

CONTROL ORDERS IN 2011

FINAL REPORT OF THE INDEPENDENT REVIEWER
ON THE PREVENTION OF TERRORISM ACT 2005

by

DAVID ANDERSON Q.C.

Independent Reviewer of Terrorism Legislation

MARCH 2012

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EXECUTIVE SUMMARY

What were Control Orders?

- Control orders were preventative measures, intended to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement in terrorism-related activity. They have now been replaced with Terrorism Prevention and Investigation Measures (TPIMs).
- Control orders were made against 52 people over the lifetime of the Prevention of Terrorism Act 2005. All were men, suspected of involvement in Islamist terrorism. The identity of a controlled person is generally kept confidential.
- The duration of the orders was from between a few months to more than four-and-a-half years. At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens.

Control Orders in Context

- Control orders replaced a power, introduced after 9/11, to detain non-nationals in prison despite the fact that they were not at the time deportable. Their precursors included a series of wartime and colonial measures providing for executive detention, and internment and exclusion orders used in Northern Ireland (2.3).
- There is nothing unique in international terms about the existence of a regime that imposed significant constraints on the liberty of those suspected, but not convicted, of terrorist activity. The purely preventative aim of the control order system, its separation from the criminal justice process, its application to home citizens and the length of time for which an individual could be subject to it however placed it towards the more repressive end of the spectrum of measures operated by comparable western democracies (2.19).
- In the United Kingdom, measures with similarities to control orders exist both for countering national security threats and for the prevention of other types of serious crime. Comparable restrictions to those imposed by control orders can be imposed by the executive under asset-freezing and immigration / nationality powers. Outside the national security field, measures of comparable severity have not been imposed on unconvicted persons, though the Serious Crime Act 2007 in particular confers extensive powers on the courts (2.27).

The Control Order System

- The majority of control orders were imposed on the basis of the Home Secretary's suspicion that the subject was a hardened terrorist, actively involved in terrorist plots in the UK or abroad, or in recruiting for terrorism, terrorism facilitation or terrorism training. A smaller number, particularly in the early years, were imposed chiefly on suspicion of the subject wishing to travel abroad for terrorist purposes (3.18).
- 23 of the 52 controlled persons were subject to involuntary relocation to a different town or city in the UK (3.34). By the end of the regime, most control orders incorporated other restrictions including a curfew of up to 16 hours, confinement within a geographical boundary, tagging, financial reporting requirements and restrictions on association and communication (3.27).
- Control orders could be distressing for controlled persons and their families. In the words of the wife of one controlled person, assessed as a reliable witness by the High Court, "*You literally feel as though you are fighting a ghost and there never seems to be any light at the end of the tunnel*" (3.39).
- Though imposed by the Home Secretary, control orders were the subject of judicial scrutiny which, though not always prompt, was thorough and careful. The controlled person was not entitled to see all the evidence against him, for national security reasons. However after 2009, each controlled person was entitled to sufficient information about the allegations against him to give effective instructions in relation to those allegations to a Special Advocate instructed on his behalf (3.71).

Control Orders in 2011

- Five new control orders were served in 2011, eight renewed and four revoked. 265 modifications were granted, and 87 refused (4.3). Five controlled persons were charged with breach of their control orders, three of whom await trial. As in the previous three years, no controlled person absconded.
- All nine controlled persons at the end of 2011 were British citizens suspected of Islamist terrorism. Each control order featured a wide range of restrictions, including in six cases relocation (4.9). Relocation requirements were upheld as necessary and proportionate by the High Court in two cases during 2011 (4.28).

- Four of the final control orders had been in force for longer than two years. Each of the nine persons who was under a control order at the end of 2011 has now been placed under a TPIM (4.12).

End of Term Report

- Based on my observation of the system, with particular reference to 2011, I conclude that:
 - In terms of their **effectiveness** (6.7), there are good reasons to believe that control orders fulfilled their primary function of *disrupting terrorist activity*. The disruptive effect of relocation was as prized for national security reasons as it was resented by families. Control orders are likely also to have *released intelligence resources* for use in relation to other targets. It is less clear that they assisted controlled persons in *disengaging from terrorism*. They did not prove a useful source of evidence for *criminal prosecutions*.
 - Control orders proved generally **enforceable** (6.15), despite difficulties in bringing successful prosecutions of controlled persons for repeated minor breaches of their orders.
 - Control orders may have been a source of grievance and resentment in some quarters, but not to the same extent as measures (e.g. stop and search powers) which affected far greater numbers of people. There is no evidence therefore that control orders were **counter-productive** (6.17).
 - The administrative procedure for making and reviewing control orders was evidence-based and thorough. Despite the constraints of a closed material procedure, the courts did manage in the period under review to provide a substantial degree of **fairness** to the controlled person (6.23). However the delays were at times excessive (as the Court of Appeal remarked in 2011), and even if it complies with the European Convention of Human Rights, no procedure can be wholly fair in which a participant is enabled neither to hear nor (therefore) to rebut the detailed evidence adduced against him (3.75).
- In summary, control orders were an effective means of protecting the public from a small number of suspected terrorists who presented a substantial risk to national security, but whom it was not feasible to prosecute. A conscientious administrative procedure, coupled with close judicial scrutiny and an improved disclosure regime, ensured a substantial degree of fairness to the subject. But

there is something unsettling about any system which allows the executive to impose intrusive measures on the individual, challengeable only by way of a closed material procedure and after significant delay. Accordingly, while some compromise of fairness may be justifiable in the interests of national security, it is essential that the use of this and similar powers should be kept to an absolute minimum.

Terrorism Prevention and Investigation Measures

- Despite their structural similarities the TPIM is not a rebadged control order, but a new model. Significant differences include:
 - A requirement of reasonable belief of involvement in terrorism-related activity (rather than reasonable suspicion) before a TPIM can be made (5.11)
 - A two-year limit on the duration of a TPIM (5.16)
 - No power of relocation or confinement to a particular area (5.21)
 - Less restrictive powers relating to curfew, communications and police searches (5.22).
- Those changes were motivated by civil liberties concerns. They are unlikely to further the requirements of national security – rather the reverse. However, by making significant extra resources available for covert investigative techniques, the Government has sought to ensure (and MI5, which is best placed to judge, has accepted) that there should be no substantial increase in overall risk (6.36).

Recommendations

- My examination of the control order system in the last year of its operation has prompted a number of recommendations in relation to TPIMs (section 7). They relate, in particular, to:
 - Ensuring that TPIMs are ***used only as a last resort***, when prosecution, deportation or less intrusive executive measures are not a feasible alternative (Recommendations 1, 2)
 - Ensuring that no individual measure is imposed unless the Secretary of State is satisfied that it is ***necessary*** for purposes connected with

preventing or restricting the individual's involvement in terrorism-related activity (Recommendation 3)

- Ensuring the **highest possible degree of fairness** in the closed material procedure, by giving sufficient information in all TPIM cases to enable the subject to give effective instructions and by addressing the consistent concerns expressed by Special Advocates (Recommendations 4, 5)
- Improving **transparency**, in the form of the quarterly reports issued under TPIMA 2011 (Recommendation 6)
- Inviting Parliamentary Committees to consider how best I can assist them in future with the task of keeping the necessity for and operation of TPIMA 2011 under **parliamentary review** (Recommendation 7).

1. INTRODUCTION

Control Orders

- 1.1. Control orders imposing restrictions upon persons suspected by the Government of involvement in terrorism were made against a total of 52 people between 2005 and 2011. The governing statute was the Prevention of Terrorism Act 2005 **[PTA 2005]**. All the controlled persons were men, and the suspicions in each case related to Islamist terrorism.
- 1.2. A control order was a bundle of obligations, different in each case but often including long curfew periods at a specified address, tagging and tight restrictions on association and communication. In a substantial minority of cases it also involved relocation to a different town or city. The purpose of control orders was to restrict the individual's involvement in terrorism-related activity. Orders remained in force for periods ranging from a few months to more than four-and-a-half years.
- 1.3. Controversy attended control orders throughout the life of the regime, essentially for two reasons.
 - First, **they restricted a range of basic freedoms**, including the freedom of expression and association, the right to respect for private and family life and even - depending on the length of the curfew – the right to liberty.¹ Of all the powers at the disposal of the state, only imprisonment has a greater impact on these freedoms. Yet unlike imprisonment, control orders could be imposed on persons who had neither been charged nor convicted of a criminal offence.
 - Secondly, **the ability of individuals to mount an effective court challenge was diminished** by the non-disclosure to them, for national security reasons, of the detailed allegations upon which their control orders were founded. This was said to contravene their right to a fair trial, essential elements of which are the right to know the case against you and the ability to challenge that evidence.²
- 1.4. Over time, the higher courts of the UK, with valuable assistance from the European Court of Human Rights in Strasbourg, produced a body of case law

¹ Rights guaranteed by Articles 10, 11, 8 and 5 respectively of the European Convention of Human Rights, and thus by the Human Rights Act 1998 **[HRA 1998]**.

² For a historical and comparative account of the right to a fair hearing, which was enshrined in the common law long before Article 6 of the ECHR, see the Justice report *Secret Evidence*, September 2009, chapter 1.

that moderated the legal climate in which control orders operated, and reconciled their operation with the requirements of the European Convention on Human Rights [ECHR] and Human Rights Act 1998 [HRA 1998].³ They did not however succeed in neutralising the objections of those who considered control orders to be fundamentally opposed to British traditions of liberty and fairness.

TPIMs

- 1.5. Control orders are now a thing of the past, PTA 2005 having been repealed and replaced by the Terrorism Prevention and Investigation Measures Act 2011 [TPIMA 2011]. TPIMs, as the replacement measures are known, are similar to control orders in many respects. They are, however, limited to a maximum duration of two years; a higher evidential test must be satisfied before they can be made; and they cannot contain some of the more severe restrictions available under the control order regime.⁴ These are significant changes: TPIMA 2011 is a new rather than a rebadged model.

Safeguards

- 1.6. Exceptional powers require exceptional safeguards. Several were provided by PTA 2005 itself:
- **Judicial scrutiny** through court permission for a control order to be imposed, automatic court review of each control order (unless discontinued by the controlled person) and the right of appeal against modification, refusal to modify or renewal of a control order.⁵
 - Automatic **expiry every 12 months** of the powers in the PTA 2005, unless renewed by Parliament,⁶
 - **Quarterly reports** by the Secretary of State on the exercise of his powers, laid before Parliament;⁷
 - **Annual reviews** of the operation of the system by the Independent Reviewer of Terrorism Legislation, which were informed by secret material

³ See 3.82, below.

⁴ See section 5, below.

⁵ PTA 2005 sections 3, 10, 11: see 3.64-3.81, below.

⁶ PTA 2005 section 13.

⁷ PTA 2005 section 14(1).

and laid before Parliament in open versions in time to inform the renewal debates.⁸

- 1.7. In addition, parliamentary Committees maintained a close and often critical interest in control orders. Though (unlike the Independent Reviewer) they did not have the advantage of seeing the secret material on which control orders were based, they took evidence from those concerned and built up a high degree of expertise in the subject.⁹ NGOs and academics, in the United Kingdom and elsewhere, also provided well-informed and pertinent commentaries.¹⁰

Independent Review

- 1.8. Independent review of anti-terrorism legislation has existed in the UK since the 1970s. PTA 2005 was the first occasion on which review by the Independent Reviewer was placed on a statutory basis. Provision currently exists for annual independent review of the Terrorism Acts 2000 and 2006 [**TA 2000, TA 2006**], the Terrorist Asset-Freezing &c. Act 2010 [**TAFSA 2010**] and TPIMA 2011. Further “snapshot” reports connected with terrorism legislation may be produced, either at ministerial invitation or on the Reviewer’s own initiative.¹¹

- 1.9. The uniqueness of the Independent Reviewer’s post derives from a combination of two factors:

- complete independence from Government; and
- unrestricted access, based on a very high level of security clearance, to documents and to personnel within Government, the police and the security services.

Its authority derives also from listening to the widest possible range of those affected by the laws against terrorism, including those against whom they have been applied.

- 1.10. As Independent Reviewer I am provided with a room in the Home Office, which I use in particular for meetings and for inspecting confidential documents. My

⁸ PTA 2005 section 14(2)-(7). The annual reports of my predecessor as Independent Reviewer, Lord Carlile of Berriew CBE QC, together with the responses of the Home Secretary, are available on my website <http://terrorism-legislation-reviewer.independent.gov.uk>.

⁹ A. Tomkins, *Parliament, Human Rights and Terrorism*, published as chapter 2 of T. Campbell, K. Ewing and A. Tomkins (eds.), *The Legal Protection of Human Rights* (OUP 2011).

¹⁰ See, to take only one example, the short but brilliant survey by C. Walker, *The threat of terrorism and the fate of control orders* [2010] PL 4-17.

¹¹ See, e.g., the reports into the definition of terrorism (2007), Operation Pathway (2009) and Operation GIRD (2011), all available on the Independent Reviewer’s website.

base however remains in my own Chambers, from which I continue to practice as a self-employed member of the Bar.

- 1.11. My predecessor, Lord Carlile of Berriew Q.C., produced six annual reports on the operation of the PTA 2005, between January 2006 and February 2011. Each, together with the Home Secretary's response to it, can be accessed from my website. Lord Carlile concluded in his last report that:

“The control orders system, or an alternative system providing equivalent and proportionate public protection, remains necessary, but only for a small number of cases where robust information is available to the effect that the individual in question presents a considerable risk to national security, and conventional prosecution is not realistic.”¹²

Certain features of the control order regime were influenced by Lord Carlile's earlier recommendations: for example, the establishment of the Control Order Review Group [**CORG**], in which every control order is discussed on a quarterly basis by police, MI5 and other officials,¹³ the contents of letters from chief officers of police concerning the reasons preventing prosecution¹⁴ and the composition of the quarterly reports provided for by PTA 2005 section 14(1).¹⁵ Lord Carlile also recommended that the duration of control orders be limited to two years, save in genuinely exceptional circumstances,¹⁶ a suggestion that was given effect (though without the exceptions) in the replacement regime under TPIMA 2011.

- 1.12. The history of independent review and the current role of the Reviewer are summarised at <http://terrorism-legislation-reviewer.independent.gov.uk>, where copies of previous reports, future plans and contact details can also be found. I travel widely in the exercise of my functions and welcome approaches, on a confidential basis if required, from anyone with relevant experience or knowledge.

Scope of this report

- 1.13. This report covers the last year of a control order regime that is already defunct. PTA 2005 was repealed with effect from 15 December 2011.¹⁷ Its replacement,

¹² *Sixth Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2011.
¹³ *First Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2006, §46.
¹⁴ *Ibid.*, §58.
¹⁵ Special Report of 11 December 2006.
¹⁶ *Third Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2008, §§50-51.
¹⁷ TPIMA 2011 sections 1, 31(2).

the TPIM regime, entered into force on that day, which (as explained at 1.15-1.16, below) falls outside the period of this review.

1.14. In the circumstances, the scheme of this report is:

- to explain the context (section 2) and operation (section 3) of control orders, with particular reference to 2011 (section 4);
- to summarise the respects in which the TPIM regime will operate differently (section 5);
- to give my opinion on whether control orders were effective, enforceable, counter-productive and fair (section 6); and
- to make some limited recommendations concerning the future operation of the TPIM regime (section 7).

Time period covered

1.15. This and subsequent review periods are as follows:

- The period covered by this review runs from 11 December 2010 to 14 December 2011.¹⁸
- The first review period under TPIMA 2011 will run from 15 December 2011 to 31 December 2012.¹⁹
- From 2013 until the expiry of TPIMA 2011, which is currently fixed for 13 December 2016,²⁰ review periods will coincide with the calendar year.²¹

1.16. Parliament has thus decided that the 42-day transitional period between the two Acts, provided for by TPIMA 2011 Schedule 8, should be covered in my next report rather than in this one. For the sake of simplicity and save where greater precision is necessary, I shall refer to the period under review simply as 2011.

Resources and methodology

1.17. The Home Office made its files freely available to me, including legal advice given to the Government and secret intelligence relating to those considered for

¹⁸ TPIMA 2011 Schedule 8 para 6, amending the application of PTA 2005 section 14(3). PTA 2005 was passed on 11 March 2005, and TPIMA 2011 on 14 December 2011, entering into force on the following day.

¹⁹ TPIMA 2011 section 20(2) and Schedule 8, para 8.

²⁰ TPIMA 2011 section 21(1).

²¹ TPIMA 2011 section 20(2).

and subjected to control orders. Officials and lawyers within Government have discussed ideas at my invitation and reviewed a draft of this report for accuracy and to ensure that I have not inadvertently spilled any secrets. I am grateful also to my Special Adviser, Professor Clive Walker of the University of Leeds, for his comments on a draft of the report. Any remaining errors are mine.

