 63.
[174] See Lord Carlile, *Sixth Report* (n 66) para 55.
[175] David Anderson, *First Report* (n 72) para 11.37.
[176] ibid para 11.33.
[177] One of Lord Macdonald's main criticisms of control orders was that controlees became 'warehoused far beyond the harsh scrutiny of due process', as a result of which, some terrorist activity would 'undoubtedly' remain unpunished by the criminal law: Lord Macdonald, *Report* (n 12) 10 (para 11).
[178] David Anderson, *First Report* (n 72) para 11.37.
[179] See David Anderson, *Final Report* (n 65) para 6.34

From a national security perspective, however, the two-year time limit may be regarded as a cause for concern. As discussed in Chapter 4, in respect of at least one-third of all controlees, the government regarded it as necessary to maintain their control orders beyond two years. Despite the fact that TPIM subjects are likely to pose an equivalent type and level of risk,[180] they cannot be subjected to TPIMs for more than two years, even if it is believed they remain a threat beyond that period. Further, given the maximum duration of notices, it appears unlikely that suspects will engage in 'new' incriminating activity whilst under TPIMs, but will instead 'keep their heads down',[181] knowing that the measures will be lifted within two years. Although it is expected that individuals who are assessed to pose a continuing risk at the expiry of their TPIM notice will remain the subject of surveillance,[182] this 'begins and ends with observation'.[183] Indeed, as the *Counter-Terrorism Review* concluded, surveillance does not of itself prevent or disrupt a suspect's activities, therefore it cannot mitigate risk in the same manner, or to the same extent, as measures like control orders or TPIMs.[184]

Whilst the two-year limit may be viewed as 'an acceptable compromise'[185] between liberty and security, it creates a situation where individuals who the Government is unable to prosecute or deport within this time-frame, but who remain radicalised and potentially liable to re-engage in terrorism-related activity at its expiration, will become free of constraint. Although the Government has stated that 'comprehensive and detailed plans' have been developed for managing former TPIM subjects,[186] the fact that the TPIM notices imposed on

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[180] Under TPIMA, s 4(1), the 'terrorism-related activity' upon which the decision to impose a TPIM notice is based is defined in identical terms to that which justified the making of a control order under s 1(9) of the PTA. See also David Anderson, *First Report* (n 72) para 11.33.
[181] David Anderson, *Oral Evidence Before the Joint Committee on Human Rights, Review of the Terrorism Prevention and Investigation Measures Regime* (19 March 2013) 6. See also David Anderson, *Final Report* (n 65) para 6.33.
[182] See Oral evidence of James Brokenshire, *Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Oral Evidence* (2012), answers to questions 232-237.
[183] David Anderson, *Final Report* (n 65) para 6.35
[184] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 38 (para 13).
[185] David Anderson, *First Report* (n 72) para 11.38. See also Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects' (n 48) 230.
[186] Home Office, *Government Response to the Tenth Report Of Session 2013-14 from the Joint Committee On Human Rights HL Paper 113/HC 1014: Post-Legislative Scrutiny: Terrorism Prevention*

seven suspects, including those against whom the allegations 'are at the highest end of seriousness, even by the standards of international terrorism',[187] expired between 2 January and 10 February 2014,[188] has understandably engendered considerable disquiet.[189]

vi. Review and Renewal of the TPIM Regime

A further difference between the regimes is that, while the control order powers were subject to annual parliamentary renewal,[190] the TPIM powers require renewal only after being in operation for five years.[191] Although described as 'a bit of a fiction'[192] by Lord Carlile, the JCHR argued that the annual review and renewal of control orders by Parliament represented an important safeguard,[193] and therefore expressed its disappointment at the Government's reluctance to expose TPIMs to 'the rigours of formal and regular post-legislative scrutiny which annual renewal entails.'[194] The House of Lords' Select Committee on the Constitution, meanwhile, questioned whether it was 'constitutionally appropriate to

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And Investigation Measures Act 2011 (Cm 8844, 2014) 7. These plans are said to include consideration by the police of 'Prevent interventions ... to limit the impact of radicalisation', identifying stabilising factors, including employment and education, to assist the individual to move away from extremism, and engaging the probation services to work with subjects in the final months of their TPIM notices (p 7).

[187] David Anderson, *First Report* (n 72) para 11.36. A profile of each of the TPIM subjects, compiled from the open court judgments, is provided at para 4.12 of the Report. See also David Anderson, *Second Report* (n 72) paras 3.6-3.7.

[188] The TPIM notices against CF, CD, BM, CE, AM, BF and AY, all expired between these dates. See David Anderson, *Second Report* (n 72) para 4.20.

[189] See Home Affairs Committee, *Counter Terrorism* (HC 231, 2014) para 105; Intelligence and Security Committee, *Annual Report 2012-2013* (HC 2012-13, 547) 17; JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) 79; Nigel Morris, 'Out of Control: The Verdict on May's Suspect Policy' *The Independent* (23 January 2014) <www.independent.co.uk/news/uk/politics/out-of-control-the-verdict-on-mays-terror-suspect-policy-9078159.html> accessed 25 January 2014.

[190] PTA, s 13.

[191] TPIMA, s 21(1). The Home Secretary's TPIM powers expire five years after the date on which the 2011 Act was passed, and will therefore require renewal in December 2016. Pursuant to s 21(2)(c), the Home Secretary may, after consulting the Independent Reviewer, the Intelligence Services Commissioner, and the Director General of the Security Service (s 21(3)), renew the powers for a period not exceeding 5 years by order made by statutory instrument. The renewal order must also be approved by affirmative resolution of both parliamentary Houses (ss 13(4)-(6)).

[192] PBC Deb (Bill 193) 21 June 2011, col 23.

[193] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) para 1.44.

[194] ibid para 1.45. See also Joint Committee on Human Rights, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571) para 1.27.

place on a permanent basis such a scheme of extraordinary executive powers.'[195] The Government nevertheless maintained that renewal every five years is appropriate, as, in line with the Fixed-term Parliaments Act 2011, this will ensure that 'each new Parliament will have the opportunity to debate ... [TPIMs] in the context of the situation at the time'.[196]

Aside from being one respect in which the TPIM Act is 'less liberal'[197] than the control order system it replaces, the absence of a requirement for annual parliamentary review and renewal also serves to emphasise the extent to which preventive counter-terrorism measures have become normalised under UK law.[198] Indeed, the Coalition Government has stated that it believes the TPIM regime establishes a framework which 'ought to be able to operate on a stable basis indefinitely.'[199] However, as was the case with control orders,[200] annual reviews of the Act will be carried out by the Independent Reviewer of Terrorism Legislation,[201] whilst s 19 places a duty on the Home Secretary to make quarterly reports to Parliament on the exercise of the TPIM powers,[202] thus ensuring that the regime's operation remains subject to some measure of external scrutiny.