- 1.18. I have had discussions with Ministers, with civil servants from the Office for Security and Counter-Terrorism at the Home Office [OSCT], with police officers experienced in managing control orders both in London and outside, and with other departments and agencies including MI5. I have attended part of the closed session of a control order / TPIM appeal. I have also spoken to individuals who are or have been subjected to control orders, to solicitors acting on their behalf, to judges and to barristers instructed for controlled persons, for the Home Secretary and as special advocates. A number of these sources preferred to speak to me on the basis that they would not be identified by name, and I have honoured their wishes so as to be able to convey their views as frankly as possible.
- 1.19. I have read the files on all persons in respect of whom control orders were made or renewed during the period under review, together with the open and many of the closed judgments in control order proceedings. However, I do not see my function as being to pronounce upon individual cases: a judicial procedure exists for that purpose. I have therefore resisted saying that I would or would not have taken the same decision as the Home Secretary in a particular case or range of cases. The reason I have looked at individual files is to see whether they indicate systemic problems with the operation of the control order regime, or point to improvements that could be introduced under the TPIM regime.

2. CONTROL ORDERS IN CONTEXT

Preventative purpose

- 2.1. Some have sought to characterise control orders as a form of “*pre-punishment*”:²² and indeed they must sometimes have felt like punishment to those subject to them. Others would consider such powers justifiable only if their primary aim had been “*to encourage and to facilitate the gathering of evidence*” for the criminal process, and to prevent the obstruction of that process.²³
- 2.2. So far as the courts were concerned, however, the control order was neither punitive nor retributive,²⁴ and it did not on the whole prove effective in gathering evidence that could be admissible in future criminal trials. The true purpose of the regime, as stated in the Act, was quite simply to protect members of the public from a risk of terrorism by preventing or restricting the controlled person’s involvement in terrorism-related activity.²⁵

Antecedents

- 2.3. Preventative restraints for counter-terrorism purposes had precursors in a series of colonial and wartime measures providing for executive detention, in the power to intern IRA suspects which remained on the statute book until the end of the 20th century, and in the exclusion order regime.²⁶
- 2.4. TA 2000, intended as a comprehensive recasting of anti-terrorism legislation in the United Kingdom, made no provision for restrictions other than after arrest. Lord Lloyd’s seminal report of 1996, which provided much of the basis for the Act, contemplated no more than a possible future need “*to detain terrorist suspects in time of emergency*”.²⁷

²² Lucia Zedner, *Preventative Justice or Pre-Punishment? The Case of Control Orders* (2007) 60(1) CLP 174-203.

²³ Lord Macdonald of River Glaven QC, Report on the Review of Counter-Terrorism and Security Powers, Cm 8003, January 2011, pp. 9-10.

²⁴ *SSHD v MB* [2007] UKHL 46, [2008] 1 AC 440, per Lord Bingham at §§15-24. The point is legally significant, since a punitive measure is more likely to require the additional protections given by Article 6 ECHR in criminal cases, which include a lesser tolerance of hearsay evidence.

²⁵ PTA 2005 sections 1(1) and 1(3); cf. Explanatory Notes, para 3.

²⁶ For an account of these measures, see D. Bonner, *Executive Measures, Terrorism and National Security* (Ashgate, 2007) and for a comparative perspective see K. Roach, *The 9/11 Effect – Comparative Counter-Terrorism* (Cambridge, 2011). The courts were generally tolerant of such measures, in some cases perhaps unduly so: *R v Halliday* [1917] AC 260; *Liversidge v Anderson* [1942] AC 206; *Ireland v UK* (1978) 2 EHRR 25.

²⁷ Rt. Hon. Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol 1, Cm 3420, October 1996, §18.14.

2.5. Hopes that TA 2000 would provide all necessary anti-terrorism powers lasted little more than a year. On 11 September 2001, Al-Qaida related terrorism killed thousands of civilians in a single day, without warning and in the most spectacular fashion. The legislative reaction was swift – some would say hasty. Thus:

- The United Kingdom derogated from Article 5(1) of the ECHR (right to personal liberty), the only ECHR signatory to do so,²⁸ and from Article 9 of the International Covenant on Civil and Political Rights. The purpose of these derogations was to permit the arrest and detention of a foreign national whom it was wished to remove or deport, but in circumstances where removal or deportation was not possible.
- The Anti-terrorism Crime and Security Act 2001 [**ATCSA 2001**], introduced to Parliament on 19 November 2001, received Royal Assent on 14 December. Its centrepiece was Part 4, which provided for the detention of non-nationals suspected of international terrorism. The power was intended for use against individuals who were not at that time deportable because of the risk that they would be tortured or mistreated in their countries of origin.²⁹

2.6. Exercise of the power to detain was however subject to review by the Special Immigration Appeals Commission [**SIAC**]: and in December 2004, the judicial House of Lords by a majority of 8-1 quashed the derogation order made under HRA 1998, and declared that ATCSA 2001 section 23 was incompatible with Articles 5 and 14 of the ECHR, insofar as it was disproportionate and permitted the detention of international terrorists in a way that discriminated on grounds of nationality or immigration status.

2.7. The judges reasoned – presciently, in the light of the 7/7 attacks of the following summer – that UK nationals as well as foreign nationals were capable of posing a terrorist threat, and that it cannot truly have been necessary to exercise a power of detention in relation to foreign nationals if no such power was deemed to be required in relation to British citizens. The judgment, widely applauded in academic circles and beyond, has since been characterised as the high-water mark of domestic judicial interventionism in relation to counter-terrorism.³⁰

²⁸ The Human Rights 1998 (Designated Derogation) Order 2001.

²⁹ Pursuant to the judgment of the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413.

³⁰ Adam Tomkins, *National security and the role of the court: a changed landscape?* (2010) 126 LQR 543-567.

2.8. A judicial declaration of incompatibility under HRA 1998 is not the quashing of a statute, but rather an invitation to reconsider it. Against that background, the Government proposed the repeal of ATCSA 2001 Part 4 and its replacement by the system of control orders now contained in PTA 2005. It is one of the ironies of 21st century counter-terrorism law that a power exercisable only against foreign nationals has been replaced by one which, by the end of its period of operation, was being used solely against British citizens.

The need for control orders

2.9. In an ideal world, every person justly suspected of terrorist activity would be prosecuted in the United Kingdom or extradited to face justice elsewhere. This does not always happen. Frequently cited obstacles include:

- the inadmissibility (unique in the common law world, save for Ireland) of domestic intercept evidence in criminal trials;³¹
- the prohibition (imposed by Article 3 of the ECHR) on deportation to a country where the deportee risks suffering torture or inhuman or degrading treatment;³² and
- the prohibition (imposed by Article 6 of the ECHR) on deportation to a country where the deportee has suffered or risks suffering a “*flagrant denial of justice*”, destroying the very essence of the right to a fair trial.³³

2.10. But these specific impediments do not tell the whole story. Even if all of them were removed, prosecution of persons believed to have been involved in terrorism would not always be possible. As the point was put by a former Director of MI5:

“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

³¹ Regulation of Investigatory Powers Act 2000 [RIPA 2000] Section 17. The potential value of intercept evidence can be seen from how recent major terrorist trials in other common law jurisdictions (e.g. Canada and Australia) have made use of it. The difficulties relating to rendering such evidence admissible in the UK are however attested to by there being eight reviews of IAE since 1993, the most recent of which (pursuant to the Coalition Agreement) is still underway.

³² This difficulty, first identified in *Chahal*, may be circumvented by the negotiation of memoranda of understanding [MoUs] providing for deportation with assurances [DWA]: see the account in *Othman v UK* (ECtHR, 17 January 2012) §§73-75, and the Court’s approval of the MoU with Jordan at §§76-92 and 193-205.

³³ *Othman v UK* (17 January 2012) §§258-267.

it falls short of evidence to support criminal charges to bring an individual before the courts, the best solution if achievable.”³⁴

- 2.11. All these elements illustrate the unfortunate truth that even after the significant expansion in the number and range of terrorist offences since 9/11, a strong intelligence case against an individual cannot always be translated into a successful prosecution, either at home or abroad. No effort should be spared in improving this unsatisfactory state of affairs. It is however realistic to assume that this will continue to be the position in the short and medium term at least.
- 2.12. Confronted with a dangerous person who cannot be prosecuted or deported, how is the Government to react? **Preventative detention**, as previously attempted, has been declared unlawful by the courts.³⁵ **Surveillance** is certainly part of the answer, but it is resource-intensive and does not, in itself, have a disruptive effect.
- 2.13. **Control orders** were devised as, in effect, a hybrid of those two solutions. The aim was to prevent or disrupt terrorist activity by confining the subject to his residence for a significant part of the day and restricting his ability to associate and communicate with others. This sat unhappily with common law traditions of individual liberty. It was unproductive in terms of evidence usable in the criminal process, since controlled persons were aware of being watched in a way that subjects of covert surveillance may not be. It was also expensive, particularly once legal costs were factored in. It did however have three advantages: it was capable of preventing terrorist activity; it had the potential to be ECHR-compliant in a way that preventative detention did not; and it was considerably cheaper than round-the-clock surveillance.

International comparisons

- 2.14. A detailed comparative account of the various analogies to the control order regime would be far beyond the scope of this report. The following outlines may however suffice to give a flavour of how things operate in other developed western jurisdictions.
- 2.15. The closest parallel to the UK’s control order regime is in **Australia**, where control orders may be imposed for the purpose of protecting the public from a

³⁴ Dame Eliza Manningham-Buller, 1 September 2005 speech in The Hague, accessible from www.mi5.gov.uk/output/speeches-by-the-director-general.html

³⁵ *A v SSHD* [2004] UKHL 56 (the Belmarsh case) and its less famous sequel *A v United Kingdom* (ECtHR, 19 February 2009).

terrorist act.³⁶ The police, with the authority of the Attorney-General, may make an application to the court for a control order, which may remain in being for up to 10 years. The court must be satisfied *either* that there are reasonable grounds to consider that the order requested would substantially assist in preventing a terrorist act, *or* that the controlled person is suspected on reasonable grounds to have provided training to, or received training from, a listed terrorist organisation. Only two applications for control orders have been made since the start of the regime in 2005.

2.16. In **Canada**, courts may impose “*peace bonds*” upon persons who pose a threat, whether they have a previous criminal record or not.³⁷ They may be imposed on both citizens and non-citizens, and breach of such an order is a criminal offence. Orders may include any reasonable condition, short of detention, that the judge considers appropriate. These may include curfew, tagging, weapons prohibition and remaining within a specified geographic area. The court which imposes a peace bond must be satisfied that there are reasonable grounds to fear that a terrorism offence will be committed. The maximum duration of a bond relating to terrorism is 12 months, extendable to two years if the person concerned has been previously convicted of a terrorist offence. Another peace bond may be sought after expiry, if the original conditions can still be satisfied. Peace bonds have been imposed on acquitted defendants.³⁸ In addition, security certificates under the Immigration and Refugee Protection Act 1978 can be used to detain foreign residents who are “*engaging in terrorism*”.

2.17. **New Zealand** has nothing comparable to control orders in its anti-terrorist legislation.³⁹

2.18. Moving beyond the Commonwealth, fundamental differences in constitutional arrangements and in the systems of criminal justice require a strong health warning to be placed on any but the most thorough and scholarly of comparative analyses. It is fair to remark, however, that:

- The **United States** has in place a number of robust measures for dealing with suspected terrorists. Foreign nationals whom the Attorney General reasonably believes to be engaged in terrorism-related activity

³⁶ Under the Criminal Code 1995, section 104. A number of Australian states have also adopted legislation permitting the imposition of controls on those whom a court is satisfied are members of declared criminal gangs.

³⁷ Under the Anti-Terrorism Act 2001 (section 83.3 of the Criminal Code).

³⁸ *R v Ahmed* [2011] SCC 6.

³⁹ D. Small, *The uneasy relationship between national security and personal freedom: New Zealand and the ‘war on terror’* (2011) Int JLC 467-486.

are subject to administrative detention under the PATRIOT Act.⁴⁰ The National Defense Authorization Act 2011 appears capable of authorising the military detention of US citizens and lawful resident aliens who are apprehended in the United States,⁴¹ though President Obama has pledged that his administration “*will not authorize the indefinite military detention without trial of American citizens*”.⁴²

- In parts of **Europe**, the inquisitorial approach to criminal justice allows persons suspected but not convicted of terrorist activity to be detained in custody or under strict bail conditions for extended periods of time. Because the person is under active investigation for a crime, the difficulties with Article 5 that have been experienced under ATCSA 2001 and PTA 2005 do not arise in the same form.

Thus, for example, in **France**, the offence of *association de malfaiteurs en relation avec un enterprise terroriste* allows a wide range of persons (including those travelling abroad for terrorist training, those suspected of planning it and their associates or supporters) to be arrested by the police and passed (after a maximum of six days in police detention) to the investigating magistrate.⁴³ The phase of pre-trial detention can last for up to four years. Bail may be granted on conditions including a residence requirement, prohibition on going to specified places, surrender of identity documents and prohibition on carrying on a defined business or social activity.

Both **Germany** and **Italy** have allowed for preventative measures (including residence restrictions) to be applied to those convicted of criminal offences or under criminal investigation.⁴⁴ There are however no measures comparable to control orders or TPIMs, in part because of historical mistrust of executive powers.

- 2.19. To conclude, there was nothing unique in international terms about the existence of a regime that imposed significant constraints on the liberty of those suspected, but not convicted, of terrorist activity. The purely preventative aim of the control

⁴⁰ PATRIOT Act, section 412. This measure may be subject to some constitutional restraint, but this is limited because of the non-citizen status of the detained persons and the priority given to national security: *Zadvydas v Davis* 533 US 678 (2001).

⁴¹ Leaving open several points which were not answered in *Rumsfeld v Padilla* 542 US 426 (2004) or *Al-Marri v Wright* 534 F 3d 213 (2008).

⁴² Statement by the President on HR 1540, 31 December 2011.

⁴³ Compare TA 2006, section 5: preparation of terrorist acts.

⁴⁴ As may be seen from the jurisprudence of the European Court of Human Rights: see 48038/06 *Schönbrod v Germany* and 4646/08 *OH v Germany*, 24 November 2011; 21906/09 *Kronfeldner v Germany*, 19 January 2012; 7367/76 *Guzzardi v Italy* A39 (1980); 26772/95 *Labita v Italy*, 6 April 2000.

order system, its separation from the criminal justice process, its application to home citizens and the length of time for which an individual could be subject to it however placed it towards the more repressive end of the spectrum of measures operated by comparable western democracies.

Comparators in UK

Executive responses to national security threats

- 2.20. Control orders were (and TPIMs are) part of a range of executive orders available in the United Kingdom to avert threats to national security.
- 2.21. The measure that most closely resembles them is the **asset freeze**, currently provided for by the Terrorist Asset-Freezing Etc. Act 2010 [**TFA 2010**] which in turn implements international and European obligations. Designations are for a renewable period of 12 months. By requiring a licence for all income and expenditure, however mundane, such an order tends to be experienced by the subject (if at liberty in the United Kingdom) as troublesome and intrusive to a high degree. One consequence tends to be that employment and significant travel are made dependent on governmental consent. The threshold tests for an asset freeze are similar to those for control orders, as are the procedures for legal challenge. As was the case with control orders, they are fairly sparingly used. I recently reported in detail on the operation of TFA 2010 from its commencement in December 2010 until September 2011.⁴⁵
- 2.22. **Proscription** is available only against organisations, though criminal offences capable of being committed by individuals include membership of and fundraising for a proscribed organisation. I reported in July 2011 on the operation of proscription in 2010.⁴⁶
- 2.23. Various **immigration and nationality powers** are exercisable on national security grounds, without the prior requirement of a criminal conviction. Each is taken by the executive and can be based on intelligence material rather than evidence admissible in a court. Legal challenges to the exercise of these powers will generally make use of a closed material procedure. They include:
- **Deportation** where this is deemed conducive to the public good. Pending deportation, a person can be detained for a period that is reasonable in all the circumstances, or subject to immigration bail on

⁴⁵ D. Anderson, *First report on the operation of the Terrorist Asset-Freezing &c. Act 2010*, December 2011. The report is available on my website, together with the Treasury's constructive *Response to the independent reviewer's first report* of February 2012, Cm 8287.

⁴⁶ D. Anderson, *Report on the operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2011: available on my website.

conditions that can be more stringent than anything that was imposed under a control order.⁴⁷

- **Exclusion**, where refusal of entry to the UK is deemed conducive to the public good.
- **Deprivation of British citizenship**, resulting in a simultaneous loss of the right of abode in the UK. This is sometimes accompanied by exclusion from the UK, in cases where the individual is outside the UK at the time, and could similarly be combined with deportation.

2.24. A further category of powers is available after conviction for a criminal offence. Thus:

- The **terrorist notification scheme**, which applies automatically on conviction for a criminal offence, requires the subject to notify police of any permanent or temporary address and any intention to travel overseas for a period of between 10 and 30 years.⁴⁸
- **Terrorist foreign travel restrictions**, which may be imposed where this is judged necessary by a court, ban a person for a renewable period of six months from travelling outside the UK.⁴⁹

Preventative powers outside the national security field

2.25. Sometimes described as analogous to control orders are a range of powers operating outside the national security field, which like control orders are preventative in nature and do not require a criminal conviction before they can be imposed. Thus:

- **Antisocial behaviour orders [ASBOs]** may impose a variety of prohibitions for a period of at least two years, including a curfew and prohibitions on visiting certain locations.⁵⁰
- **Football banning orders** of between two and three years may be made on proof that a person has previously caused or contributed to any

⁴⁷ See, generally, *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704 and *Walumba Lumba v SSHD* [2011] UKSC 12. Periods of detention even in excess of six years, which typically result from repeated challenges to the planned deportation, may be justified where there is a risk to national security: *Othmann v SSHD*, Special Immigration Appeals Commission, 6 February 2012, §6. The same judgment is an example of extremely stringent bail conditions, including what amounts to house arrest for 22 hours per day.

⁴⁸ CTA 2008, Part 4.

⁴⁹ CTA 2008 section 58 and Schedule 5.

⁵⁰ Crime and Disorder Act 1998 Part 1. The two-year minimum is specified in section 1(7).

violence or disorder in the UK or elsewhere and that there are reasonable grounds for believing that a banning order would help prevent football related violence or disorder.⁵¹

- **Risk of sexual harm orders**, aimed at preventing “grooming” and imposable until further order of the court, will typically include restrictions on accessing the internet.⁵²
- **Serious crime prevention orders [SCPOs]** are designed to protect, restrict or disrupt persons in the commission of serious crime.⁵³ They may be issued for a maximum but renewable period of five years. They may contain restrictions concerning communications (use of mobile telephones), association, finances, travel within the UK and abroad, access to and use of premises and use of the internet,⁵⁴ though in practice they have been used cautiously. Those subject to an SCPO may also be required to answer questions and to produce documents.
- **Domestic violence protection notices and orders** typically exclude the subject from the shared home or an exclusion zone around it.⁵⁵

2.26. SCPOs, in particular, present obvious similarities to control orders. The analogy presented by the powers summarised at 2.25 above is however not as close as it might seem. Control orders are distinguishable in a number of ways. Thus:

- They were **imposed by the executive** rather than the courts (though subject to judicial scrutiny both before and after being made).
- They did not require proof to the civil standard⁵⁶ that the subject has already been involved in the type of conduct that it was intended to prevent, but merely **reasonable suspicion** (TPIMs, reasonable belief).

⁵¹ Football Spectators Act 1989, section 14B.

⁵² Sexual Offences Act 2003 section 123. They are to be distinguished from **sexual offences prevention orders, foreign travel orders** and **sex offender notification orders**, each of which can be imposed only after conviction.

⁵³ Serious Crime Act 2007 sections 1-41 and Schedules 1-2: see House of Lords Select Committee on the Constitution, 2nd report of 2006-07, *Serious Crime Bill*, HL Paper 41, February 2007; *R v Hancox (Dennis)* [2010] EWCA 102; [2010] 1 WLR 1434. It seems likely that the SCPO was modelled at least in part on the control order: an example of counter-terrorism powers seeping into other parts of the criminal law.

⁵⁴ Prompting the CPS Legal Guidance on SCPOs to comment that “*the possible terms of an order could restrict the person’s life in almost any respect, and to a very significant degree, including his/her home and where he/she lives*”.

⁵⁵ CSA 2010 sections 24-33.

⁵⁶ Which in these contexts, may equate to proof beyond reasonable doubt: *R v Manchester Crown Court ex p McCann* [2002] UKHL 39, [2003] 1 AC 787; *Re S-B (Children)* [2009] UKSC 17, [2010] 1 AC 678 §11; *R v Hancox* [2010] EWCA Crim 102, [2010] 1 WLR 1434, §4.

- They could thus be obtained on the basis of ***intelligence material*** that does not constitute evidence admissible in a court.
- The ***range of restrictions*** far exceeded those that tended to be imposed under other types of order.
- Constraints of national security normally required challenges to involve a ***closed material procedure*** from which the subject was excluded.

Conclusion

2.27. In the United Kingdom, measures with similarities to control orders exist both for countering national security threats and for the prevention of other types of serious crime. Comparable restrictions to those imposed by control orders can be imposed by the executive under asset-freezing and immigration / nationality powers. Outside the national security field, measures of comparable severity have not been imposed on unconvicted persons, though the Serious Crime Act 2007 in particular confers extensive powers on the courts.

3. HOW THE SYSTEM WORKED

- 3.1. The powers and remedies relating to control orders are clearly set out in PTA 2005, as amended in relatively minor respects by the Counter-Terrorism Act 2008 [CTA 2008] and the Crime and Security Act 2010 [CSA 2010].⁵⁷
- 3.2. The description in this section is based on the statutory framework and other relevant documents, supplemented by my own observations of the system in action and conversations with those who operated the system or were affected by it (in particular Home Office Ministers and officials, police, MI5, judges, controlled persons and lawyers on all sides of the court process).

Derogating and non-derogating control orders

- 3.3. PTA 2005 provided for the making (by the courts, not the executive) of “*derogating control orders*”.⁵⁸ Such orders, if accompanied by a renewed derogation from Article 5 of the ECHR (right to liberty), could have imposed restrictions extending as far as house arrest in the form of a 24-hour curfew. Fortunately, it was never thought necessary for any such order to be made. The remainder of this report accordingly deals only with “*non-derogating control orders*”, which I refer to for convenience simply as control orders.

Procedure for making control orders

- 3.4. A control order could be made by the Secretary of State if:
 - she had reasonable grounds for suspecting that an individual was or had been involved in terrorism-related activity (***the reasonable suspicion test***);⁵⁹ and
 - she considered that it was necessary, for purposes connected with protecting members of the public from terrorism, to make a control order imposing obligations on that individual (***the necessity test***).⁶⁰

The reasonable suspicion test could be satisfied by evidence of terrorism-related activity, however distant in time. The necessity test was its essential complement, designed to focus control orders on the prevention of future activity,

⁵⁷ CTA 2008 sections 10-13 (fingerprints and non-intimate samples, never commenced); CTA 2008 section 78 (entry and search of premises); CTA 2008 sections 79-81 (technical); CSA 2010 section 56 (personal search and seizure, never commenced). For background to these amendments, see the Explanatory Notes to TPIMA 2011, paras 6-12 and 17.

⁵⁸ PTA 2005 sections 1(2)(b), 4-6.

⁵⁹ PTA 2005 section 2(1)(a).

⁶⁰ PTA 2005 section 2(1)(b).

and to ensure that a control order could only be made where it was necessary and proportionate to do so.

3.5. Before a control order could be made, certain preparatory steps were required by statute. In particular:

- Where it appeared to the Secretary of State that the suspected involvement in terrorism-related activity may have involved the commission of a terrorist offence capable of police investigation, she was required before making a control order to **consult the police** (who had in turn to **consult prosecutors**) on whether there was evidence that could realistically support a criminal prosecution.⁶¹
- Save in urgent cases, a control order could be made only by **permission of the court**, which could be granted unless the court considered the Secretary of State's decision that there were grounds to make the order was "*obviously flawed*".⁶² Such applications were in practice made without notice to the proposed subject of the order,⁶³ and the grant of permission was followed by directions for a hearing in relation to the order "*as soon as reasonably practicable after it is made*".⁶⁴

3.6. I have inspected the files for each of the five control orders made in 2011.⁶⁵ They are witness to the thoroughness with which control orders were prepared for at the administrative level. Normal practice during the period under review was as follows:

- The request that a control order be considered was formulated (by MI5) with an accompanying dossier of evidence.
- The police prepared an advice file which was examined by the CPS, along with any available evidence. The advice of independent counsel was not taken at this stage, in accordance with usual CPS practice. The CPS returned the file to the police along with a detailed (though inevitably secret) letter of advice. The chief officer of the relevant police force provided a letter, explaining his conclusion and how it was arrived

⁶¹ PTA 2005 section 8(2) and 8(4).

⁶² PTA 2005 section 3(1)(2). In urgent cases, the Secretary of State was entitled to make an order but was obliged immediately to refer it to the court: section 3(3)(4)(6).

⁶³ As permitted by PTA 2005 section 3(5).

⁶⁴ PTA 2005 section 3(2)(c).

⁶⁵ These were for CC, CD, CE, CF and BM (the latter replacing a control order initially made in 2009).

at. That letter was treated as disclosable and so tended to be relatively brief in the statement of its reasons.

- Independent counsel (a security-cleared barrister in private practice) was shown the dossier of evidence and gave written advice as to:
 - whether the reasonable suspicion test and the necessity test were satisfied both as regards the making of the control order and its specific conditions (including relocation, where applicable); and
 - whether the procedure for challenge could be conducted in a manner compliant with ECHR Article 6.

In the absence of positive advice on these points from counsel, no control order would be made.

- Other departments and agencies were consulted in the Control Order Liaison Group [**COLG**], a committee convened for the specific purpose of considering new control orders.
- A detailed dossier was prepared, often extending to multiple lever arch files, summarising and annexing the evidence which was relied upon in relation to both the reasonable suspicion test and the necessity test.
- A detailed submission was put up to the Minister for Crime and Security and the Home Secretary, summarising the evidence upon which reliance was placed and drawing their attention to any countervailing factors. That submission would deal, under subheadings, with:
 - The test for a control order
 - The risk that the person was assessed to present
 - Why a control order was considered necessary
 - The prospects of prosecution
 - Proposed control order obligations
 - Necessity and proportionality of relocation (where applicable)
 - Impact on ECHR rights
 - Exit strategies.

Accompanying the submission would be a number of annexes, dealing with such matters as personal details and known family circumstances, the assessment of MI5, the proposed obligations and a draft of the witness statement that it was proposed should be submitted in support of the application to the court for permission. Unless urgency dictated otherwise, the full dossier of evidence relied upon was supplied to Ministers at the same time.

- The Minister would not infrequently come back with queries or requests for further detail (for example, concerning possible alternative disposals), which would be answered in the form of a further written submission.
- The decision whether to apply for permission to make a control order, and if so on what conditions, was then taken by the Home Secretary.

3.7. Any administrative procedure of this kind inevitably relies heavily on untested evidence. However thorough or fair-minded, it can be no more than the prelude for a contested judicial hearing in which the affected person (or at the very least, a special advocate charged with defending his interests) is given full disclosure of all material with a bearing on the case, and an opportunity to rebut the evidence that is relied upon. The need for caution is particularly great when – as will often be the case – much of the evidence was second or third-hand (hearsay or multiple hearsay), or a “*mosaic*” composed of many small indications, often in the form of coded conversations, none conclusive in itself.

3.8. Subject to that vital caveat, the procedure seemed to me an exemplary one. The letters from the CPS addressed carefully and responsibly the vital issue of whether there is sufficient evidence to support prosecution. Independent legal advice was in each case sought on the statutory tests and the ECHR. That advice was fairly summarised for Ministers and given proper weight before any application for permission was made to the court. The preparation of the submissions for Ministers was, so far as I could ascertain, scrupulously fair. Every time that counsel expressed a reservation over some aspect of the evidence in the case for a control order, I found it to be faithfully reflected in the submission. It is evident also from the specific questions that they raised, and from my own conversations with them, that Ministers in the period under review personally scrutinised these files with a degree of care that was entirely appropriate to the intrusive nature of the order that was sought, and that the decisions in each case were truly those of the Home Secretary.

Procedure for modifying, renewing and revoking control orders

- 3.9. The great majority of **modifications** to control orders were consensual, and were implemented after exchange of correspondence between the Home Office and the controlled person's solicitors. Non-consensual modifications were typically implemented after tripartite discussions between Home Office, MI5 and police. Only for significant modifications (e.g. the introduction of a relocation requirement) was it likely that ministerial approval would be required.
- 3.10. Control orders needed to be annually **renewed**. The consent of Ministers was required. Representations from the controlled person were specifically requested in advance. After taking counsel's advice a submission was put up to Ministers, setting out the test, the background, the national security case for renewal, the proposed obligations in a renewed control order, the impact of the control order on the controlled person, exit strategies and a summary of counsel's advice. Annexes would provide further information on personal details and known family circumstances, the MI5 assessment (together with supporting documents), the proposed schedule of obligations and the renewal instrument for signature. Renewal was for a year at a time, though the view would sometimes be taken that absent evidence of re-engagement in terrorism-related activity, the aim should be to bring the order to an end earlier by revocation.
- 3.11. Decisions on **revocation** and **non-renewal** were also taken by Ministers, after receipt of submissions which include an assessment by MI5.
- 3.12. I have reviewed the submissions to Ministers in sample cases of renewal and revocation. Without exception I found them to be careful and well-constructed documents which formed a proper basis for administrative review.

Who was subject to control orders?

- 3.13. MI5 claimed in 2007 to have identified at least 2000 individuals who posed a direct threat to national security and public safety because of their support for terrorism.⁶⁶ Yet between 2005 and 2011 only 256 individuals were charged under terrorism legislation in Great Britain, and 157 convicted,⁶⁷ and only 52 people were placed under control orders.

⁶⁶ Address to the Society of Editors by Jonathan Evans, Director General of MI5, <https://www.mi5.gov.uk/output/intelligence-counter-terrorism-and-trust.html> (5 November 2007). In later years, figures were no longer given. Most recent estimates are that numbers of violent Islamist extremists have reduced: Home Affairs Select Committee, *Roots of Violent Radicalisation*, Report of 31 January 2012, §§10-11 and evidence there cited.

⁶⁷ Home Office Statistical Bulletin 15/11, 13 October 2011, Table 1a.

- 3.14. Of the 52 men subject to control orders between 2005 and 2011, 24 were British citizens (including some with dual nationality) and 28 were foreign nationals. There was however a marked change in the use of control orders over the period of their operation. Initially, control orders were used solely against foreign nationals who had previously been subject to detention under Part 4 of ATCSA 2001. By the end, the subject of each of the nine control orders in force was a British citizen.
- 3.15. Control order cases are normally (though not always) anonymised, for the protection of the controlled person.⁶⁸ In addition, some of the evidence relied upon in most cases is never placed in the public domain, because it is liable to compromise covert sources or otherwise to harm the public interest.
- 3.16. In most cases there is however sufficient information within the public domain to build up some kind of picture of what has been alleged (and in some cases, proven in criminal proceedings) against a controlled person. The necessity for and proportionality of control orders need to be assessed against the threat that was thought to be posed by the individuals against whom control orders have been made.
- 3.17. An invaluable report for this purpose was produced for the Centre for Social Cohesion in 2010.⁶⁹ Within the limitations of the open sources from which it derives, it sets out in the course of some 70 pages what is known and what was alleged about each of the 45 men who were subject to control orders between 2005 and 2009.
- 3.18. Those brief portraits, strengthened by my own reading of the material, reveal a wide range of terrorist involvement. Thus:
- The sole or principal information against some controlled persons was that they **wished to travel abroad for terrorist purposes**, including fighting coalition forces and terrorist training. Such persons might have been candidates for “*light-touch control orders*” in the past, and were less frequently subject to control orders in recent years.
 - The majority of controlled persons were thought to be **hardened terrorists, actively involved in terrorist plots in the UK or abroad, or in recruiting for terrorism, terrorism facilitation or terrorist training**. Inspection of the open judgments reveals a wide variety of men of this description.

⁶⁸ *SSHD v AP (No. 2)* [2010] UKSC 26.

⁶⁹ Robin Simcox, *Control Orders – Strengthening National Security*, Centre for Social Cohesion 2010.

- In a slightly different category was the ***al-Qaida ideologue*** Abu Qatada, briefly subject to a control order in 2005 between his release from Belmarsh and his detention with a view to deportation to Jordan, who was sentenced *in absentia* to life imprisonment in Jordan for his involvement in two terrorist offences and is said to have provided funds, advice or guidance to terrorists in many countries.⁷⁰

Control orders and criminal justice

An alternative to prosecution?

3.19. Control orders were acknowledged on all sides to be a second-best solution, for use only when criminal proceedings (or, where appropriate, deportation) were out of the question. The Secretary of State expressly accepted, near the outset of the control order scheme, that

“the scheme of the Act is that control orders should only be made where an individual cannot realistically be prosecuted for a terrorism-related offence”.⁷¹

The assessment of the prospects for prosecution was more than a one-off obligation. Implicit in the scheme of PTA 2005, as the courts held, was a duty on the Secretary of State to keep the possibility of prosecution under continuing review,⁷² and “*to do what he reasonably can to ensure that continuing review is meaningful*”, in particular by providing the police with material in his possession which was or might be relevant to any reconsideration of prosecution.⁷³

3.20. This was plainly correct in principle. The imprisonment of a dangerous terrorist protects the public more effectively - and more economically - than the restrictions imposed by a control order or TPIM. Furthermore, significant restrictions on the freedom of the subject are more palatable from a civil liberties standpoint if they are imposed on the basis of proof, as opposed to mere suspicion, of guilt. It is right that all reasonable steps should be taken to ensure that prosecution, if feasible, can occur.

3.21. Prior involvement with the criminal justice system did not however confer immunity from control orders. Whilst the majority of the 52 controlled persons

⁷⁰ He was recently released on bail following a SIAC judgment of 6 February 2012, amid a blaze of publicity after the judgment of the European Court of Human Rights in *Othman v UK* (17 January 2012).

⁷¹ *SSHD v E* [2007] UKHL 47 §14.

⁷² *Ibid.*, §§18, 26-28.