IV. Enhanced Terrorism Prevention and Investigation Measures

In conjunction with recommending that control orders should be repealed and replaced by less intrusive measures,[203] the *Counter-Terrorism Review* concluded that 'exceptional

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[195] House of Lords Select Committee on the Constitution, *Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 198) para 13.
[196] *Government response to Joint Committee on Human Rights, Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)* (2010-2012, HL 204, HC 1571), letter from James Brokenshire to Dr Hywel Francis (14 November 2011) 9.
[197] David Anderson, *Final Report* (n 65) para 5.9. See also Liberty, *Liberty's Second Reading Briefing on the Terrorism Prevention and Investigation Measures Bill* (2011) para 29.
[198] See Helen Fenwick, 'Designing ETPIMs Around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?' (2013) 76(5) Modern Law Review 876, 903.
[199] Security Minister, Baroness Neville-Jones, oral evidence before the JCHR, 8 February 2011: JCHR, *Counter-Terrorism Review: Oral Evidence* (2010-2012, HC 797-i) Q 50. See also Home Office, *Government Reply to the Sixteenth Report from the Joint Committee on Human Rights Session 2010-12 HL Paper 180, HC 1432: Legislative Scrutiny: Terrorism Prevention And Investigation Measures Bill* (Cm 8167, 2011) 12.
[200] See Prevention of Terrorism Act 2005, ss 14(2)-(6).
[201] TPIMA, s 20. See David Anderson, *First Report* (n 72) and *Second Report* (n 72).
[202] ibid s 19. The Home Secretary was subject to the same duty in respect of control orders under s 14(1) of the PTA.
[203] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 41 (para 23).

circumstances' may arise in the future where it could be necessary for the Government to seek Parliamentary approval[204] for more restrictive measures.[205] In order to provide for such an eventuality, the Government therefore prepared and published the Draft Enhanced Terrorism Prevention and Investigation Measures Bill.[206]

The Draft Bill makes provision for a separate, parallel system of Enhanced Terrorism Prevention and Investigations Measures - ETPIMs - that would run alongside the existing TPIM regime.[207] If enacted, the ETPIM powers would remain in force for one year,[208] but may be renewed for up to a further 12 months by order.[209] As there is 'substantial overlap'[210] between TPIMs and ETPIMs, and 'much correlation'[211] between the manner in which the two systems operate, to avoid repetition, the following discussion will therefore focus only on the substantive differences between the two schemes.

The first key distinction between TPIMs and ETPIMs are that the latter constitute 'emergency measures' which are designed to be used in 'exceptional circumstances'.[212] While the *Counter-Terrorism Review* contemplated these measures being used only in the event of 'a

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[204] The enactment of these 'exceptional emergency measures' would require the agreement of both Houses of Parliament. When Parliament is in recess, however, ss 26-27 of the Terrorism Prevention and Investigation Measures Act 2011 provide a power for the Home Secretary to introduce by order ('a temporary enhanced TPIM order') powers to impose Enhanced-TPIM notices.

[205] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 43 (para 28).

[206] Home Office, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (Cm 8166, 2011), hereafter referred to as the 'Draft Bill'. To enable pre-legislative scrutiny, the *Draft Bill*, which consists of 12 clauses and 2 schedules, was published on 1 September 2011. For discussion of the issues relating to the use of draft emergency legislation, see Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Report* (2012-13, HL 70, HC 495) paras 27-38.

[207] ETPIMs and TPIMs are separate entities, and an individual cannot be subject to both types of notice simultaneously. See Draft Enhanced Terrorism Prevention and Investigation Measures Bill, cl 4(1). See also Explanatory Notes to the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, para 13.

[208] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, cl 9(1). The 12 month period would run from the day on which the Act is passed.

[209] ibid cl 9(2)(b)(ii). Before making an order extending the powers beyond the initial 12 months, the Home Secretary is required to consult the Independent Reviewer, the Intelligence Services Commissioner, and the Director General of the Security Services (cl 9(3)).

[210] Home Office, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Memorandum by the Home Office to the JCHR* (2011) para 6.

[211] Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Report* (2012-13, HL 70, HC 495) para 10.

[212] Home Office, *Review of Counter-Terrorism and Security Powers* (n 6) 43.

very serious terrorist risk that cannot be managed by other means',[213] the Draft Bill is unfortunately silent on the circumstances that may prompt its introduction. The lack of clarity on this crucial matter was criticised by the Joint Committee,[214] which, although accepting that it would be 'impossible to define a hard and fast "trigger"',[215] asserted that the Government should set out in unambiguous terms the types of exceptional circumstances that would lead to the Draft Bill being introduced.[216] In response, the Government explained that, whilst it was not possible to provide an exhaustive summary, potential scenarios could include, 'a situation where there was credible reporting pointing to a series of concurrent, imminent attack plots',[217] or, in the wake of a major terrorist incident, where there was a prospect of further attacks.[218] However, while such circumstances may be viewed as appropriate 'triggers', as Walker suggests, rather than the nature of the threat, 'what really should be focused upon is ... the capability of the agencies dealing with it and whether they are being overwhelmed.'[219]

Commensurate with their more onerous character, a higher standard of proof applies to ETPIMs than regular TPIMs: thus the Home Secretary must be satisfied 'on the balance of probabilities' that the individual is, or has been, involved in terrorism-related activity.[220] The only other difference in the test for imposing an 'enhanced TPIM notice' is that some or all of the measures imposed must be ones that could not be included in a standard TPIM

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[213] ibid 43 (para 27). See also Explanatory Notes to the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, para 6.
[214] The Joint Committee on the Draft Enhanced Prevention and Investigation Measures Bill was appointed by the House of Commons and the House of Lords to examine the Draft Bill. The Committee delivered its Report in November 2012.
[215] Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Report* (2012-13, HL 70, HC 495) para 23.
[216] ibid. See also HC Deb 5 September 2011, vol 532, cols 105-6 (James Brokenshire).
[217] Home Office, *Government Response to the Report from the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Session 2012-13 HL 70, HC 495* (Cm 8356, 2013) para 2.
[218] ibid.
[219] Clive Walker, 'The Reshaping of Control Orders in the United Kingdom' (n 33) 155.
[220] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, cl 2(1). Cf Terrorism Prevention and Investigation Measures Act 2011, s 3(1).

notice.[221] ETPIMs are subject to the same two-year limit as TPIMs.[222] However, as time spent on a TPIM does not count towards that served on an ETPIM,[223] by means of consecutive notices, measures could potentially be maintained against an individual for up to four years.[224]