⁷³ *SSHD v E and S* [2007] EWCA Civ 459, accepted by the Secretary of State and cited by her to the Home Affairs Select Committee: *Post-Legislative Assessment of PTA 2005* Cm 7797, February 2010, §30.

had not been charged with any terrorism-related offence prior to being placed under a control order:

- at least four persons (AT, AU, AV and AW) had been charged and convicted of offences related to terrorism prior to being placed under a control order; and
- at least five persons (AH, AJ, AY, BF, and CF) had been charged with offences related to terrorism and either found not guilty or had charges against them dropped.

While these facts at least demonstrate a willingness to use the criminal justice system before resorting to the control order, there is a troubling feel to the imposition of control orders on persons acquitted of terrorist offences. The practice was never criticised by the courts. Logically, it is explicable by the discrepancy between the high criminal burden and the lower threshold for the imposition of a control order, and by the fact that a control order could be imposed wholly or partly on the basis of information distinct from that which formed the subject of criminal proceedings. The practice is troubling not because it constitutes an abuse of the control order system but because it reveals an unpalatable truth: that while it should always be the first and preferable option for dealing with suspected terrorists, the criminal justice system is not always enough to keep the public safe.

An adjunct to prosecution?

- 3.22. A more difficult argument to make, and one that was never accepted by the Government, is that control orders could only properly operate (or should have been refashioned) as an adjunct to the prosecutorial process. The former Director of Public Prosecutions Lord Macdonald of River Glaven QC, in his report on the Counter-Terrorism Review, proposed that control order-type restrictions should only be permitted if, “*in the view of the Director of Public Prosecutions, a criminal investigation into that individual is .. justified*”.⁷⁴ Control orders would be accompanied by “*active police investigations*”, and their restrictions would be “*closer in character to bail conditions, and therefore inherently less objectionable*”. Though no such condition was imposed in TPIMA 2011,⁷⁵ the argument leaves a verbal trace in the title of the replacement measure: Terrorism Prevention *and Investigation* Measures.

⁷⁴ Report on the Review of Counter-Terrorism and Security Powers, Cm 8003, January 2011, p. 11.

⁷⁵ To the regret of the Joint Committee on Human Rights: *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (First Report)*, July 2011, §§1.16-1.28.

- 3.23. Lord Macdonald's proposal was not adopted because of the perception that control orders were necessary on public safety grounds in precisely those cases when there was no reasonable prospect of convicting the person concerned. That perception seems to me a correct one. It is confirmed by Lord Carlile's repeated findings that "*prosecution is pursued whenever there is a case satisfying the charging standards contained in the Code and policies of the Crown Prosecution Service.*"⁷⁶ The inability of the criminal justice system to provide public protection in all cases is illustrated by the orders imposed on men who had already been acquitted at terrorist trials.
- 3.24. It must also be acknowledged that as an opportunity for the gathering of evidence usable in a criminal trial, control orders cannot be counted a success.⁷⁷ At least eight former controlled persons were arrested on suspicion of a terrorist offence but not subsequently charged. I am aware of only one former controlled person who was charged with a terrorist offence. The activity in respect of which he was charged pre-dated the control order, and the charges did not result in a conviction.

What obligations were imposed?

- 3.25. The obligations in a control order made against an individual had to be "*necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity*".⁷⁸ They did not however have to be connected with the matters which grounded the Secretary of State's suspicion of involvement in terrorism.⁷⁹
- 3.26. 16 types of obligation were listed in section 1(4) of the Act. The list was illustrative rather than exhaustive, though I am not aware of any obligation being imposed that did not fall within its extremely broad scope.
- 3.27. Typically, control orders by the end of their period of operation incorporated some or all of the following:
- A curfew of up to 16 hours
 - A residence requirement (in some cases, involving relocation)
 - A geographical boundary (ranging from an entire county to a few square miles)

⁷⁶ *Sixth Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2011, §64.

⁷⁷ Indeed the Home Office was keen to impress upon me that this was never their purpose.

⁷⁸ PTA 2005 section 1(3).

⁷⁹ PTA 2005 section 2(9).

- A requirement to wear an electronic tag
- A prohibition on travelling abroad
- Restrictions on the use of communications equipment and technology
- Restrictions on association with specified individuals, including limitations on pre-arranged meetings or home visitors without prior approval
- Regular reporting requirements at set times during the day, either in person at a police station or to phone in from a designated location such as home or place of work
- Financial reporting requirements, including use of a single bank account and prior approval for transfer of money or goods abroad
- Attendance at a specified mosque and/or not to lead prayers
- Notification of and permission for employment or academic study and training.

3.28. In the early years of the regime, less obviously dangerous targets (for example, those in relation to whom the principal ground for suspicion was a desire to travel for terrorist training) were sometimes subject to so-called “**light-touch control orders**”. That is not a precisely-defined term, but is generally taken to refer to control orders without the more obviously stringent obligations such as curfew, relocation and geographical boundaries. Obligations forming part of a typical light-touch control order were:

- Notification of home address to the police; two working days’ notice of intention to stay elsewhere
- Surrender of passport
- Prohibition on leaving the country without permission
- Prohibition on entering international ports without permission
- Requirement (e.g. weekly / daily) to report to police station.

Such orders were essentially used to prohibit travel abroad for terrorism-related purposes. The phrase “**limited control orders**” was used, to describe orders that in addition to the above obligations included a short curfew (e.g. four hours,

split into two two-hour segments) as well as a daily reporting requirement, to provide a greater degree of assurance against absconding.

- 3.29. At the other extreme, some early control orders were characterised by very long curfews of up to 18 hours. No curfew period of longer than 16 hours has been imposed since the House of Lords found that control orders including an 18-hour curfew amounted to a deprivation of liberty, contrary to ECHR Article 5.⁸⁰
- 3.30. The obligations imposed upon those who were under control orders at the end of 2011 are tabulated at **Annex 1** to this Report, and two sample control orders in force during 2011 are at **Annex 2**.
- 3.31. Lawyers representing the interests of controlled persons questioned with me the practice of requiring **telephone reporting** before leaving the house for the first time and after returning for the last time each day. That requirement was easily forgotten and could be a significant source of anxiety. It was perceived as unnecessary, since an electronic tag allowed the authorities to know whether the controlled person was at home or not.
- 3.32. There may be persons in respect of whom an obligation to warn of an intention to leave the house serves a useful intelligence purpose. A telephone assurance that the controlled person will not be leaving the house again may also have some value – at least where the word of the controlled person is trusted by the authorities. I question however whether it will always be necessary to require telephone reporting, particularly on return, when the tag is already informing the authorities that the controlled person is at home.

Relocation

- 3.33. An important feature of the control order, not replicated in the TPIM, was relocation (or, in the colourful phrase used by NGOs critical of the practice, “*internal exile*”). Relocation could occur voluntarily, for example because a controlled person in accommodation provided by the Home Office asked to move to a larger house because of an increase in his family size. There were also some relocations due to the housing provider withdrawing the rental of the property. In most cases, however, relocations were undertaken for national security reasons: to remove the controlled person away from his extremist associates, or otherwise to disrupt terrorism-related activity. Typically, a person from London or its environs would be relocated to accommodation provided by the Home Office in a provincial town or city two or three hours’ travel away. A few relocations were within the same city.

⁸⁰ *SSHD v JJ and others* [2007] UKHL 45, [2008] 1 AC 385.

- 3.34. During the lifetime of the control order system, 23 controlled persons out of the total of 52 were relocated for national security or practical reasons (not including voluntary moves).⁸¹
- 3.35. Steps were always taken to allow the controlled person's wife and children to relocate with him if they so wished. Often they chose not to do so, and relocation conditions were challenged before the courts on the basis of their disruptive effect on family life. In at least four cases, relocation conditions were struck down by the courts.⁸² In others, including two heard during 2011, relocation was upheld as necessary and proportionate (subject, in one case, to the payment of travelling expenses to the controlled person's family).⁸³
- 3.36. Relocation, though not practised at the outset of the control order regime, became its most controversial feature. Lord Macdonald, in his report on the Review of Counter-Terrorism and Security Powers, described relocation requirements as being "*utterly inimical to traditional British norms*".⁸⁴ That conclusion was echoed by the Review itself, which concluded that there should be "*an end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal daily life*".⁸⁵

What was their effect on the individual?

- 3.37. The effects of control orders on the individual have been well documented over the years, in evidence before the Joint Committee on Human Rights,⁸⁶ in the media and in the open judgments in control order cases.⁸⁷ The judgments are of particular value as sources, since the evidence referred to in them has at least been subject to a degree of judicial scrutiny.
- 3.38. I have, in addition, myself had the opportunity to speak to a small number of current and former controlled persons, and to the legal representatives of a much larger number.

⁸¹ They were GG, JJ, KK, HH, NN, AE, AH, AM, AN, AP, AS, AU, AY, BF, BG, BM, BX, CA, CB, CC, CD, CE and CF.

⁸² BF, AN and CA had their relocations overturned on proportionality grounds, and BM because insufficient disclosure had been made.

⁸³ See 4.28-4.29, below.

⁸⁴ *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven* QC Cm 8003, January 2011, §22.

⁸⁵ *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* Cm 8004, January 2011, §23.

⁸⁶ See, e.g., the evidence of Gareth Peirce a solicitor experienced in acting in control order cases, summarised in the Joint Committee on Human Rights' *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* HL Paper 64 HC 395, February 2010, §§40-43.

⁸⁷ In many of those cases, the central issue at stake was whether a particular restriction was disproportionate, given its deleterious effect on the freedoms and quality of life of the controlled person and his family.

- 3.39. The disruption experienced not only by controlled persons but by their families was eloquently expressed by the wife of CA, in a full-page article in *The Muslim Weekly* of 16 December 2011.⁸⁸ As she wrote:

“One of the most testing and strenuous effects of living with someone under virtual house arrest is the lack of privacy. Police officers retain the right to come and go as they please and unannounced. They are free to search your property whenever they visit and the restrictions on the detainee’s freedom results in an entire restructure of your life. Life becomes a constant set of reminders, deadlines and fear of what may come next. What may happen if you accidentally forget to call in or run late? The fear of what tomorrow may bring makes sleeping virtually impossible and the nights endless. On many occasions I looked out the window in the early hours of the morning after morning prayer just to calm myself. Any shuffling outside our front door, any slight movement fill me with dread, the heart sinking feeling experienced during three previous early morning raids. This is something our first-born struggles with. If he hears a police car, if he sees men in suits and officers in the house he begins to get upset and frightened that they will ‘take daddy away’.

...

The restrictions and monitoring of who may and may not enter your home, as well as times and places the detainee can leave their residence and what can and cannot be kept at their location results in the majority of time being spent alone in the home and this pressure is immense on a marriage and on home life. You literally feel as though you are fighting a ghost and there never seems to be any light at the end of the tunnel. This hopelessness, anguish and extreme anxiety manifests itself in constant arguments, loneliness and in the case of our eldest child who had just turned four, Post-Traumatic Stress Disorder.”

- 3.40. This article is cited at some length because CA’s wife was described by Mitting J, in a 2010 judgment in which he struck down CA’s relocation from Crawley to Ipswich, as “*an impressive witness and person*”, the truth of whose evidence was accepted “*without reservation*”.⁸⁹

- 3.41. Mental health problems have been said to be widespread among controlled persons. Dr. Michael Korzinski, co-founding director of the Helen Bamber Foundation, told a committee of Parliament in 2011:

“... all the controlees I have worked with and who have come off control orders have major mental health problems. You see breakdowns within their

⁸⁸ <http://www.themuslimweekly.com/pdfversion/Versions/20111216/tmw15.pdf>
⁸⁹ *CA v SSHD* [2010] EWHC 2278, §3.

families, and children who are completely dysfunctional in school and who need support.”⁹⁰

Administrative review of control orders

3.42. A control order had effect for 12 months, but could be renewed any number of times.⁹¹ The Secretary of State was entitled to renew a control order for a further 12-month period if she considered both:

- that **a control order was still necessary** for purposes connected with protecting members of the public from a risk of terrorism (i.e., the necessity test that needed to be satisfied when a control order was made);
- and that **the obligations to be imposed by the renewed order were necessary** for purposes connected with preventing or restricting involvement of the controlled person in terrorism-related activity.⁹²

The reasonable suspicion test in section 2(1)(a) could be satisfied by suspicion of past as well as current terrorism-related activity. Accordingly, unless new exculpatory material came to hand, Ministers would not re-open their decision on that test at the renewal stage. Submissions to Ministers did however include up-to-date background on the individual’s suspected involvement, because of its relevance to the necessity test.

3.43. Renewals of control orders were considered both at renewal meetings and at the multi-agency meetings of the Control Order Review Group [**CORG**], established in 2006 after a recommendation from the Independent Reviewer, Lord Carlile. The purpose of the CORG, as set out in its terms of reference, was as follows:

“To bring together the departments and agencies involved in making, maintaining and monitoring control orders on a quarterly basis to keep all the orders under frequent, formal and audited review.

To ensure that the control order itself remains necessary as well as ensuring that the obligations in each control order are necessary and proportionate. This includes consideration of whether the obligations as a whole and individually:

- Are effectively disrupting the terrorism-related behaviours of and risk posed by the individual?

⁹⁰ Public Bill Committee, TPIM Bill, 21 June 2011, Q130.

⁹¹ PTA 2005 section 2(4).

⁹² PTA 2005 section 2(6).

- Are still necessary to manage the risk?
- Need to be amended or added to in order to address new or emerging risks?

To monitor the impact of the control order on the individual, including on their mental health and physical well-being, as well as the impact on the individual's family and consider whether the obligations as a whole and/or individually require modification as a result.

To keep the prospect of prosecution under review, including for breach of the order.

To consider whether there are other options for managing or reducing the risk posed by individuals subject to control orders.”

CORG minutes are made available to the courts, and assist them in determining whether cases were considered in a fair and even-handed way.⁹³

- 3.44. I attended a number of meetings of CORG during 2011. Each control order received a quarterly review, with input from the police who monitored the order, the Home Office and MI5. There was discussion of the manner in which the order is being implemented, the continued need for it, compliance with conditions of the order and the progress of any legal challenge. No formal medical report was commissioned, but all present fed in such information as they had concerning the mental and physical health of the subject and the impact of the order on the individual and his family. No representations from controlled persons or their legal representatives were specifically invited in advance of CORG meetings: but such meetings were known to take place on a quarterly basis; representations were accepted at all times; and any representations made by or on behalf of a controlled person, including applications for revocation or modification of the control order,⁹⁴ would be considered either at a regular CORG meeting or, if it was deemed sufficiently important, at an ad hoc meeting.
- 3.45. The chief officer of the relevant police force is required by the Act to ensure that the investigation of a controlled person's conduct with a view to his prosecution for a terrorist offence is kept under review throughout the period of the control order, consulting the prosecution authority where he considers it appropriate.⁹⁵
- 3.46. CORG meetings are no substitute for contested hearings before an impartial tribunal in which the opinions of departments and agencies can be contested on

⁹³ *AM v SSHD* [2011] EWHC 2486 (Admin), §33 (Silber J); *SSHD v BF* [2011] EWHC 1878 (Admin), §40 (Davis J).

⁹⁴ Under PTA 2005 section 7.

⁹⁵ PTA 2005 sections 8(4) and 8(5).

behalf of the controlled person. From my own experience of them, I can however endorse the recent judicial statement that:

“the reviews in control order cases are both regular and meaningful, and are directed towards a meaningful exit strategy in each case”.⁹⁶

Duration of control orders

3.47. The longest period for which a person was subject to a control order was in excess of 55 months. The shortest period was two months. The 45 control orders that were revoked, quashed or expired, including the nine that were in force at the end of the regime but not the seven absconds, were of the following duration:

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

The equivalent table for just the nine persons subject to control orders at the end of the regime in December 2011 is at 4.11, below.

3.48. As the table shows, 15 persons were subject to control orders for more than two years (the significance of that figure lying in the fact that two years is the maximum duration of a TPIM, in the absence of fresh evidence). It is possible that some of the seven controlled persons who absconded might have been kept under control orders for more than two years, though all absconded before that point was reached. The four individuals who had spent less than two years on control orders by the end of the regime, but who were then served with TPIM notices in early 2012, also had the potential to stay subject to the two regimes for more than two years in total.

Exit strategies

3.49. The principal “*exit strategies*” for controlled persons, all of which must be kept consistently under review, are prosecution, deportation, modification, revocation and non-renewal.⁹⁷

3.50. Of the 52 people who were subject to control orders over the lifetime of the scheme:

⁹⁶ *SSHD v BF* [2011] EWHC 1878 (Admin) §52 (Davis J).

⁹⁷ *SSHD v BF* [2011] EWHC 1878 (Admin) (Davis J) §43, reflecting Home Office policy statements.

- 10 were served with notices of intention to deport, 6 of whom have been deported.⁹⁸
- 20 had their orders revoked:
 - 15 as a result of a decision by the Government that the necessity test was no longer satisfied;
 - 3 because the Government assessed that the disclosure required by the House of Lords in *AF (No. 3)*⁹⁹ would cause undue damage to the public interest; and
 - 2 on direction of the court.
- 4 orders were not renewed as a result of a decision by the Government that the necessity test was no longer satisfied.
- 3 orders were quashed by the High Court, including one abscond.
- 5 orders expired after the controlled person absconded.
- 1 individual absconded after his order had been quashed but before a new order could be served.
- 9 were superseded by TPIMs in 2011-2012.

3.51. As previously noted, not a single former controlled person has been successfully prosecuted for a terrorist offence. Having spoken to those involved, I do not believe that this reflects any lack of enthusiasm for this course on the part of those who enforce and monitor control orders, or on the part of the police (and, where appropriate, the CPS) who were obliged to keep the possibility of prosecution under review throughout the period during which the control order had effect.¹⁰⁰ Rather, it is a consequence of the facts that:

- controlled persons are persons in respect of whom the police will almost certainly already have confirmed that there is no evidence available that could realistically be used for the purposes of a prosecution;¹⁰¹ and that

⁹⁸ Prior to deportation they were either held in custody or granted bail.

⁹⁹ As to which, see 3.72, below.

¹⁰⁰ PTA 2005 section 8(4)(5).

¹⁰¹ PTA 2005 section 8(2).

- controlled persons will normally choose not to commit terrorist offences while subject to restrictions which give the authorities a good opportunity to observe any such offences being committed.

3.52. In summary, control orders were not effective as an aid to the investigation and prosecution of terrorist crime. It is likely that the chief value of TPIMs – Terrorist Prevention and Investigation Measures – will continue to lie in the “*prevention*” rather than the “*investigation*” of terrorism.

Cost of control orders

3.53. The annual cost of control orders to the **Home Office** has ranged, in the period 2006-2011, between £1.9 million and £4.6 million. In 2009-10 and 2010-11, the totals were £3,195,000 and £2,859,000 respectively. A breakdown is at **Annex 3** to this Report.

3.54. The bulk of these costs (between 65% and 80%: over £2m in each of the past two financial years) has consisted of legal expenses, both of the Home Office and of the Special Advocates’ Support Office [**SASO**]. Other elements include staff and administrative costs, the cost of accommodation, subsistence, council tax, telephone and utility bills paid for controlled persons and the daily fee paid to the Independent Reviewer in respect of his work on reviews such as this one.

3.55. In order fully to inform the public debate, I have sought quantification of the costs incurred by other public authorities, with the following results:

- **Legal Services Commission [LSC]** costs, relating to legal aid for controlled persons, have been calculated at £1,020,000 for 2009-10 and £240,000 for 2010-11. These figures are liable to upward or downward revision for the reasons stated in the explanatory note to the table at **Annex 4** to this Report, and may also to some extent be double-counted as Home Office costs.
- **HM Courts and Tribunals Service [HMCTS]** figures for the judicial costs of control orders have been calculated by HMCS at £55,000 for 2010 and £86,000 for 2011.¹⁰²

¹⁰² These are estimates by HMCTS, intended to provide only an indicative figure. They were calculated by estimating the Administrative Court and Court of Appeal daily judicial costs and multiplying them by the estimated number of control order-related sitting days. The judicial costs of control order related reading and judgment writing time in the Administrative Court has been estimated and aggregated with the estimated judicial court costs. The costs do not include administrative or accommodation costs because HMCTS systems do not provide a reliable basis for attributing such costs to reading, hearing and court time.

- **Ministry of Justice** costs relating to the electronic monitoring of control orders have been calculated at £74,264 for 2009-2010 and £31,950 for 2010-11¹⁰³.

In each case, these are updated versions of figures originally supplied in response to Freedom of Information Act requests.

- 3.56. Not included in these figures are the no doubt very substantial costs incurred by the police and by MI5 in relation to control orders, including surveillance costs. I was unsuccessful in obtaining (even confidentially) an estimate of these costs, which were said to be difficult to quantify.
- 3.57. It is not possible, therefore, accurately to compare the overall costs of administering control orders – including the cost of such surveillance as may be necessary to buttress the control order regime – with what is sometimes suggested as an alternative: the 24-hour surveillance of each control order subject. It is plain to me however that the cost of the latter, if feasible, would be considerably greater. Constant surveillance is remarkably expensive.¹⁰⁴ To the extent that the need for it can be removed or reduced by the restrictions inherent in a control order, substantial savings are likely to be made – even after allowance has been made for the legal and other costs of control orders.¹⁰⁵ Control orders and surveillance were in any event not exact substitutes: while surveillance may produce useful information, it does not itself prevent or disrupt terrorism-related activities.

Enforcement of control orders

- 3.58. Contravention of an obligation imposed by a control order was a criminal offence, as were certain associated matters.¹⁰⁶ In England and Wales, where all controlled persons resided, it was for the controlled person to choose whether to have his case heard in the Crown Court (trial on indictment) or before the Magistrates Court (summary trial). The maximum penalty on conviction was imprisonment for five years (trial on indictment) and six or 12 months (summary conviction, depending on the jurisdiction and the date of the offence).¹⁰⁷

¹⁰³ The electronic monitoring of controlled individuals is delivered under a contract with the Ministry of Justice. Additional information may be held by the Ministry of Justice.

¹⁰⁴ Though it is not open to me to comment on the accuracy of figures (between £11 million and £18 million per subject per year) given in evidence before the Public Bill Committee on the TPIM Bill by Lord Carlile: 21 June 2011 col 26 Q83.

¹⁰⁵ The Government has stated that “*the costs of surveillance exceed by a considerable margin the costs of control orders*”: *Review of Counter-Terrorism and Security Powers*, Cm 8004, p. 38 §13.

¹⁰⁶ PTA 2005 section 9(1)-(3).

¹⁰⁷ PTA 2005 section 9(4)-(8).

- 3.59. It was commonplace for large numbers of small breaches to accumulate – unsurprisingly, given the complexity of the orders, the possibility of forgetfulness (particularly where telephone calls to monitoring companies were concerned) and in some cases no doubt the attractions of petty disobedience to a person otherwise largely deprived of power and autonomy. Some controlled persons would regularly return a few minutes late for curfew, or fail to telephone the monitoring company at the appointed times, or meet people without the requisite authorisations. Other breaches were more serious: for example, using internet cafés or planning to abscond.
- 3.60. Prosecutions tended not to be brought until a substantial number of breaches had been committed. Even then, however, convictions were not easy to come by. The CPS indicated to me that cases could be difficult and resource-intensive to assemble: for example, proof that telephone logs correctly show the time that calls were made can be hard to establish. Furthermore, controlled persons generally opted for jury trial; and juries did not always take a serious view of repeated small breaches of requirements whose necessity may not have been obvious to them.
- 3.61. Over the lifetime of control orders (2005-2011), 14 controlled persons were prosecuted for breaching their control order obligations – one of them on two separate occasions.
- 3.62. The outcome of those prosecutions was not encouraging for the authorities. Thus:
- There were 2 convictions (of MB and BX, resulting in sentences of 20 weeks' and 15 months' imprisonment respectively).
 - There were 2 acquittals.
 - 1 person absconded prior to trial.
 - 1 left the UK voluntarily, and the case was closed.
 - In 6 cases, no evidence was offered as it was considered no longer in the public interest to continue with the trial.
 - 3 still await trial.

That picture demonstrates the considerable difficulties attending prosecutions for breach of control orders. Those difficulties were illustrated most strikingly in December 2007, when a controlled person who had absconded was acquitted of breach of his control order obligations. The jury appears to have been swayed

by the argument that mental health issues alleged to have been caused by the terms of the order constituted a “*reasonable excuse*”.

- 3.63. In one case, numerous breaches “*none in themselves necessarily particularly serious (at least on the face of it), but cumulatively troubling*” were taken into account for the purpose of finding the necessity test still to be satisfied on a section 3(10) appeal, not because they indicated renewed terrorism-related activity but because they “*reflect negatively on [the controlled person’s] attitude and mindset*”.¹⁰⁸ Though it has obvious limitations, such an approach indicates that evidence of repeated breaches could on occasion be considered relevant for purposes other than prosecution.

Judicial intervention

- 3.64. Though all control orders were made by Home Office Ministers – and are thus correctly described as executive orders – each one was the subject of careful and repeated judicial scrutiny, by operation of statute or at the option of the controlled person.

Appeals and reviews

- 3.65. The making of control orders required the prior **permission** of the High Court, save in cases certified by the Secretary of State to be urgent, where retrospective permission was required.¹⁰⁹ At this preliminary stage, the court reviewed all the evidence relied upon in support of the control order, but did not normally hear representations on behalf of the intended subject of the order.¹¹⁰ The function of the court was to consider whether the Secretary of State’s decision to make that order was obviously flawed, and to withhold its permission if so.¹¹¹
- 3.66. When permission was granted, an **automatic full appeal** against the making of the control order would follow, save where the controlled person requested otherwise.¹¹² The purpose of such a “*section 3(10) appeal*” was to determine whether the Secretary of State’s decisions to impose a control order, and each of

¹⁰⁸ *SSHD v BF* 2011] EWHC 1878 (Admin) §§71-74 (Davis J).

¹⁰⁹ PTA 2005 sections 3(1), 3(3), 3(4).

¹¹⁰ As permitted by PTA 2005 section 3(5). It will often be important to avoid tipping off a person that he is about to be made subject to a control order.

¹¹¹ PTA 2005 sections 3(2), 3(6). In relation to a prior application, anomalously, the Court had no express power equivalent to the retrospective section 3(6)(b) power to withhold permission in relation to a one or more obligations only.

¹¹² PTA 2005 sections 3(2)(c), 3(6)(b)(c), 3(7), 3(14).

the obligations in it, were “*flawed*”, applying judicial review principles.¹¹³ The role of the court in this exercise was as follows:

- In determining whether the ***reasonable suspicion test*** was satisfied (PTA 2005 2(1)(a)), the court assessed the facts relied upon to see if they did amount to reasonable grounds for suspicion.
- In determining whether the ***necessity test*** was satisfied (PTA 2005 section 2(1)(b)), considerations of proportionality arose. A degree of deference was paid to the decisions of the Secretary of State; but intense scrutiny was required as to the necessity for each of the obligations imposed.
- If the control order and its obligations were to be upheld, the court had to consider the reasonable suspicion test and the necessity test to be satisfied *both* at the time the control order was made *and* at the time of the appeal hearing.¹¹⁴

3.67. In addition, a controlled person had the right both to ***appeal against the renewal or modification*** of a control order (“*a section 10(1) appeal*”), and to ***appeal against any refusal to revoke or modify*** a control order (“*a section 10(3) appeal*”). As to the necessity test, the court had again to consider, in an appeal against renewal or refusal to revoke a control order, whether the Secretary of State’s decisions regarding the necessity for the order and for each material obligation in it were flawed, applying the same principles as under a section 3(10) appeal.¹¹⁵ The reasonable suspicion test could not however be revisited at this stage, because there had already been an opportunity to test it on the section 3(10) appeal. Nor was it normally open to the court to proceed on the basis that there were anything *more* than reasonable grounds for suspecting the controlled person of involvement in terrorism-related activity¹¹⁶ - though judges would occasionally refer to findings on the balance of probabilities.

3.68. At any of the above hearings, the controlled person was entitled to adduce evidence to demonstrate that the control order, or any obligation imposed in it, was not necessary or was no longer necessary. The courts were unsympathetic to suggestions that controlled persons were in practice unable to call such

¹¹³ PTA 2005 sections 3(10)-(11).

¹¹⁴ *SSHD v MB* [2006] EWCA Civ 1140, [2007] QB 415, §§57-65, which remained authoritative to the end: *SSHD v BF* [2011] EWHC 1878 (Admin), §7 (Davis J).

¹¹⁵ PTA 2005 sections 10(4)-(6); *CD v SSHD* [2011] EWHC 1273 (Admin), §§13-19 (Simon J).

¹¹⁶ *AM v SSHD* [2009] EWHC 572 (Admin), §6 (Keith J).

evidence because of the stigma that would attach to them if they were known to be subject to control orders.¹¹⁷

Secrecy and the Special Advocate

3.69. It is normally considered impossible to inform a controlled person (or a prospective controlled person) of the full evidence on which the decision to impose a control order was taken. Much of that evidence invariably emanates from domestic or foreign intelligence sources. The risks of disclosing it to the controlled person, or referring to it in a public court hearing, are routinely said to include:

- the exposure of a covert human intelligence source [CHIS], with potentially catastrophic consequences for that person;
- the exposure of surveillance techniques (human or electronic) whose existence or use would not otherwise have been known to the controlled person or indeed to the world at large, potentially rendering them unusable in future contexts; and
- the exposure of intelligence provided by foreign liaison partners, which pursuant to the “*control principle*” may have been shared on the strict condition that it would never be disclosed.

There will sometimes be the suspicion that these concerns (in particular, the second) are overplayed. I am however in no doubt, from my own questioning of those who obtain such evidence and are familiar with the techniques in question, that their essential basis is genuine.

3.70. Non-disclosure brings its own problems. A person who does not know the full details of the case against him, and so is not in a position to contest the evidence relied upon, cannot be said fully to enjoy the ***right to a fair trial***.¹¹⁸ Furthermore, a case in which crucial evidence is not heard in open court infringes the ***open justice principle***. Identified drawbacks of closed proceedings include:

- the unavailability of evidence that can come to light only if the individual or public is aware of the executive’s claims;
- the court’s reliance on the executive to be fair and forthcoming about confidential information and to characterise accurately the case for secrecy; and

¹¹⁷ *AM v SSHD* [2011] EWHC 2486 (Admin) §§25-29 (Silber J).

¹¹⁸ Even if the procedure complies with the minimum guarantees of ECHR Article 6: see *Al-Rawi v Security Service* [2011] UKSC 34, §68 (Lord Dyson).

- the risk that the dynamic or atmosphere of closed proceedings may condition a judge to favour unduly the security interest over priorities of accuracy and fairness.¹¹⁹

3.71. The solution arrived at in relation to control orders – a “*closed material procedure*” – was originally applied in the context of challenges before specialist tribunals to certain immigration appeals, and exists also in other contexts including appeals against vetting decisions and against other executive orders such as proscription and the freezing of assets. More controversially, a similar system has recently been proposed for civil litigation where “*sensitive material*” is in issue.¹²⁰ In essence:

- The Secretary of State makes only such disclosure to the controlled person about the reasons for the order as is not contrary to the public interest.
- Full disclosure is however made to a “*Special Advocate*”, chosen by the controlled person from a panel of security-cleared barristers appointed by the Attorney-General and entrusted with representing the interests of the controlled person in litigation.
- The litigation is then conducted partly “*in closed*”, with the Special Advocate present but the controlled person and his own legal representatives absent.
- The Special Advocate may apply to the court for further disclosure to the controlled person, and may (in theory) call evidence. Her efficacy is however limited by the fact that once proceedings have gone into closed, she may not communicate with or take instructions from the controlled person, save on strict conditions aimed at ensuring that no additional disclosure is inadvertently made.

In the case of control orders, such a system was provided for by PTA 2005 Schedule 1, given effect by Rule 76 of the Civil Procedure Rules. Rule 76.2 modifies the overriding objective of the Rules (“*enabling the court to deal with cases justly*”)¹²¹ so as to require a court to ensure that information is not disclosed contrary to the public interest, a concept that has been described as

¹¹⁹ G. Van Harten, *Weaknesses of adjudication in the face of secret evidence*, (2009) International Journal of Evidence and Proof 1.

¹²⁰ *Justice and Security Green Paper*, Cm 8194, October 2011.

¹²¹ CPR 1.1(1).

“*breathhtakingly broad*”.¹²² The system is replicated, in all essential particulars, under the TPIM regime.

- 3.72. The extent to which the Special Advocate procedure is consistent with the requirements of a fair trial will depend to a large extent on the degree of disclosure that is made to the controlled person. After prolonged litigation in London and Strasbourg, the law as it related to control orders can now be summarised in the following proposition, taken from *AF (No. 3)*:

“[T]he controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.”¹²³

As the Senior Law Lord went on to say:

“Provided that this requirement is satisfied ***there can be a fair trial*** notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials ***the requirements of a fair trial will not be satisfied***, however cogent the case based on the closed materials may be.”

- 3.73. There are certainly cases in which sufficient information is indeed given to the controlled person to satisfy the court that he has had a fair trial.¹²⁴ However, even where the disclosure required by *AF (No. 3)* has been supplied, ignorance of closed material may put the controlled person and his advocate at “a *considerable disadvantage*”,¹²⁵ and the assistance of a Special Advocate who is unable to take instructions will not always enough to bridge the gap. Some members of the Supreme Court have expressed misgivings about the Special

¹²² K.D. Ewing and J-C Tham, *The Continuing Futility of the Human Rights Act* [2008] PL 668, 674: by Rule 76.1(4), disclosure is contrary to the public interest “*if it is 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 is likely to harm the public interest*”.

¹²³ *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, per Lord Phillips at §59, following the judgment of the Grand Chamber of the European Court of Human Rights in *A v UK* (2009) 49 EHR 625, §220.

¹²⁴ *AM v SSHD* [2011] EWCA Civ 710, §12, per Laws LJ: “*There is no possibility whatever that he was not fully aware of the case against him and had every proper opportunity to deal with it.*”

¹²⁵ *CD v SSHD* [2011] EWHC 2087 (Admin) §35 (Owen J).