While sch 1 of the Draft Bill replicates much of sch 1 to the TPIM Act, a number of the measures that are available to the Home Secretary under ETPIMs are considerably more stringent than those that can be imposed by regular TPIMs. In contrast to TPIMs, under an ETPIM notice an individual can be required to relocate to 'any locality' in the UK,[225] and can be confined to their residence between specified hours of the day, this period not being limited to 'overnight'.[226] ETPIMs may also include geographical boundaries on movement which prohibit an individual from leaving a defined area;[227] total bans on the possession or use of electronic communication devices;[228] and a requirement not to associate or communicate with any person without the Home Secretary's prior permission.[229]

As is acknowledged in the Home Office Memorandum to the JCHR, 'there are similarities'[230] between ETPIMs and non-derogating control orders. Although the Draft Bill exhaustively lists the types of measures available under ETPIMs,[231] these include some of the harshest

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[221] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, cl 2(4)(b). In all other respects, cl 2 replicates s 3 of the Terrorism Prevention and Investigation Measures Act 2011.
[222] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, cl 3(1)(a).
[223] ibid cl 4.
[224] ibid cls 2(2), (6). For further discussion, see Helen Fenwick, 'Designing ETPIMs Around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?' (2013) 76(5) Modern Law Review 876, 887-888.
[225] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1, para 1(3)(a). Cf Terrorism Prevention and Investigation Measures Act 2011, sch 1, paras (3)-(5).
[226] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1, para 1(2)(c). Cf Terrorism Prevention and Investigations Measures Act 2011, sch 1, para 1(2)(c).
[227] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1, para 4: 'Movement restrictions measure'. Cf Terrorism Prevention and Investigations Measures Act 2011, s 1(2)(c).
[228] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1, para 8: 'Electronic communication device measure'. Cf Terrorism Prevention and Investigations Measures Act 2011, sch 1, para 7.
[229] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1, para 9: 'Association measure'. Cf Terrorism Prevention and Investigations Measures Act 2011, sch 1, para 8.
[230] Home Office, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Memorandum by the Home Office to the JCHR* (2011), para 15.
[231] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, sch 1.Cf Prevention of Terrorism Act 2005, s 1(4).

conditions imposed under non-derogating orders, such as forced relocation and curfews of up to 16-hours.[232] Further, given the stringency of the measures included in sch 1, it appears unlikely that ETPIMs will be any less inimical to the prospects of prosecuting suspects than control orders were considered to be. Nevertheless, certain important differences, including the raised standard of proof and the two-year time limit, mean that ETPIMs are not an outright facsimile of non-derogating control orders.[233]

In 2013, David Anderson reported that the police, Government and agencies had expressed to him that they were, at present, 'content with the powers that they have',[234] and that he had not detected any enthusiasm for the Draft Bill's enactment.[235] Whilst a significant escalation in the terrorist threat to the UK could evidently change things, it may be hoped that, like derogating control orders before them,[236] ETPIMs remain 'contingency powers' that it never proves necessary to invoke.

V. TPIMs: Usage to Date

As is clear from the foregoing analysis, there are manifest similarities between the regimes created by the PTA and TPIMA. Despite these parallels, the raised standard of proof, less extensive powers relating to curfews, the preclusion of involuntary relocation, and their two-year maximum duration, means that, in certain respects at least, TPIMs may justifiably be described as 'a different animal from control orders.'[237]

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[232] Whilst no maximum curfew length is specified in the Draft Bill, the accompanying Explanatory Notes indicate that, in accordance with the case law on control orders, it would be possible to impose a curfew of up to 16-hours under ETPIMs: Explanatory Notes to the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, para 24.

[233] See Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill: Report* (2012-13, HL 70, HC 495) para 15. See, however, the contrary assessment of Liberty: Sophie Farthing, 'Anyone for TPIMs – Control Orders With a Twist?' (2011) <www.liberty-human-rights.org.uk/news/2011/anyone-for-tpims-control-orders-with-a-twist-.php> accessed 2 October 2013.

[234] David Anderson, *First Report* (n 72) para 3.14.

[235] ibid.

[236] See chapter 3 of this thesis.

[237] David Anderson, *Final Report* (n 65) para 6.31.

To date, there have been a total of ten TPIM subjects, all but one of these individuals having been transferred directly from a control order in early 2012.[238] Due to the statutorily mandated expiry of seven notices,[239] the absconding of two suspects,[240] BX[241] and CC,[242] and the imprisonment of DD for breach of his TPIM measures,[243] no TPIM notices have been in force since 10 February 2014.[244] The dearth of TPIM notices, combined with fact that there has already been two well-publicised absconds, led the JCHR to conclude in its 2014 report that, 'TPIMs may be withering on the vine as a counter-terrorism tool of practical utility.'[245] In contrast, whilst acknowledging that the absconds evidently demonstrate that 'TPIMs cannot reduce the risk from their subjects to zero',[246] David Anderson submits that the sparing use of TPIMs, along with the current absence of extant notices, should be viewed as 'a matter of pride rather than regret',[247] as this is, in part, attributable to the effective deployment of other, preferable, measures, including prosecution and deportation.[248] However, had these preferred means of dealing with terrorist suspects proven less successful, it is very possible that additional TPIM notices would have been issued. Indeed, MI5 are said to have considered the possibility of imposing TPIM notices in several dozen cases during 2012-13.[249] Thus, despite the system having 'reached a

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[238] David Anderson, *Second Report* (n 72) 2. DD was served with a TPIM notice in October 2012 (para 3.1).
[239] ibid para 4.20. The TPIM notices imposed on CF, CD, BM, CE, AM, BF and AY all expired between 2 January and 10 February 2014 due to reaching their two-year limit.
[240] These, along with the seven control order absconds, are discussed in Chapter 6 of this thesis.
[241] BX (Ibrahim Magag) absconded on 26 December 2012. BX's TPIM notice was allowed to lapse in January 2013 at the end of its first year. See David Anderson, *Second Report* (n 72) para 4.16.
[242] CC (Mohammed Mohamed) absconded on 1 November 2013. CC's TPIM notice was subsequently revoked in December 2013. See David Anderson, *Second Report* (n 72) para 4.14.
[243] DD's TPIM notice was revoked after he was imprisoned following conviction for breaches of his TPIM notice. See David Anderson, *Second Report* (n 72) paras 3.4, 5.5. It is likely that DD' TPIM notice will be revived upon his release prison in March/April of 2014.
[244] David Anderson, *Second Report* (n 72) 3. See also HC Deb 27 March 2014, vol 578, cols 49-50 WS (Theresa May).
[245] JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) para 80.
[246] David Anderson, *Second Report* (n 72) para 4.46.
[247] ibid para 4.7.
[248] ibid para 6.7.
[249] ibid para 4.2.

pause',[250] Anderson reports that he has 'detected no sign either from Ministers or from intelligence agencies that the future use of TPIMs has been written off as unlikely.'[251]

Although it is probable that they will continue to be used sparingly, the Government nevertheless asserts that TPIMs constitute an 'important tool' in the armoury of powers available to the police and Security Services for protecting national security.[252] Whether, in light of the available evidence on the operation of the two regimes, it can legitimately be said that control orders were, and TPIMs are, an effective means of protecting the public from a risk of terrorism, will therefore be examined in the following concluding chapter.

[250] ibid 6.1.
[251] ibid para 6.7.
[252] Home Office, *The Government Response to the Tenth Report of Session 2013-14 from the Joint Committee on Human Rights HL Paper 113 / HC 1014: Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (Cm 8844, 2014) 7.

Chapter 6
Conclusions

The central aim of this thesis was to critically examine the UK government's use of anti-terrorism control orders under the Prevention of Terrorism Act 2005, and to assess the effectiveness and human rights compatibility of the regime. Whilst control orders constituted a 'more rational and proportionate'[1] response to the post-9/11 terrorist threat than the previous ATCSA, Part 4 detention scheme,[2] they were nonetheless considered by many to be deeply flawed and an affront to fundamental human rights.[3] While the system initially operated at the outer limits of the rights guaranteed by the ECHR,[4] certain important judicial decisions served to temper a number of its worst excesses.[5] Though the regime remained unpopular throughout its lifespan,[6] control orders did possess three key advantages: they 'had the potential to be ECHR-compliant in a way preventative detention did not';[7] they were 'considerably cheaper than round-the-clock surveillance';[8] and they were 'capable of preventing terrorist activity'.[9]

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[1] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process in Counterterrorism Law and Beyond' (2011) 56(4) McGill Law Journal 863, 877. See also Ed Bates, 'Anti-Terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29(1) Legal Studies 99, 119.

[2] ATCSA, ss 21-23.

[3] See, for example, Amnesty International, *Five Years On: Time to End the Control Orders Regime* (2010); Liberty, *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (2010) 11; Keith Ewing, 'The Futility of the Human Rights Act – A Long Footnote' (2005) 37 Bracton Law Journal 41, 47.

[4] See Helen Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the 'War on Terror' (2010) 63(1) Current Legal Problems 153, 161. See also Susanne Forster, 'Control Orders: Borders to the Freedom of Movement or Moving the Borders of Freedom?' in Marianne Wade and Almir Maljevic (eds) *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer 2009) 354, 365.

[5] See chapter 4 of this thesis.

[6] As was repeatedly emphasised by Lord Carlile in his annual reports, 'nobody, least of all those who have to administer and enforce them, like[d] control orders. In every case alternatives [were] sought if available': *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2010) para 39. See also HL Deb 3 Feb 2010, vol 717, col 194 (Lord West).

[7] David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) para 2.13.

[8] ibid. Constant surveillance is said to be exceptionally expensive, Lord Carlile suggesting that 24/7 surveillance costs between £11 million and £18 million per subject per year: PBC Deb (Bill 193) 21 June 2011, col 28 (Q 83).

[9] ibid.

I. Control Orders: Usage and Effectiveness

Despite predictions that they could potentially affect 'hundreds—thousands, who knows',[10] in practice, sparing use was made of control orders, Lord Carlile confirming that they were rightly reserved for 'very troubling cases'.[11] Between March 2005 and December 2011, a total of 52 suspects were placed under non-derogating orders,[12] of which 24 were British citizens[13] and 28 were foreign nationals.[14]

Table 6.3 Control Orders by Nationality of Controlee[15]

Year	British citizen	Foreign national	Total Number of Orders in Force at Year End[16]
2005	1	8	9
2006	7	9	16
2007	8	6	14
2008	4	11	15
2009	9	3	12
2010	8	0	8
2011	9	0	9

[10] Conor Gearty, 'Human Rights in an Age of Counter-terrorism' (2005) 58(1) Current Legal Problems 25, 43.
[11] Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2011) para 43.
[12] David Anderson, *Final Report* (n 7) para 1.1. Profiles of 42 of the 45 men who were made subject to control orders between March 2005 and December 2009 are provided in Robin Simcox, *Control Orders: Strengthening National Security* (Centre for Social Cohesion 2010).
[13] David Anderson, *Final Report* (n 7) para 3.14. Some of those classified as 'British citizens' possessed dual citizenship.
[14] ibid. Walker submits that the total number of orders in force 'would have been higher and more oriented towards foreign fighters were it not for an aggressive policy of deportations after July 2005': Clive Walker, *Terrorism and the Law* (OUP 2011) 325.
[15] The information in Table 6.3 is compiled from the Home Office statements to Parliament on control order powers made pursuant to s 14(1) of the PTA. See HC Deb 12 December 2005, vol 440, col 131WS; HC Deb 11 December 2006, vol 454, col 41WS; HC Deb 12 December 2007, vol 469, col 30WS; HC Deb 15 December 2008, vol 485, col 83WS; HC Deb 15 December 2009, vol 502, col 109WS; HC Deb 16 December 2010, vol 520, col 124WS; HC Deb 19 December 2011, vol 537, col 143WS.
[16] In keeping with the reporting periods used in the Home Office statements, the 'Year End' figures in Table 6.3 are those which applied on 10 December of each year.

Although the number of orders in force remained relatively low throughout, as the figures in Table 6.3 show, over the course of the regime's lifetime there was a notable shift in the government's use of control orders. Whilst initially most orders were imposed on 'undeportable' foreign nationals, from 2009 onwards they were increasingly used against 'untriable' British suspects.[17] Consequently, at the time of the regime's expiry in 2011, all nine controlees were British citizens.[18]

Though the PTA provided a 'framework to deal with all forms of terrorism',[19] each of the 52 men against whom control orders were made was suspected of involvement in Islamist terrorism.[20] According to the reports of the Independent Reviewers, the majority of controlees were 'very high risk'[21] suspects who were thought to be 'hardened terrorists, actively involved in ... plots in the UK or abroad, or in recruiting for terrorism, terrorism facilitation or terrorism training.'[22] The principal allegation against most other controlees was that they intended to travel overseas for terrorist purposes, such as to fight against coalition forces[23] or undertake terrorist training.[24] In addition, the information contained in the open court judgments reveals that non-derogating orders were used to 'control' a broad spectrum of alleged activities, including the planning of mass-casualty attacks in the UK[25] and