Advocate procedure;¹²⁶ and so, strikingly, have the Special Advocates themselves.¹²⁷

- 3.74. The Government has sought to minimise the extent of its duty to provide *AF (No. 3)* disclosure, in the context of vetting cases in the employment tribunal¹²⁸ and other executive orders.¹²⁹ Even after *AF (No. 3)*, the Government argued that it did not have to provide the subject of a light-touch control order with sufficient information to enable him to give effective instructions. That attempt failed in the High Court;¹³⁰ the appeal was stayed and eventually discontinued. It remains to be seen whether the argument will be revived in the context of light-touch TPIMs. The Government has recently raised the possibility of *legislating “to clarify the contexts and types of civil cases in which the ‘AF (No. 3)’ disclosure requirement does not apply”*.¹³¹
- 3.75. Since the controlled person never normally saw the closed evidence, incorrect inferences that may have been drawn from it would rarely come to light. Practical illustrations of the principle that “*evidence which has been insulated from challenge may positively mislead*”¹³² are therefore hard to come by in the control order context. The ease with which unsustainable conclusions can be reached when only one side of the story has been heard is however demonstrated by the following. A photograph of a person (BF) holding a gun, from which a judge in control order proceedings had “*understandably*” drawn a “*secure inference*” of his engagement in terrorist-related activity, was later put in a different light in evidence given by BF at his criminal trial.¹³³ The Government conceded in subsequent control order proceedings concerning BF that the

¹²⁶ *Al-Rawi v Security Service* [2011] UKSC 34. See, in particular, Lord Dyson, Lord Hope and Lord Kerr. It is fair to point out that such misgivings have not generally been expressed by the High Court judges who preside over the closed procedure in control order cases.

¹²⁷ <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>

¹²⁸ *Tariq v Home Office* [2011] UKSC 35.

¹²⁹ *Bhuta v HM Treasury* [2011] EWHC 1789 (Admin), under appeal.

¹³⁰ *SSHD v BC* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542 (Collins J). Light-touch orders on BB and BC had been substituted in October 2009 for the previous more onerous orders in the hope of avoiding the *AF (No. 3)* gisting obligation.

¹³¹ *Justice and Security Green Paper*, Cm 8194 October 2011, §2.43. I opposed this idea in my written and oral evidence before the Joint Committee on Human Rights in January 2012, because the issue is fact-dependent (and thus more appropriate for judicial than legislative decision) and because any legislation risks being unduly restrictive of the *AF (No. 3)* right to disclosure.

¹³² *Al-Rawi v Security Service* [2011] UKSC 34, §93 (Lord Kerr).

¹³³ The reason BF could not comment on the photograph in the first control order proceedings was that he did not appear in those proceedings, which concerned control orders on two other persons (BG and BH). The error in this case was not therefore attributable to the use of closed material procedures. It is easy to see however how similar incorrect inferences, few of which will ever come to light, are liable to result from the use of closed material procedures, in which detailed evidence is not shown to, and therefore cannot be the subject of comment from, a controlled person.

photograph “is to be dated to a family holiday in 2002 (not in 2008) and is not linked to terrorist activity”.¹³⁴

- 3.76. The Government takes the view that the *AF (No. 3)* obligation has placed it in “an *invidious position*”, drawing support in this from the evident reluctance with which some Law Lords ruled as they did.¹³⁵ Notably however, and despite the forebodings of some Law Lords, the control order system has survived the introduction of the *AF (No. 3)* disclosure duty. A few control orders have had to be revoked, and the duty may have deterred others from being made. The right of a person to know the case against him, at least in outline, is however so fundamental that in the context of control orders (and TPIMs) at least, the decision in *AF (No. 3)* is a very welcome one.¹³⁶
- 3.77. The Special Advocates used their response to the Green Paper on Justice and Security to raise some specific concerns regarding the operation of closed material procedures more generally, including in the control order context.¹³⁷ In my own written and oral submissions to the Joint Committee on Human Rights,¹³⁸ I expressed a degree of sympathy with those concerns, and proposed a way in which they might be addressed. I return to this subject in my recommendations, (section 7, below).

Time taken by proceedings

- 3.78. Section 3(10) reviews normally took around six months to be heard, although in some cases they could take well over a year.
- 3.79. Section 10 appeals normally took around two or three months to be heard, although renewal appeals could take longer if they were joined with other court proceedings for case management reasons.
- 3.80. Especially when combined with further appeals to the Court of Appeal or above, and when delayed by variations to control orders, the result could be substantial injustice in terms of the time taken for cases to be resolved. As the Court of Appeal remarked in one case, in which the section 3(10) review took nine months and the (successful) appeal a further 13 months:

¹³⁴ *SSHD v BF* [2011] EWHC 1878 (Admin), §29 (Davis J). The photograph was however only one piece of evidence among many: and the control order was upheld.

¹³⁵ *Post-Legislative Assessment of PTA 2005*, CM 7797, February 2010, §65.

¹³⁶ A comparative analysis found in the UK, Canada, Israel and the US “a common reliance .. on a baseline requirement that a suspect be told at least the ‘core’ or ‘gist’ of the allegations against him”: *D. Barak-Erez and M. Waxman, Secret Evidence and the Due Process of Terrorist Detentions* [2009] Col. J.Int. Law 3-60.

¹³⁷ <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

¹³⁸ Available on my website and on that of the Joint Committee.

“It is essential that cases of this kind are brought to trial and any appeal is heard in a period measured within a vastly shorter timescale than the present proceedings have taken to reach this court. It is simply not right that the proceedings to determine the validity of this control order with its significant impact on the civil liberties of BM have lasted 22 months.”¹³⁹

- 3.81. This factor also places a premium on prompt disclosure by Government at the earliest opportunity. The Special Advocates have consistently complained about “*prejudicially late disclosure by the Government*”, which they describe as “*the routine experience of all practising SAs*”, and about the practice of ‘iterative disclosure’.¹⁴⁰ They consider that these practices require them to digest a great volume of material in a period that is inadequate for the purpose; and that there is no effective way of deterring them since the normal sanction for late disclosure – the adjournment of proceedings – will not normally be welcomed by the controlled person. The Government, and counsel regularly instructed by them, point to the challenging deadlines that courts and controlled persons regularly insist upon, and deny that there is a systemic problem of late disclosure.

Judicial influence on control orders

- 3.82. Decisions of the appellate courts supplied certainty and parameters in the operation of the control order system. Thus:
- In *MB* (2006), the Court of Appeal interpreted the power in PTA 2005 section 3(10) to determine whether decisions of the Secretary of State are “*flawed*” as giving the court “*all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision-maker, if that is what Article 6 requires.*”¹⁴¹
 - In *JJ* (2007), the House of Lords held an 18-hour curfew to amount to a deprivation of liberty, in breach of Article 5 ECHR.¹⁴² Thereafter, following Lord Brown, no curfew in excess of 16 hours was imposed.
 - In *E* (2007), the House of Lords ruled that the Secretary of State is under a duty to keep the possibility of prosecution under continuing review.¹⁴³

¹³⁹ *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366, per Thomas LJ at §41(i). The replacement control order issued in April 2011 came up for section 3(1) review a further 10 months later, in February 2012.

¹⁴⁰ Response from Special Advocates to Justice and Security Green Paper, §17(5)(6).

¹⁴¹ *SSHD v MB* [2006] EWCA Civ 1140, [2007] QB 415. The judgment “*made a significant practical difference in several control orders cases*”: see A. Tomkins, *National Security and the Role of the Court* (2010) 126 LQR 543, 555-557.

¹⁴² *SSHD v JJ* [2007] UKHL 45, [2008] 1 AC 385. The case was finally balanced: two members of the five-judge court dissented, and Lord Brown (one of the majority) considered “*the acceptable limit to be 16 hours*” (§105).

- In *MB* (2007), the House of Lords used the Human Rights Act section 3 to “read down” the Schedule to PTA 2005 and CPR Rule 76, the result being that non-disclosure of material was acceptable only to the extent that it was compatible with the right of the controlled person to a fair trial.¹⁴⁴
- In *AF (No. 3)* (2009), the House of Lords held that a controlled person had always to be given sufficient information about the allegations against him to enable him to give effective instructions to his special advocate in relation to them.¹⁴⁵
- In *AP* (2010), the Supreme Court held that proportionate restrictions on private and family life in a control order (such as relocation, combined with a lengthy curfew) could be decisive in determining whether the overall effect of the order constituted a deprivation of liberty under Article 5 ECHR.¹⁴⁶

3.83. The latter judgment praised the work of the lower courts, which were said to have developed “*special expertise and experience, not generally shared by members of the appellate courts*”, and spoke of “*the wisdom of not generally interfering with their decisions in control order cases*”.¹⁴⁷ It would be unfortunate if the shift from control orders to TPIMs meant that issues considered by 2011 to be settled as a matter of law will need to be relitigated at appellate level in the new statutory context, particularly if this results in long delays to the final judicial resolution of the lawfulness of restrictive measures.

¹⁴³ *SSHD v E* [2007] UKHL 47.

¹⁴⁴ *SSHD v MB* [2007] UKHL 46, [2008] 1 AC 440, §§44 (Lord Bingham), 72 (Baroness Hale), 84 (Lord Carswell), 92 (Lord Brown). This reading survived the subsequent guidance from Strasbourg that a fair trial might require more disclosure than the House of Lords had thought in *MB*: see *AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, §67 (Lord Phillips).

¹⁴⁵ *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269. In so holding, the House of Lords followed the guidance of the European Court of Human Rights in *A v UK* (2009) 49 EHRR 625, a case concerning detention in Belmarsh under ATCSA 2001, and departed from its earlier ruling in *SSHD v MB and AF* [2007] UKHL 46, [2008] 1 AC 440.

¹⁴⁶ [2010] UKHL 24. [2011] 2 AC 1.

¹⁴⁷ *Ibid.*, §§19-20; cf. *SSHD v MB* [2007] UKHL 46, [2008] 1 AC 440 §67, Baroness Hale.

4. USE OF CONTROL ORDERS IN 2011

Statistical information

- 4.1. The quarterly reports required by PTA 2005 section 14(1) were in each case produced promptly. Subject to one point (4.4, below), their contents were appropriately informative, in accordance with the guidance given by my predecessor, Lord Carlile of Berriew Q.C.
- 4.2. Copies of the quarterly reports for the period under review are at **Annex 5** to this Report.
- 4.3. The information in those reports concerning the exercise of control order powers during 2011 is presented in tabular form at **Annex 6** to this Report. In particular:
- 5 new control orders were served, 8 renewed and 4 revoked.
 - All 9 controlled persons at the end of the period were British citizens.
 - 265 modifications were granted and 87 refused.
 - 5 controlled persons were charged with breach of their control orders.
 - No controlled person was charged with or convicted of a separate terrorism-related offence.
- 4.4. The table also shows that for the first three quarters of the year, the majority of the controlled persons were outside the Metropolitan Police Service area. This information was withheld in the last quarter. It may be that this was connected with the ending of relocation, and the consequent expectation that in 2012 a number of controlled persons would return to London. Whether that is so or not, I can see no justification for reducing the amount of publicly available information. I return to this topic in my recommendations, (section 7, below).

Who were the controlled persons?

- 4.5. Nine control orders were in force at the end of the period under review, a comparable figure to the eight in force at the end of 2010, 12 at the end of 2009 and 15 at the end of 2008.
- 4.6. All those subject to control orders during 2011 were British citizens (including dual nationals). It is indicative of the changing nature of the terrorist threat that the measure that control orders were designed to replace – detention in Belmarsh under ATCSA 2001 – was available only against foreign nationals.

- 4.7. Each of the controlled persons was suspected of Islamist terrorism. As in previous years, no control order was made in connection with Northern Ireland-related terrorism or far-right extremist terrorism. So far as Northern Ireland is concerned, I have enquired as to why control orders have never been used. The reasons are said to include the difficulty of preventing absconding across the Irish border, together with undesirable echoes of the Exclusion Orders that were controversial in the nationalist community between the 1970s and the 1990s.

Restrictions imposed

- 4.8. The restrictions imposed as conditions of each of the control orders in force during 2011 are presented in tabular form at **Annex 1** to this Report.
- 4.9. As is apparent from **Annex 1**, there were no light-touch control orders in place during 2011. The following statistics stand out:
- At the end of 2011, six of the nine controlled persons (BM, BX, CC, CD, CE and CF) were ***relocated*** under a type of residence requirement that is not available under the TPIM system.
 - All nine were subject to ***curfew*** periods of between 8 and 14 hours, the commonest period being 12 hours.
 - All nine were additionally subject to ***tagging***, a telephone ***reporting obligation***, a list of ***prohibited associates***, an obligation to permit ***police entry***, various restrictions on ***communications equipment*** in the residence, obligations to ***surrender travel documents*** and ***not to leave the UK*** or ***enter international ports***, and requirements to ***notify employment*** and seek ***approval for academic study or training***.
 - A majority (between six and eight in each case) were required to seek approval for ***pre-arranged meetings*** outside the residence, to use only ***specified mosques***, to hold only ***one bank account***, to obtain prior approval for ***foreign transfers*** and to ***report daily*** to a police station.
 - A minority (three in both cases) faced restrictions on ***entry of visitors*** to the residence, and were obliged ***not to lead prayers*** outside their own residence.
- 4.10. At **Annex 2** to this Report are the schedules from two control orders from the period under review. The first schedule contains a more onerous set of obligations than the second, though neither could properly be described as a

light-touch control order, since no such orders existed as the control order system came to an end.

Duration of final control orders

4.11. The figures for duration over the lifetime of the control order scheme are presented at 3.47, above. The control orders in force in December 2011 had been in force for the following periods:¹⁴⁸

0-1 years	1-2 years	2-3 years	3-4 years	4-5 years
4	1	2	1	1

4.12. Four of the nine controlled persons at the end of the scheme had therefore already been subject to control orders for more than two years. Since all nine are now subject to TPIMs, the total period under control will increase if time spent under the two regimes is taken together. The two-year maximum duration of a TPIM runs from the start of the TPIM, without regard to any prior period spent subject to a control order.

Prosecutions for terrorist offences

4.13. None of the nine men who were subject to control orders in 2011 had previously been convicted of a terrorist offence. Three had previously been acquitted of a terrorist offence. I cannot give details because of the possibility that they might aid identification of the persons in question.

Prosecutions for breach

4.14. Charges were brought in 2011 in relation to a number of breaches by controlled persons of conditions of their orders. There were no convictions. The jury acquitted CD on two counts and returned no verdict on twelve other counts: CD had spent time on remand and no retrial was sought. Charges against BM, BG and BF were discontinued, in BM's case after the relevant control order had been declared by the court to be flawed from the outset. As of December 2011, charges against BX, CC and AY were pending. BX and CC were remanded in custody and AY was on bail.

4.15. **Annex 7** to this Report presents in tabular form the charges for breach during 2011, and summarises the status of each case.

¹⁴⁸ One of those recorded as having been in force for less than a year replaced an earlier control order that was revoked: see 4.19, below.

Absconds

- 4.16. No controlled person absconded in 2011, continuing a record stretching back to June 2007. There were seven absconds before June 2007, five of them by persons who were on light-touch control orders, with daily reporting requirements but no relocation and no curfew. The absence of absconds since mid-2007 has coincided with the trend away from light-touch control orders, and/or the more extensive use of relocation.

Legal proceedings

Section 3(10) review hearings

- 4.17. Each of the five persons upon whom new control orders were served during 2011 allowed the default section 3(10) hearing to take its course. In two of those cases, CD and CE, the control order was upheld by the court. The three other appeals were to be heard in 2012 (BM in February, CC and CF in July).
- 4.18. Section 3(10) proceedings also took place during 2011 in relation to three control orders served in 2010. In one of those (BF), the control order was upheld in the High Court. In the other two (CB and BP), the section 3(10) proceedings were indefinitely stayed by the Court, as serving no useful purpose since the control orders had been revoked.¹⁴⁹
- 4.19. A High Court decision to uphold a control order in 2010 was successfully appealed to the Court of Appeal in 2011 (BM): see further 4.25, below. A new control order replaced that which the Court of Appeal had revoked. Two other appeals were dismissed.¹⁵⁰ An appeal by AT (whose control order had been revoked in 2009) was argued in December 2011 and upheld on non-disclosure grounds in February 2012.¹⁵¹

Section 10(1) appeals

- 4.20. Of seven renewals of control orders in 2011, six were appealed. One appeal was heard and was unsuccessful (BG), two appeals were withdrawn (BH and CA) and three appeals were to be heard in 2012 (BX in April, AY in May and AM in June). One appeal against the renewal of a control order in 2010 was heard in 2011 and was unsuccessful (BH).

¹⁴⁹ *SSHD v CB and BP* [2011] EWHC 1990 (Admin), Silber J.

¹⁵⁰ *AM v SSHD* [2011] EWCA Civ 710; *AH v SSHD* [2011] EWCA Civ 787.

¹⁵¹ *SSHD v AT* [2012] EWCA Civ 42. Although AT's control order had been revoked in 2009, the appeal was said to be relevant "as providing a possible basis for a claim for compensation, and perhaps to removing any remaining stigma arising from the making of the order": §3. It is expected that the case will be remitted to the High Court for consideration of what further disclosure is required.