[17] David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013) 3 EHRLR 233, 239.
[18] TPIM notices were served upon all nine of these individuals in early 2012. See David Anderson, *Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) para 4.4.
[19] HC Deb 22 February 2005, vol 431, col 165 (Charles Clarke).
[20] See David Anderson, *Final Report* (n 7) para 1.1. According to David Anderson, no control orders were made against individuals suspected of involvement in Northern Ireland-related terrorism due to 'the difficulty of preventing absconding across the Irish border, together with the undesirable echoes of Exclusion Orders that were controversial in the nationalist community between the 1970s and the 1990s' (*Final* Report, para 4.7).
[21] Lord Carlile, *Sixth Report* (n 11) para 60.
[22] David Anderson, *Final Report* (n 7) para 3.18. See also Lord Carlile, *Sixth Report* (n 11) para 50.
[23] *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin).
[24] David Anderson, *Final Report* (n 7) para 3.18. See also Lord Carlile, *Sixth Report* (n 11) para 50.
[25] AM and AY, for example, were suspected of involvement in the 2006 airline liquid bomb plot (the Overt plot): *Secretary of State for the Home Department v AM* [2009] EWHC 3053 (Admin); *Secretary of State for the Home Department v Y* [2010] EWHC 1860 (Admin). See also *Secretary of State for the Home Department v GG and NN* [2009] EWHC 142 (Admin); *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin).

abroad,[26] the provision of financial, material or logistical support for terrorism-related activity,[27] and attendance at terrorist training camps.[28]

As discussed in chapter 1, for a variety of reasons, accurately assessing the effectiveness of preventive measures like control orders is an exceptionally difficult undertaking.[29] Nevertheless, one of the grounds on which control orders were frequently decried by their critics was that they were 'ineffective'[30] and did little to enhance national security.[31] The most damaging piece of evidence in relation to the efficacy of control orders as a mechanism for protecting the public from a risk of terrorism is the fact that 7 of the 52 controlees absconded from their orders.[32] As was commented by Lord Carlile at the time of the disappearances, 'absconding by persons who [were] or predictably about to be controlees is an embarrassment to the system.'[33] It is, however, important to note that the last of these absconds occurred on 18 June 2007.[34] The absence of any further absconds beyond this date appears to be primarily attributable to increased vigilance on the part of the authorities involved in the monitoring and enforcement of control orders, and also the 'trend away'[35] from the use of light touch orders which did not include curfews or involve forced relocation. In his 2011 report, Lord Carlile consequently opined that, whilst control orders were by no

[26] *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin).
[27] *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin); *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin).
[28] *Secretary of State for the Home Department v AL* [2007] EWHC 1970 (Admin).
[29] See pp 11-17 of this thesis.
[30] See JUSTICE, *Home Office Review of Counter-Terrorism and Security Powers: Written Submissions of JUSTICE* (2010) 8; Liberty, *From 'War' to Law* (n 3) 11; Home Office, *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation* (Cm 8005, 2011) 14.
[31] For example, in Liberty's submission to the *Review of Counter-terrorism and Security Powers* it was asserted that ending control orders would 'not ... have any impact on the security of us all, particularly as the evidence demonstrates that [they] do little to protect us in the first place': Liberty, *From 'War' to Law* (n 3) 11.
[32] David Anderson, *Final Report* (n 7) para 4.19. This equates to a disappearance rate of 13%. Bestun Salim (LL) absconded in August 2006; Zeeshan Siddiqui (AD) in October 2006; AK in January 2007; Ibrahim Adam (AC) and Lamine Adam (AB) in May 2007; and HH in June 2007. Cerie Bullivant (AG), who absconded from his control order on 22 May 2007, subsequently handed himself in to the police on 25 June 2007. See Simcox, *Control Orders* (n 12).
[33] Lord Carlile, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2008) para 23.
[34] HC Deb 21 June 2007, vol 561, col 111WS (Tony McNulty).
[35] David Anderson, *Final Report* (n 7) para 4.16. In addition, in February 2009 new police powers of search and entry designed to aid the monitoring and enforcement of control orders were inserted into the PTA (ss 7A-7C) by CTA 2008, s 78.

means 'failsafe or foolproof',[36] it was 'not a fair criticism to use those absconds of some years ago as evidence against the [system's] current viability'.[37]

It is clear, as was acknowledged by both the Labour[38] and Coalition[39] governments, that from a security perspective, control orders were an imperfect tool that could not entirely eliminate the risk of an individual's involvement in terrorism-related activity.[40] However, from the information provided in the Independent Reviewers' reports, and that which can be gleaned from the voluminous body of case law, it appears that in most cases they were largely effective in either preventing or restricting the controlee's involvement in such activity.[41] Indeed, in his annual reports Lord Carlile consistently maintained that control orders remained 'a necessity for a small number of cases, in the absence of a viable alternative',[42] and that the system represented a 'justifiable and proportional safety valve for the proper protection of civil society'.[43] Similarly, in his 'end of term report' on the regime, David Anderson concluded that there were 'good reasons to believe' that control orders 'had fulfilled their primary function of disrupting terrorist activity',[44] and that they were 'an effective

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[36] Lord Carlile, *Sixth Report* (n 11) para 89.
[37] ibid para 39. In addition, in his 2007 report Lord Carlile submitted that the disappearance of 'a small minority' did not necessarily undermine 'the benefits of the orders in relation to the majority': *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2007) para 59.
[38] See Home Office, *Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (Cm 7797, 2010) para 55. See also HC Deb 21 June 2007, vol 561, col 112WS (Tony McNulty).
[39] See HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 38.
[40] For example, according to Lord Carlile's 2010 report, two controlees continued to associate with extremist groups despite being subject to non-derogating orders: Lord Carlile, *Fifth Report* (n 6) para 44. See also *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin), in which Ouseley J stated, 'I believe, and firmly so, that CD has been involved in terrorism-related activity, although to a markedly reduced extent since the imposition of the Control Order and TPIM' [13].
[41] As David Anderson notes, the proposition that measures like control orders and TPIMs prevent terrorism-related activity must, however, be approached with caution, as it asserts that 'but for the [control order] or TPIM notice, the subject would pose a threat': David Anderson, *First Report* (n 18) para 11.6.
[42] Lord Carlile, *Third Report* (n 33) para 27. See also *Second Report* (n 37) para 7; *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2009) para 37; *Fifth Report* (n 6) para 96; *Sixth Report* (n 11) para 90.
[43] Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) para 61; *Second Report* (n 37) para 59; *Third Report* (n 33) para 76; *Fourth Report* (n 41) para 78; *Fifth Report* (n 6) para 85; *Sixth Report* (n 11) 1.
[44] David Anderson, *Final Report* (n 7) 6. According to Anderson, evidence contained in the closed material indicated that control orders had prevented suspected terrorists from 'travelling overseas,

means of protecting the public from a small number of suspected terrorists who presented a substantial risk to national security',[45] but whom it was not feasible to prosecute or deport. In contrast, due to the nature and stringency of the 'obligations' they imposed, non-derogating orders did not prove useful as a tool for gathering evidence against controlees,[46] nor were they effective as an aid to the investigation and prosecution of terrorism-related crimes.[47]

In assessing the overall effectiveness of control orders in protecting the public from a risk of terrorism, it is also necessary to take into account any counterproductive impacts they may have had. It is well documented that counter-terrorism measures, particularly those which intrude upon individual rights, have the capacity to marginalize and alienate the individuals and communities against whom they are targeted.[48] As Zedner observes, there is a danger that counter-terrorism policies may 'spawn countervailing risks'[49] by undermining social cohesion, damaging community relations, and fostering distrust of the police, the security services and the government. Measures designed to enhance security may thus serve to engender feelings of resentment and hostility in those targeted, thereby increasing their vulnerability to religious or political radicalisation and rendering them more susceptible to terrorist recruitment.[50] While it was suggested by some that control orders had undoubtedly contributed to the potentially radicalising 'folklore of injustice'[51] and may have acted as a

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maintaining contact with senior Al-Qaida personnel, providing funds, facilitating the travel and training of others and engaging in terrorist-related activity within the United Kingdom' (ibid para 6.8).

[45] ibid 6.

[46] ibid.

[47] ibid para 3.52. See chapter 3 of this thesis.

[48] See, for example, Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993); Mark McGovern and Angela Tobin, *Countering Terrorism or Counter-Productive? Comparing Irish and British Muslim Experiences of Counter-insurgency Law and Practice* (Edge Hill University 2010); Christina Pantazis and Simon Pemberton, 'Trading Liberties for Greater Security?: The Impact on Minority Communities' (2008) 73 Criminal Justice Matters 12; Christina Pantazis and Simon Pemberton, 'From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation' (2009) 49 British Journal of Criminology 646.

[49] Lucia Zedner, 'Terrorism and Counterterrorism: What is at Risk?' in Layla Skinns, Michael Scott and Tony Cox (eds), *Risk* (Cambridge University Press, Cambridge 2011) 118.

[50] ibid 109-121.

[51] Gareth Peirce, oral evidence to the JCHR: JCHR, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (2009-10, HL 64, HC 395) Ev 2.

'recruiting sergeant for terrorism',[52] there is a lack of evidence to support these claims.[53] According to David Anderson, although it was conceivable that they might have promoted 'a degree of disenchantment in the wider Muslim community',[54] such limited evidence as is available indicates that control orders, and their replacement, TPIMs, 'have not become a major source of grievance among Muslim people generally.'[55]

II. The Move from Control Orders to TPIMs

The Coalition government's decision to replace control orders with TPIMs was essentially a political one, 'taken on civil liberties rather than national security grounds.'[56] To date, TPIMs, like control orders before them, are assessed to have been generally effective in preventing or restricting involvement in terrorism-related activity,[57] but equally unproductive in terms of enabling the gathering of evidence against suspects or facilitating prosecution.[58] By limiting the use of curfews,[59] introducing a two-year maximum duration,[60] and ending the practice of relocation, the TPIM regime is, however, considered to provide 'less extensive protection'[61] than the control orders system did.

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[52] Liberty, *From 'War' to Law* (n 3) 18. See also Victor Tadros, 'Controlling Risk' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP, 2013) 140.

[53] See Home Office, *Review of Counter-Terrorism and Security Powers* (n 38) 39.

[54] David Anderson, *Final Report* (n 7) para 6.20.

[55] David Anderson, *First Report* (n 18) para 11.17. For example, in a 'methodologically weak' 2007 study by Muslim Voice UK, only 10.3% of Muslims surveyed believed that control orders should be abolished. However, 71% thought that controlees should be 'put on trial to see if they were innocent or guilty': Home Office, *What Perceptions Do the UK Public Have Concerning the Impact of Counter-terrorism Legislation Since 2000?* (Home Office Occasional Paper 88, 2010) 22. As a source of grievance, control orders were said to be 'far outranked' by TA 2000, s 44 stop and search powers: David Anderson, *Final Report* (n 7) para 6.21.

[56] David Anderson, *Final Report* (n 7) para 6.36. As Anderson noted in his *First Report* on TPIMA, the replacement of control orders by TPIMs 'was not prompted by any court judgment, either from the United Kingdom or from Strasbourg': *First Report* (n 18) paras 11.1. See chapter 5 of this thesis.

[57] See David Anderson, *First Report* (n 18) 6, paras 8.16, 11.5-11.8; *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2014) 3, paras 6.3-6.4.

[58] See David Anderson, *First Report* (n 18) 6, paras 8.16, 11.9-11.10; *Second Report* (n 57) 3, paras 6.3. See also JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) 3, para 35.

[59] TPIMA, sch 1, para 1.

[60] ibid s 5(2).

[61] David Anderson, *First Report* (n 18) para 11.54. See also HC Deb 28 January 2013, vol 556, col 162 (Yvette Cooper); HC Deb 6 November 2013, vol 570, col 246 (Pat McFadden).

Whilst one of the control order regime's most controversial features,[62] the power to relocate suspects did bring 'significant advantages'[63] from a national security perspective. Indeed, it is thought that the ending of relocation may have made it easier for suspects to abscond, the JCHR noting that 'the risk of absconding is higher when a TPIM subject remains in the midst of their local community and network'.[64] Following the disappearances of Ibrahim Magag (BX)[65] and Mohammed Mohamed (CC),[66] in his 2014 report, David Anderson stated that he believed the time had come to 'revisit the issue of locational restraints.'[67] While not advocating a 'simple restoration of relocation'[68] as it was practised under the PTA, Anderson suggested that re-interpreting or expanding the use of the existing exclusion measure,[69] or

[62] See JCHR, *Annual Renewal of Control Orders Legislation 2010* (n 51) paras 41, 45-46; Lord Macdonald, *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cm 8003, 2011) 12; Liberty, *From 'War' to Law* (n 3) 12.

[63] David Anderson, *Second Report* (n 57) para 6.20. Anderson submits that relocation, by taking suspects out of circulation, 'assisted in the disruption of networks', and is 'likely also to have played a significant part in stemming the flow of absconds' under control orders (para 20).

[64] JCHR, *Post-Legislative Scrutiny* (n 58) 4. See also David Anderson, *Second Report* (n 57) para 4.48.

[65] Magag absconded on 26 December 2012. After removing his GPS tag with scissors, he escaped by getting into a London taxi. See Jamie Grierson, 'Terror Suspect Ibrahim Magag 'jumped into cab' to Escape, Claims Yvette Cooper' (8 January 2013) *The Independent* <www.independent.co.uk /news/uk/crime/terror-suspect-ibrahim-magag-jumped-into-cab-to-escape-claims-yvette-cooper-8443165.html> accessed 5 October 2014.

[66] Mohamed absconded on 1 November 2013. It was widely reported in the press that he entered An Moor mosque in Acton, removed his GSP tag, and then left disguised as a woman wearing a burqa. See Alan Travis and Benn Quinn, 'Missing Terror Suspect: Theresa May to Make Urgent Statement' (4 November 2013) *The Guardian* <www.theguardian.com/uk-news/2013/nov/04/missing-terror-suspect-theresa-may-statement> accessed 5 October 2014.