- 4.21. There was, in addition, one appeal against the modification of a control order without consent (AY) which was later withdrawn. Although there were 265 modifications in the year, only 14 of these modifications were without consent, and hence liable to be appealed under section 10(1).

Section 10(3) appeals

- 4.22. 87 requests for modifications were refused in 2011, and appeals were brought in relation to five of those refusals. Three appeals were heard and were unsuccessful (CD, BM, AM) and two were withdrawn (CE and BF). Section 10(3) appeals were also heard in 2011 against three refusals to modify a control order in 2010 (all AM). These appeals were unsuccessful.
- 4.23. There were no appeals against refusals to revoke control orders.

Important decisions

- 4.24. There were no court decisions in 2011 raising major points of principle, to compare with past cases such as *JJ, MB* and *AF (No. 3)*.¹⁵² That is testament to the growing maturity of the control order case law, rather than to any absence of litigation activity. There were however judgments of general legal importance for the control order (and by extension the TPIM) regime.
- 4.25. In one case, the Court of Appeal struck down a control order that had been upheld by the High Court.¹⁵³ The High Court's error was to consider only whether the control order was necessary on the date of the hearing, and not whether it had been necessary also on the date it was made. Basing itself solely on the open evidence, so as to avoid delaying the outcome of the case, the Court of Appeal concluded that the control order was flawed from the outset and directed that it should be revoked from the point that it was made within 48 hours of judgment. It was replaced by a new one.
- 4.26. In two other cases, the High Court rejected the argument that the Secretary of State has a public law duty, analogous to that which has been held to exist in relation to Imprisonment for Public Protection prisoners, to provide a controlled individual with a reasonable opportunity to demonstrate that the obligations contained in the control order were no longer necessary.¹⁵⁴
- 4.27. Of political rather than legal significance were two judgments in which decisions to relocate controlled persons away from London were upheld on their facts as

¹⁵² See 3.82, above.

¹⁵³ *BM v SSHD* [2011] EWCA Civ 366, 5 April 2011.

¹⁵⁴ *SSHD v BF* [2011] EWHC 1878 (Admin) (Davis J) §§34-52; *AM v SSHD* [2011] EWHC 2486 (Admin) (Silber J) §§20-44.

necessary and proportionate measures to protect the public.¹⁵⁵ In *CD*, the High Court in its open judgment remarked that “*there is nothing in the evidence as to why CD’s wife has not joined him*” and added:

“[S]ince his return [from Syria] he has endeavoured to obtain firearms on a number of occasions from a number of associates for the purposes of putting into effect a planned terrorist attack, has held covert meetings with associates in relation to plans to use the firearms as part of this planned attack and has displayed a very high level of security awareness.”

In *BM*, it stated in its open judgment:

“Although it is clear that the serious infringement of Article 8 rights which results from any relocation order is particularly serious in this appellant’s case, the real risk that without such restriction the appellant would take part in the transfer of monies to those fighting against Allied Troops outweighs those rights.”

- 4.28. Since the Coalition Government had by then decided not to permit relocation as a condition of TPIMs, these judgments caused a degree of controversy. The Government sought to reconcile the apparent discrepancy between its policy position and these court rulings by emphasising that the introduction of TPIMs would be accompanied by new money for a range of covert investigative techniques, including human and technical surveillance.

Decisions that made a difference

- 4.29. The intervention of the courts has in past years been decisive in ending control orders or significant obligations such as relocation.¹⁵⁶
- 4.30. In 2011, the actual results of judicial intervention were relatively minor. Thus:
- The revocation of the control order served on BM in May 2009, ordered by the Court of Appeal in April 2011, made no practical difference to BM, since a replacement control order was immediately issued in its place.
 - There was no other successful challenge to the making or renewal of a control order. However in one case in which a renewal was upheld, the

¹⁵⁵ *CD v SSHD* [2011] EWHC 1273 (Admin) (Simon J); *BM v SSHD* [2011] EWHC 1969 (Admin) (Calvert-Smith J).

¹⁵⁶ See e.g. *Cerie Bullivant*, whose second control order was quashed by Collins J in [2008] EWHC B2 (Admin); the cases in which control orders had to be revoked as a consequence of the disclosure requirement recognised by the Law Lords in *AF (No. 3)* (including AF himself, whose control order was revoked in 2009); and the striking down by Mitting J of a forced relocation from Crawley to Ipswich in *CA v SSHD* [2010] EWHC 2278 (QB). Over the lifetime of the control order regime, three relocations were struck down on proportionality grounds and one on disclosure grounds.

court ordered that a number of obligations should be modified as agreed by the parties.¹⁵⁷

- In another case, the court upheld CE's control order but overturned a modification which required CE to end chance meetings as soon as possible.¹⁵⁸ That judgment led to similar requirements being removed from the control orders where this modification had been imposed. As a result, AY withdrew his appeal against the modification and BX withdrew this ground of appeal from his renewal appeal

4.31. A summary provided by the Home Office of each of the court decisions on control orders in 2011 is at **Annex 8** to this Report.

¹⁵⁷ *BH v SSHD*, Order of 8 March 2011.

¹⁵⁸ *CE v SSHD* [2011] EWHC Admin 3157 (Lloyd Jones J).

5. TERRORISM PREVENTION AND INVESTIGATION MEASURES

Counter-Terrorism Review

- 5.1. The replacement of control orders had been mooted by both the Conservatives and the Liberal Democrats prior to the General Election of May 2010. The Coalition Agreement of 20 May stated the Government would “urgently review control orders as part of a wider review of counter-terrorist legislation, measures and programmes.” That review was announced to the House of Commons on 13 July 2010, and published on 26 January 2011.¹⁵⁹
- 5.2. The Counter-Terrorism Review made a commitment to repeal PTA 2005 and introduce a new system of terrorism prevention and investigation measures. The new regime would not make provision for some of the more intrusive restrictions available under control orders, and would provide increased civil liberties safeguards for those subject to the new measures. No provision would be made for derogation from the ECHR: but draft emergency legislation containing more stringent measures would be prepared for use in the event of a very serious terrorist risk that could not be managed by other means.¹⁶⁰
- 5.3. Following debates in the House of Commons on 2 March and the House of Lords on 8 March 2011, the powers in PTA 2005 were renewed until 31 December 2011.¹⁶¹ A 42-day transitional period, running from the date of commencement (15 December 2011), was provided for by TPIMA 2011 Schedule 8.

Passage of the Bill

- 5.4. The Bill was introduced on 23 May 2011 and received royal assent on 14 December 2011. There were lengthy debates over the substance of the measures provided for, concerning in particular, the ending of the relocation power, with the consequent return of some controlled persons to London prior to the Olympic Games and the replacement of the curfew of up to 16 hours by an unquantified “overnight residence requirement”.
- 5.5. The Joint Committee on Human Rights produced two reports on the Bill.¹⁶² While welcoming the stated aim of allowing individuals to lead as normal a life as possible, consistent with protecting the public, the first report made various

¹⁵⁹ *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations*, Cm 8004.

¹⁶⁰ The draft Enhanced Terrorism Prevention and Investigation Measures Bill: see further at 5.30-5.35, below.

¹⁶¹ The Prevention of Terrorism Act 2005 (Continuance in Force of sections 1 to 9) Order 2011, 2011 No. 716.

¹⁶² *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (First Report)* July 2011; (*Second Report*), 18 October 2011.

criticisms concerning what it saw as insufficient integration with the criminal justice process, the role of the court, the failure to spell out the right to a fair hearing as defined by the courts in control order cases, the retention and use of biometric material and the absence of annual parliamentary review and renewal. The second report concentrated on prior judicial authorisation, the standard of proof and the failure to provide explicitly for full merits review. Some of these matters are the subject of comment in the remainder of this section.

The new regime

5.6. The structure of the TPIM regime closely resembles that of the old control order regime. Thus:

- TPIM notices are made by the Secretary of State,¹⁶³ after police and prosecutors have been consulted on whether there is evidence that could realistically be used to prosecute the intended subject.¹⁶⁴
- A wide (though finite) range of measures may be imposed, including an overnight residence requirement, travel restrictions and restrictions on electronic communications and association with other persons.
- Permission to make a notice is required from the High Court, which goes on to hold a full review hearing unless the subject decides otherwise or the court decides to discontinue the review.¹⁶⁵
- Appeals lie against any decision to vary, extend or revive a TPIM notice and any decision to refuse to vary or revoke a TPIM notice.¹⁶⁶
- In any court proceedings where secret evidence is involved, a system of special advocates is used.¹⁶⁷

5.7. In addition to judicial scrutiny, two of the safeguards applicable under PTA 2005 apply also to the TPIM regime. Thus:

- The Secretary of State must produce a quarterly report on the exercise of her powers under the Act.¹⁶⁸

¹⁶³ TPIMA 2011 sections 2-3.

¹⁶⁴ TPIMA 2011 section 10.

¹⁶⁵ TPIMA 2011 sections 6-9.

¹⁶⁶ TPIMA 2011 section 16.

¹⁶⁷ TPIMA Schedule 4.

¹⁶⁸ TPIMA 2011 section 19.

- The Independent Reviewer must carry out an annual review of the operation of the Act, and produce an annual report which is laid before Parliament.

5.8. TPIMA 2011 however contains no equivalent to the requirement that PTA 2005 be annually renewed by Parliament.¹⁶⁹ It lasts for five years, and may be further extended by the Secretary of State after consulting the Independent Reviewer, the Intelligence Services Commissioner and the Director-General of the MI5, and after a resolution of each House of Parliament.¹⁷⁰

Principal differences

5.9. The absence of an annual sunset clause (5.8, above) is the one respect in which TPIMA 2011 is less liberal than the control order regime that it replaces. The annual renewal debates were described by Lord Carlile as “*a bit of a fiction, to be frank*”.¹⁷¹ The Joint Committee on Human Rights however considered the absence of annual reviews to be regrettable, since its effect is to normalise a system whose utility remains controversial.¹⁷² It is for consideration whether my annual reports on the operation of the TPIMA 2011 might be used to inform regular (or occasional) reviews by the Joint Committee or other Parliamentary Committees: I return to this subject in my recommendations (section 7, below).

5.10. The other differences between the TPIM regime and the control order regime conform to the Coalition Government’s expressed desire to remove the more intrusive elements of control orders and improve the safeguards for those subject to them. The principal differences have been presented by the Home Office in a table reproduced at **Annex 9** to this Report. It remains to be seen how they will impact on the operation of the system. Those which seem to me potentially the most significant are summarised below.

Reasonable suspicion

5.11. The “*reasonable suspicion*” test in PTA 2005 has been replaced by a test of *reasonable belief* that a person is, or has been, involved in terrorism-related activity.¹⁷³ “*Reasonable belief*” is a harder test to satisfy. In the words of the Court of Appeal:

¹⁶⁹ PTA 2005 section 13.

¹⁷⁰ TPIMA 2011 section 21.

¹⁷¹ TPIM Bill, Public Bill Committee, 21 June 2011, col. 23 Q70.

¹⁷² Joint Committee on Human Rights, *Renewal of Control Orders Legislation 2011, Eighth Report of Session 2010-2011* HL Paper 106 HC 838, March 2011

¹⁷³ TPIMA 2011 section 3(1).

“Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which a person 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.”¹⁷⁴

The change from reasonable suspicion to reasonable belief is thus one of real significance.

5.12. My predecessor, Lord Carlile, however concluded after examination of the files for 2010 that each of the control orders imposed would have satisfied not only the required standard of reasonable suspicion, but also the standard of reasonable belief. Whilst my role is to neither to second-guess the decisions of Ministers nor pre-empt those of the courts, my own examination of the files on control orders made in 2011 points to a similar conclusion. That indicates a careful and responsible use of the control order regime.

5.13. It may be asked why the Government should not be required to establish involvement in terrorist activity *on the balance of probabilities* (i.e. to the civil standard of proof). After all:

- Precisely that standard would have been required for the making of a derogating control order,¹⁷⁵ and would in the future be required if the ETPIM Bill were enacted.¹⁷⁶ Parliament has accordingly not deemed it incapable of fulfilment where orders of this nature are concerned: quite the contrary.
- The courts have required a still *higher* standard (proof beyond reasonable doubt) to be met for the making of orders such as ASBOs, holding that:

“.. there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.”¹⁷⁷

Those factors apply with at least the same force to control orders.

¹⁷⁴ *A and others v Secretary of State for the Home Department* [2004] EWCA Civ, [2005] 1 WLR 414, per Laws LJ at para 229. See to the same effect *Ahmed*, per Lord Brown at para 199: “to suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so”.

¹⁷⁵ PTA 2005 section 4(7).

¹⁷⁶ ETPIM Bill clause 2(1). Note however that in cases falling short of the balance of probability, it would still be open the Home Secretary to make a TPIM on the basis of reasonable belief: ETPIMS would supplement rather than replace the TPIM regime.

¹⁷⁷ *R v Manchester Crown Court ex p McCann* [2002] UKHL 39, [2003] 1 AC 787, per Lord Hope at §82, which despite being distinguished in *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 remains good law for ASBOs: *S-B (Children)* [2009] UKSC 17, [2010] 1 AC 678, §11.

5.14. Save in cases of urgency, where a lower standard could temporarily have sufficed, it would therefore have been entirely reasonable for proof on a balance of probabilities to be required before a control order or TPIM could be made.¹⁷⁸ However:

- It should not be assumed that a balance of probabilities test would have been met in all control order cases. Indeed my firm impression from reading the evidence is that there were some in relation to which it would not have been met. To impose a higher threshold in relation to TPIMs would thus have carried a tangible cost in terms of damage to national security.
- It has not been suggested by the courts that a reasonable suspicion or reasonable belief test is incompatible with Article 6 ECHR or otherwise unlawful.¹⁷⁹
- In any event, Parliament having only very recently decided after thorough debate upon the appropriate standard both in relation to asset-freezing and TPIMs, it would be desirable for consideration of any possible amendments to wait until more experience has been accumulated of the operation of that new standard.

5.15. The arguments for a balance of probabilities test are not straightforward and I shall keep them under review. Parliament having so recently spoken, however, I make no recommendation for legislative change in this or in any other respect.

Two-year limit

5.16. There was no limit on the number of times a 12-month control order could be extended, so long as the necessity test continued to be met.¹⁸⁰ As is evident from the table at 3.47 above, some controlled persons were subject to control orders for periods exceeding four years.

¹⁷⁸ See, in this regard, the recommendations of the Joint Committee on Human Rights: *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (Second Report)* 2010-2012 HL 204 / HC 1571, October 2011.

¹⁷⁹ The test was considered, for example, in *A v Secretary of State for Home Department* [2004] EWCA Civ 1123 and *SSH D v MB* [2007] UKHL 46, [2008] 1 AC 440. The fact that proof on the balance of probabilities is not required has been mentioned as a factor inclining against the characterisation of control order proceedings as criminal for the purposes of ECHR Article 6, an outcome which might result in the inadmissibility of hearsay evidence: *SSH D v MB* [2007] UKHL 46, [2008] 1 AC 440, §§21, 24 (Lord Bingham).

¹⁸⁰ PTA 2005 section 2(4), and cf. designation under TFA 2010. Proscription of an organisation is indefinite, and does not even have to be annually renewed.

- 5.17. A TPIM notice, by contrast, is subject to a two-year limit.¹⁸¹ Whilst a new notice could in theory be issued after the expiry of that time, at least some of the evidence upon which it was based would need to be of “*new terrorism-related activity*” – in other words, activity occurring after the imposition of the first TPIM notice.¹⁸² Experience with control orders suggests that evidence of this kind is unlikely to come to light.
- 5.18. A limit had been championed by academic writers¹⁸³ and was recommended (save in exceptional cases) by my predecessor, Lord Carlile.¹⁸⁴ Removing the option of parking suspected persons indefinitely on control orders will provide a desirable incentive to pay close attention to exit strategies, including prosecution, from the start. Whether, however, the effect of such a limit would in practice be (as was once claimed for a suggested 12-month limit)

“to convert control orders from the warehousing of suspects into an inquisition and the compilation of a dossier, beyond which any restraint must be based on criminal charges”¹⁸⁵

is less clear. While TPIMs may afford some intelligence-gathering opportunities, it seems to me unlikely that the prosecution of ex-TPIM subjects will become routine or indeed anything more than occasional – desirable though such outcomes would be.

Range of measures

- 5.19. The obligations that could be imposed by a control order were unlimited, save by the requirement that the Secretary of State must have considered them necessary for purposes connected with preventing or restricting involvement by an individual in terrorism-related activity.¹⁸⁶ In practice, such obligations were generally limited to those contained in the illustrative list.¹⁸⁷
- 5.20. The restrictions or “*measures*” imposable under a TPIM are, by contrast, limited to those specified in Schedule 1 to the Act.¹⁸⁸ Close inspection of those

¹⁸¹ TPIMA section 5.

¹⁸² TPIMA 2011 sections 3(2), 3(6)(b).

¹⁸³ See, in particular, C. Walker, *Keeping control of terrorists without losing control of constitutionalism* (2007) 59 Stan L. Rev. 1395, 1458 (suggesting a 12-month maximum without the possibility of renewal on the same grounds).

¹⁸⁴ *Third Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, 18 February 2008, §§50-51.

¹⁸⁵ C. Walker, *The threat of terrorism and the fate of control orders* [2010] PL 4, 16.