[67] David Anderson, *Second Report* (n 57) para 6.23. In its 2014 report on counter-terrorism, the House of Commons Home Affairs Committee stated that, 'it is deeply worrying that anyone who is subject to a TPIM, or those who were subject to control orders, can abscond with such ease'. The Committee consequently recommended that the type of measures imposed on subjects under TPIM notices should be reviewed 'to ensure that enough is being done to prevent absconsion': *Counter-terrorism* (HC 2013-14, 231) para 109.

[68] David Anderson, *Second Report* (n 57) para 6.24

[69] TPIMA, sch 1, para 3. It was suggested that this power could be used to require a TPIM subject to obtain Home Office permission before entering a particular town or London Borough, or to impose a 'doughnut-shaped exclusion zone encircling the area of the subject's residence': David Anderson, *Second Report* (n 57) para 6.25.

introducing a new power to effect involuntary relocation,[70] could help to reduce the risk of future absconds, lower the surveillance budget, and also rebuild confidence in TPIMs.[71]

David Anderson's assertion that 'to remain fully credible'[72] TPIMs must be strengthened has been implicitly or explicitly endorsed by a range of parties, including Lord Carlile,[73] the Chief Constable of the Metropolitan Police, Sir Bernard Hogan-Howe,[74] and various Conservative[75] and Labour[76] politicians. In a statement to the House of Commons on 1 September 2014, David Cameron announced that it was the Government's intention to introduce 'new powers' to add to those currently available under TPIMs, including the power to impose 'stronger locational constraints on suspects ... either through [the] enhanced use of exclusion zones or through relocation'.[77] This pledge to 'strengthen' TPIMs was subsequently reiterated by Theresa May at the Conservative Party Conference in October,

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[70] Anderson proposed that, as under the PTA, the subject, and potentially his family, could be moved to a town 'some hours' distant from his associates', but that he could be granted considerably more freedom to travel without permission, for example, within an entire county, rather than a limited area of a city or town (as was the case under control orders): David Anderson, *Second Report* (n 57) para 6.25. See also 57 (Recommendation 4).

[71] ibid para 6.23. In addition to the recommendations made in respect of locational restraints, Anderson also advised that when the occasion next arises to amend TPIMA, 'thought might usefully be given to cutting ... down' the very broad definition of involvement in terrorism-related activity under s 4 of the Act: paras 6.12-6.15, 57 (Recommendation 2).

[72] ibid 4.

[73] Following the news of the US journalist James Foley's beheading by ISIS, Lord Carlile stated that the Government could make a legislative response to the growing terror threat 'by reintroducing control orders – or beefed-up TPIMs', going on to state that the forced relocation of suspects was 'very effective': Matthew Holehouse, 'Isil: Call to Bring Back Blair's Control Orders for Terror Suspects' (22 August 2014) *The Telegraph* <www.telegraph.co.uk/news/worldnews/middleeast/iraq/11050330/Isil-call-to-bring-back-Blairs-Control-Orders-for-terror-suspects.html> accessed 7 October 2014.

[74] In an interview with LBC, Hogan-Howe stated that "something like" control orders should be re-introduced to address the increased threat from 'homegrown jihadis': Josh Halliday, 'Met Chief Calls for New Anti-terror Powers and Backs 'Presumption of Guilt'' (27 August 2014) *The Guardian* <www.theguardian.com/uk-news/2014/aug/27/police-chief-says-uk-jihadis-should-be-stripped-of-passports> accessed 7 October 2014.

[75] For example, Lord Howard (Steven Swinford, 'Lord Howard: Bring Back Control Orders to Make Britain Safer' (22 August 2014) *The Telegraph* <www.telegraph.co.uk/news/worldnews/middleeast/iraq/11051460/Lord-Howard-Bring-back-control-orders-to-make-Britain-safer.html> accessed 7 October 2014) and Boris Johnson ('Do Nothing, and We Invite the Tide of Terror to Our Front Door' (24 August 2014) *The Telegraph* <www.telegraph.co.uk/news/uknews/defence/11054093/Do-nothing-and-we-invite-the-tide-of-terror-to-our-front-door.html> accessed 7 October 2014).

[76] For example, Ed Miliband (HC Deb 1 September 2014, vol 585, col 28), Yvette Cooper (HC Deb 10 September 2014, vol 585, col 1009), and Pat McFadden, who 'welcomed' the 'at least partial U-turn' on relocation (HC Deb 1 September 2014, vol 585, col 41).

[77] HC Deb 1 September 2014, vol 585, col 26.

the Home Secretary confirming that a new Counter-Terrorism Bill will be introduced in the near future to further 'toughen up' the UK's security powers.[78]

Whilst it is accepted that modifying the extent or use of the existing exclusion measure under sch 1,[79] or amending TPIMA so that relocation requirements can be imposed on suspects, could improve the preventive efficacy of TPIM notices, the use of such measures should not become a matter of routine.[80] Due to their intrusive nature, it is submitted that stringent locational constraints should be imposed on suspects only where the nature of the threat they are perceived to pose renders it necessary and proportionate to do so.[81]

III. The Continuing Primacy of Prosecution and Ongoing Need for Executive Counter-Terrorism Measures

In responding to the threat of terrorism, as Lady Justice Arden, writing extra-curially, observes, 'using the criminal process is the best way of ensuring that rights and freedoms are not whittled away.'[82] Despite recourse to executive measures - most notably detention without trial, control orders, and TPIMs[83] - in a minority of cases, statistics demonstrate that since 9/11 the prosecution of suspected terrorists has remained the UK government's principal means of dealing with those who engage in terrorism-related activity.[84] According to Home Office data, between 11 September 2001 and 14 March 2014, 637 people have been

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[78] Theresa May, 'Speech to Conservative Party Conference 2014' (30 September 2014) <http://press.conservatives.com/post/98799073410/theresa-may-speech-to-conservative-party-conference> accessed 1 October 2014.
[79] TPIMA, sch 1, para 3.
[80] See David Anderson, *Second Report* (n 57) para 6.26.
[81] See chapter 4 (pp 121-130).
[82] Lady Justice Mary Arden, 'Meeting the Challenge of Terrorism: The Experience of the English and Other Courts' (2006) 80 Australian Law Journal 818, 836.
[83] In the counter-terrorism context, other executive measures used to avert threats to national security include: proscription under TA 2000, Pt II; asset freezing under the Terrorist Asset-Freezing etc Act 2010, Pt I; the use of entry, immigration and nationality controls to deport, exclude, or deprive suspects of British citizenship; and the use of the Royal Prerogative to refuse or withdraw passports.
[84] For further discussion, see chapter 2 of this thesis.

charged with terrorism-related offences, 405 of whom have been convicted.[85] In contrast, during this timeframe, sixteen foreign terror suspects were detained for varying periods under the ATCSA's Part 4 powers,[86] and a total of 53 individuals have been made subject to control orders and/or TPIMs.[87]

Over the course of the last thirteen years, it has frequently been asserted by organisations such as JUSTICE[88] and Liberty[89] that removing the statutory bar[90] on the admissibility of intercept material as evidence in criminal proceedings would facilitate the prosecution of more terrorist suspects and therefore obviate the need for measures like control orders and TPIMs. Although Labour[91] and the Coalition[92] have stated that they are committed to finding a way to allow intercept evidence to be used in criminal trials, both nevertheless maintained that doing so would not remove the need for executive counter-terrorism measures.[93] This view echoes that of the Chilcot Review,[94] and also concurs with the conclusions reached by both Lord Carlile[95] and David Anderson.[96] Thus, whilst a relaxation of the ban may produce a

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[85] Home Office, 'Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches' (2014) para 2.6 <www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2014/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-great-britain-financial> accessed 10 October 2014. Of this 405, 220 were convicted for offences under terrorism legislation and 185 were convicted for non-terrorism legislation offences. See also para 2.7.

[86] HC Deb 18 November 2003, vol 413, col 27WS (David Blunkett). Those detained under ATCSA, Part 4 were held for periods of between 3 days and 38 months. Following their release, nine of these individuals were made subject to non-derogating control orders in March 2005.

[87] As detailed above, non-derogating control orders were made against 52 suspects between March 2005 and December 2011. The nine individuals under control orders at the expiry of the regime were subsequently made subject to TPIM notices in early 2012, the tenth TPIM notice being issued in October 2012. Between December 2001 and March 2014, the detention without trial, control order, and TPIM powers have therefore collectively been used against 44 *different* suspects.

[88] See JUSTICE, *Intercept Evidence: Lifting the Ban* (2006) para 89-97; JUSTICE (n 30) para 14.

[89] Liberty, *From 'War' to Law* (n 3) 7, 27-28.

[90] RIPA 2000, s 17.

[91] Home Office, *Intercept as Evidence: A Report* (Cm 7760, 2009) para 25.

[92] HM Government, *The Coalition: Our Programme for Government* (2010) 24.

[93] Home Office, *Post-Legislative Assessment of the Prevention of Terrorism Act 2005* (n 38) para 48; Home Office, *Review of Counter-Terrorism and Security Powers* (n 39) 37-38.

[94] Privy Council (Chilcot) Review, *Intercept as Evidence: Report* (Cm 7324, 2008). The Privy Counsellors reported that they 'had not seen any evidence that the introduction of intercept as evidence would [have] enable[d] prosecutions' in any of the cases being dealt with through control orders at the time of the review (para 59). See also paras 58, 210.

[95] In his 2011 report on the PTA, for example, Lord Carlile averred that it was 'unrealistic in the extreme, and unhelpfully misleading to suggest that ... the admission of intercept evidence would

modest increase in terrorist prosecutions,[97] permitting the evidential use of intercept would 'not ... on its own be sufficient to render TPIMs redundant',[98] nor would it have measurably increased the prospects of successfully prosecuting any of those individuals who were placed under non-derogating control orders.[99]

Though incontestably the 'ethically superior pathway'[100] for dealing with those who are suspected of involvement in terrorism-related activity, in a limited number of cases prosecution is not a viable option.[101] Where a suspect cannot be prosecuted, or, if they are a foreign national, deported, control orders were, and TPIMs are, an important 'targeted tool of last resort'[102] which can be used to protect the public from a risk of terrorism. Such measures, while very much a 'second-best solution',[103] are consequently seen to occupy 'a small but important niche in the [UK's] counter-terrorism armoury'.[104]

The prognosis that 'the risk of terrorism from one source or another is probably ineradicable,'[105] whilst regrettable, is unfortunately well grounded. Indeed, on 29 August 2014, the threat level to the UK from international terrorism was raised from 'substantial'[106] to 'severe',[107] David Cameron proclaiming in an accompanying statement that 'we are [currently] in the middle of a generational struggle against a poisonous and extremist

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increase measurably the prospects of successful prosecution of individuals currently subject to control orders': Lord Carlile, *Sixth Report* (n 11) para 6. See also paras 66, 72.

[96] David Anderson, *First Report* (n 18) paras 7.13-7.16.

[97] See Privy Council (Chilcot) Review (n 93) para 59.

[98] David Anderson, *First Report* (n 18) para 7.15. See also David Anderson, *Second Report* (n 56) para 4.10.

[99] Lord Carlile, *Sixth Report* (n 11) para 6.

[100] Walker (n 14) 328.

[101] See chapter 2 of this thesis.

[102] Lord Carlile, *Sixth Report* (n 11) para 61 See also David Anderson, *First Report* (n 18) para 1.30.

[103] David Anderson, *Final Report* (n 7) para 3.19.

[104] ibid para 6.2.

[105] Lucia Zedner, 'Terrorism and Counterterrorism: What is at Risk?' (n 49) 118. See also Charles W Kegley, Jr. (ed), 'The Characteristics, Causes, and Controls of the New Global Terrorism: An Introduction' in Charles W Kegley, Jr. (ed), *The New Global Terrorism: Characteristics, Causes, Controls* (Prentice Hall 2002) 91.

[106] Which means that the possibility of a terrorist attack is assessed to be 'a strong possibility': MI5, 'What Are Threat Levels?' <www.mi5.gov.uk/home/the-threats/terrorism/threat-levels/the-uks-threat-level-system/what-are-threat-levels.html> accessed 10 October 2014.

[107] Which means that the possibility of a terrorist attack is assessed to be 'highly likely': ibid. See Home Office, 'Threat-level From International Terrorism Increased' (29 August 2014) <www.gov.uk/government/news/threat-level-from-international-terrorism-increased> accessed 10 October 2014.

ideology that ... we will be fighting for years and probably decades' to come.[108] Given their potential utility in addressing contemporary and future threats posed by 'home grown' and peripatetic foreign terror suspects, there is, as David Anderson concluded in his 2014 report, 'a strong case for retaining the option of TPIMs, or TPIM-like measures, as part of the toolkit for disrupting terrorists who threaten the UK or western interests abroad'.[109]

[108] David Cameron, 'Threat level from international terrorism raised: PM press statement' 29 August 2014 <www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference> accessed 10 October 2014. As the House of Commons Home Affairs Committee observed in its 2014 report: far from a more benign threat picture, which we might have been hoped for after thirteen years of intensive counter-terrorism operations, the situation today seems more complex. The threat from terrorism has dramatically changed since 2001. Today there are more Al Qa'ida inspired terrorist groups than in 2001, spread across a wider geography, with a more diverse and evolving set of capabilities ((n 67) para 2).
[109] David Anderson, *Second Report* (n 57) para 6.7.

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