¹⁸⁶ PTA 2005 section 1(3).

¹⁸⁷ PATA 2005 section 1(4).

¹⁸⁸ TPIMA 2011 section 2(2).

specified measures demonstrates that in a number of important respects, they are less intrusive than obligations that were routinely imposed by control order.¹⁸⁹

5.21. The difference is most striking in relation to **geographical restrictions**. Thus:

- The power to **relocate** controlled persons to different towns and cities is removed. A Londoner must thus be allowed to continue to reside in London, even if his network is nearby: the option of sending him to a provincial town or city has gone. This is notwithstanding the fact that relocation was undoubtedly effective in disrupting networks, and that it had been upheld as proportionate in two cases during 2011.
- The frequently-exercised power to **confine controlled persons to a particular area** is replaced by a much weaker power to exclude them from particular specified areas or places.¹⁹⁰ So while a person may be prevented from visiting a particular street where an associate lives, he cannot be restricted to his own borough, or to a part of his own town (or the town to which he had been relocated) as was previously the case.

5.22. **Curfews** of up to 16 hours are replaced by “*overnight residence measures*”.¹⁹¹ While no maximum length is specified, it would be surprising if these could be for more than 10 or 12 hours.

5.23. A power that potentially extended to a complete ban all **electronic communications** is replaced by a provision which requires the subject to be allowed the use of fixed line and mobile telephones and a computer with internet access.¹⁹²

5.24. Limits on the **freedom to associate** are relaxed, at least at the level of policy. Association with named individuals can still be prohibited: but the previous practice of prohibiting all prearranged meetings and all visitors is to be abandoned, in favour of a policy to require new associations to be notified on the first occasion only.

5.25. **Police searches** for the purpose of determining whether there is compliance with TPIMs now require a warrant from the appropriate judicial authority,¹⁹³

¹⁸⁹ Though the wording of Schedule 1 is itself open-ended at times: see, e.g., paras 8(1) and 9(1).

¹⁹⁰ TPIMA 2011 Schedule 1 para 3.

¹⁹¹ TPIMA 2011 Schedule 1 para 1(2)(c).

¹⁹² TPIMA 2011 Schedule 1 para 7(3). Control order subjects were very rarely allowed computers.

¹⁹³ TPIMA 2011 Schedule 5 para 8.

contrary to the previous position where “*Police officers retain the right to come and go as they please and unannounced.*”¹⁹⁴

5.26. A TPIM notice may require the subject, when he is required to live in accommodation specified by the Secretary of State, to comply with any specified **terms of occupancy** of that residence.¹⁹⁵ A criminal penalty of up to five years’ imprisonment may thus be available for breach of relatively trivial occupancy rules (relating, for example, to such matters as greasy walls in the kitchen, marks caused by posters and the placing of wet clothes on radiators).¹⁹⁶ Though good sense would no doubt tend to prevail within the Home Office, police and CPS in relation to matters of this kind,¹⁹⁷ and while the necessity for and proportionality of any measures will remain a matter for the High Court, it may be doubted whether such measures will always be necessary for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity.¹⁹⁸

Likely application to foreign nationals

5.27. The original TPIM subjects, being an identical group to the last controlled persons, were all British citizens (including dual nationals). It should not however be assumed that TPIMs will never in the future be imposed upon foreign nationals believed to be terrorists. It is true that the preferable option will often be to detain such persons under Immigration Act powers and then to deport them; and that deportation even to regimes that practise torture may be legally permissible, if an agreement is in place that sufficiently safeguards the interests of the deportee.¹⁹⁹ However only a few such agreements currently exist; it is not clear whether all of them meet the high standards required by the European Court of Human Rights; and even in the case of an agreement which does meet those standards, deportation may still be impermissible in the absence of sufficient guarantees that the deportee will not be tried on the basis of evidence obtained by torturing others.²⁰⁰ In such circumstances, the TPIM remains a feasible alternative in an appropriate case.

¹⁹⁴ CA’s wife, writing in *The Muslim News*, 16 December 2011: see 3.39, above.

¹⁹⁵ TPIMA 2011 Schedule 1 para 1(6).

¹⁹⁶ In an open skeleton argument filed on his behalf on 16 February 2012, BM referred to letters from the Secretary of State while he was subject to a control order, referring to such matters and telling him that he must take steps to ensure that they did not recur.

¹⁹⁷ Indeed it is my understanding that criminal charges were never brought under PTA 2005 for the equivalent offence of disobeying directions from the Home Office to comply with such occupancy rules.

¹⁹⁸ As required by TPIMA 2011 section 3(4). The word “necessary” presumably means more than merely useful, reasonable or desirable: cf. *The Sunday Times v UK* [1979] 2 EHRR 245 §59.

¹⁹⁹ *Othman v UK* (ECtHR), judgment of 17 January 2012.

²⁰⁰ As was the case in relation to Abu Qatada in Jordan: *ibid.*

Transitional period

5.28. The nine control orders that were in force immediately before commencement of TPIMA 2011 (on 15 December 2011)²⁰¹ remained in force for a 42-day transitional period.²⁰² All nine were either revoked during the transitional period or ceased to have effect at the end of it; all nine individuals have now been made subject to TPIM notices.

Administrative arrangements

5.29. The Home Office administrative arrangements are to be essentially the same for TPIMs as they were for control orders. CORG is replaced by the TPIM Review Group **[TRG]**, whose objective is to bring together the departments and agencies involved in making, maintaining and monitoring TPIM notices on a quarterly basis to keep all cases under frequent, formal and audited review. The detailed terms of reference of TRG are at **Annex 10** to this Report.

ETPIMs

5.30. The Counter-Terrorism Review concluded that there might be exceptional circumstances in which the Government would need to seek Parliamentary approval for more extensive and intrusive measures than TPIMs. Rather than trust to the Civil Contingencies Act 2004 for this purpose,²⁰³ the Government prepared and published draft emergency legislation, so that it could have a measure of pre-legislative scrutiny before being introduced should the need arise.²⁰⁴

5.31. The draft Enhanced Terrorism Prevention and Investigation Measures Bill **[ETPIM Bill]** was published only on 1 September 2011. A memorandum was supplied by the Home Office to the Joint Committee on Human Rights in order to assist its consideration of the draft Bill, but at the time of writing no special committee had been established to consider it, as was the case for the draft Bills

²⁰¹ TPIMA 2011 section 31(2).

²⁰² TPIMA 2011 Schedule 8 paras 1, 9.

²⁰³ As some considered preferable: C. Walker and J. Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (OUP 2006).

²⁰⁴ The practice of preparing emergency legislation in advance was approved by Lord Lloyd in chapter 18 of his 1996 *Inquiry into Legislation against Terrorism*. It has also proved a convenient solution to some of the problems of coalition government: compare the draft legislation in relation to the possible future need to detain terrorist suspects beyond 14 days, discussed in my *Report on the operation in 2010 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006*, July 2011, §§7.12-7.16 and 7.48-7.51 (available from my website).

providing for the temporary extension of the maximum detention period for terrorist suspects from 14 to 28 days.²⁰⁵

- 5.32. The ETPIM regime would have the same Independent Reviewer as TPIMA 2011.²⁰⁶ The operative powers of the ETPIM Bill would last for only a year, unless extended after consultation with the Independent Reviewer, Intelligence Services Commissioner and Director-General of MI5.²⁰⁷ Individual notices would be subject to the same two-year time limit as TPIMs – though time served on a TPIM would not count towards time served on an ETPIM, or vice versa.²⁰⁸ The Secretary of State would have to consider that each measure was “*necessary*” for preventing or restricting the individual’s involvement in terrorism, and keep the necessity of each measure under review throughout the period of the notice. Judicial supervision would follow the pattern familiar from PTA 2005 and TPIMA 2011: initial permission, automatic review and subsequent rights of appeal.
- 5.33. The ETPIM Bill differs from TPIMA 2011 principally in the wider range of measures that could be imposed under it.²⁰⁹ These include relocation, a curfew not limited to “*overnight*”, and tighter restrictions on movement, communication and association. As the Home Office explained at §15 of its Memorandum to the JCHR, with a degree of understatement, “*there are similarities between the proposed enhanced measures and non-derogating control orders*” under PTA 2005.
- 5.34. Paradoxically however, granted that ETPIMs are envisaged only in the event of “*a very serious terrorist risk that cannot be managed by other means*”,²¹⁰ the trigger that in PTA 2005 was set at reasonable suspicion and in TPIMA 2011 at reasonable belief is replaced by a more onerous one: the Secretary of State must be “*satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity*”. Seeking logic in this outcome, one would have to conclude that the intention was to apply a higher threshold in recognition of the fact that an ETPIM would be a potentially more onerous measure than a TPIM.²¹¹ Where the evidence in relation to a person amounted to reasonable belief but fell short of the balance of probabilities, that person could still be subjected to a TPIM.

²⁰⁵ Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills 2011, Report of 23 June 2011, HL 161 / HC 893.

²⁰⁶ ETPIM Bill, clause 6.

²⁰⁷ Clause 9.

²⁰⁸ Clause 4.

²⁰⁹ Schedule 1.

²¹⁰ ETPIM Bill Explanatory Notes, §6.

²¹¹ As was the case with derogating control orders: PTA 2005 section 4(7). But unlike derogating control orders, which would have been made by the courts, it is envisaged that ETPIMS would be made by Ministers.

- 5.35. In recent evidence to the Home Affairs Select Committee, the head of Special Operations at Scotland Yard, Assistant Constable Cressida Dick (echoing the Security Minister)²¹² stated that she envisaged that ETPIMs would be required only in “*very extreme circumstances*” such as “*credible reporting pointing to a series of concurrent attack plots*”.²¹³

AF (No. 3) disclosure

- 5.36. TPIMA 2011, like PTA 2005, is silent in relation to the circumstances in which the gist of the allegations, sufficient to allow him to give effective instructions to the Special Advocate, will be communicated to the controlled person.²¹⁴ There is no acknowledgment in the statute of the effect of *AF (No. 3)*, the Explanatory Notes stating only that:

“The disclosure obligations required by the judgment in *AF (No. 3)* will be applied as appropriate by the courts in TPIM proceedings.”²¹⁵

The Home Office Minister Lord Henley gave a similar assurance in Parliament that “*the AF principle applies to TPIMs as well as to control orders*”,²¹⁶ but again without specifying the limits of that principle. It cannot therefore be excluded that the Government may seek to argue (despite discouraging High Court precedent)²¹⁷ that *AF (No. 3)* disclosure is not required in the case of a “*light-touch*” TPIM.²¹⁸

²¹² Hansard (HC) vol 532 cols 105-106, 5 September 2011.

²¹³ Evidence of 24 January 2012, HC 1775-i, Q22, uncorrected transcript.

²¹⁴ This was regretted by the Joint Committee on Human Rights in its *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (Second Report)*, October 2011, §§1.33-1.40.

²¹⁵ At §114.

²¹⁶ HL Deb vol 731 col 341, 19 October 2011.

²¹⁷ *SSHD v BC and BB* [2009] EWHC 2927 (Admin) §57; see 3.74, above.

²¹⁸ The Supreme Court in *Tariq v Home Office* [2011] UKSC 35 held that in this area “*there are no hard-edged rules*”: §83 (Lord Hope).

6. CONCLUSIONS

General

- 6.1. Early predictions that control orders could affect “*hundreds – thousands, who knows*”²¹⁹ proved fortunately wide of the mark. So, less happily, did hopes that control orders might prove a useful accompaniment to the gathering of evidence for criminal prosecutions.
- 6.2. Instead, the control order came to occupy a small but important niche in the counter-terrorism armoury, useful and indeed necessary
- “for a small number of cases where robust information is available to the effect that the individual in question presents a considerable risk to national security, and conventional prosecution is not realistic.”²²⁰
- 6.3. Rarely has the exercise of governmental power been subject to more intense examination. I observed during the period under review that decisions on the making and review of control orders were prepared to the highest standards by officials, and taken with appropriate care and seriousness by Ministers. Expert High Court judges, attended by small armies of taxpayer-funded lawyers, scrutinised every order for compliance with statute and with ECHR rights. The appellate courts, crucially guided by Strasbourg where the vital question of disclosure was concerned, fashioned from not always promising statutory material a procedure that ensured at least the semblance of a fair trial. It is a matter for pride that in this area at least, the administrative and legal cultures of the United Kingdom addressed so conscientiously their responsibility to balance the sometimes irreconcilable requirements of national security and of individual freedom.
- 6.4. For all this, there remained something profoundly alien and unsettling about the control order. Individuals were placed under extraordinary and intrusive restrictions, often (in the early years of the regime) without explanation other than that they were suspected to be a threat to national security. Explanations became fuller after *AF (No. 3)*, but relocation became increasingly common. Legal review was far from immediate; and when the hearing came around, controlled persons spent crucial parts of it excluded from the court, oblivious both of the detailed accusations made against them and of the submissions made by Special Advocates who were able neither to communicate fully with them nor (in practice) to call evidence on their behalf. This could go on indefinitely. As one

²¹⁹ C. Gearty, *Human rights in an age of counter-terrorism* (2005) 58 CLP 25, 42.

²²⁰ Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2011.

family member put it, “*You literally feel as though you are fighting a ghost and there never seems to be any light at the end of the tunnel.*”²²¹ Only in the face of strong necessity could it ever be justifiable for the individual to be placed in such a position by the State.

- 6.5. Though TPIMs are in several respects a less severe version of control orders, it is to be hoped that executive orders of this kind, however expertly prepared and reviewed they may be, will never need to be used on a larger scale than has been the case to date. The ideal would be for renewal of the TPIM system beyond its initial 5-year currency to be judged unnecessary.²²² Whether or not this proves possible, it is important that efforts continue to improve the amenability of terrorist activity to trial by criminal process, including if it is feasible to do so the admission of the intercept evidence prohibited by RIPA section 17 but accepted by nearly all other common law countries.²²³
- 6.6. In the remainder of this section I seek to answer some more specific questions concerning the effectiveness, enforceability, counter-productiveness and fairness of control orders, and to identify some areas likely to be of importance in my first review of TPIMA 2011.

Were control orders effective?

- 6.7. The effectiveness of control orders in ***disrupting terrorism*** was monitored within Government for the period prior to May 2010.²²⁴ Those analyses are for obvious reasons secret, but I have seen the results. They are to the effect that control orders were for the most part successful in ensuring the major, moderate or minor disruption of a key national security target. In one case, the effect may have been more marked even than that.
- 6.8. There are good reasons, detailed in secret material that I have read, to believe that control orders prevented persons believed to be terrorists from travelling overseas, maintaining contact with senior Al-Qaida personnel, providing funds, facilitating the travel and training of others and engaging in terrorist-related

²²¹ The wife of CA, writing in Muslim News 16 December 2011, p. 15.

²²² Though the creeping normalisation of preventative powers, by their introduction into other areas of criminal law (2.25, above) makes this an ambitious goal.

²²³ As Lord Carlile repeatedly pointed out and as I agree, this would not be “*the quick and easy solution that some have assumed and asserted*”: *Sixth Report of the Independent Reviewer pursuant to section 14(3) PTA 2005*, February 2011, §66. A sense of the difficulties is given by *Intercept as Evidence*, December 2009, Cm 7760. I have been briefed on the current programme of work under the Coalition Agreement and look forward to scrutinising its conclusions.

²²⁴ No equivalent analysis was conducted for the period after May 2010, the Coalition Government having already committed to ending the system. I have no reason to believe that the overall picture was subject to significant change in 2011.

activity within the United Kingdom. While not all control orders were effective (in particular and most obviously, those which resulted in absconds), the less effective ones appear to have been concentrated towards the beginning of the period.

- 6.9. It is reasonable to suppose also that control orders may have **released resources** that could be used in relation to other targets. The shortage of resources is not so acute as it was in 2004, when according to the Intelligence and Security Committee, MI5 could provide coverage for only 6% of the overall known threat.²²⁵ Nonetheless, the need to prioritise remains central to the work of MI5, and is always likely to do so. To the extent that the curfews, tagging and relocation provided for by control orders reduced the resources required for surveillance of controlled persons, there was a dividend in terms of the ability to use those resources for other purposes.
- 6.10. It is less clear that control orders had effects going beyond temporary containment and disruption. Relocation under a control order may in some cases have facilitated **disengagement from terrorism**, by separating a controlled person from his former associates. The desire to disengage had however to come ultimately from the controlled person himself. There is at least one case in which the long-term disruption of terrorist groups is claimed to have been facilitated by the use of control orders, coupled with other measures such as criminal prosecution (both for terrorist and other offences), proscription, deportation and asset-freezing. The causative role of any specific measure will however always be hard to assess.
- 6.11. Also difficult is the assessment of **which restrictions were the most effective** in preventing terrorism. It is one thing to say that a bundle of restrictions had a preventative effect: quite another to attribute elements of that effect to individual restrictions.
- 6.12. At the core of the control order was the **curfew** and, in cases where it was imposed, **relocation**. Restrictions on **association** and **communication** could also be of central importance. These types of restriction had the potential to be the most disruptive, both to family life and to terrorist networks. Impact on civil liberties thus correlated strongly with benefit to national security.

²²⁵ *Could 7/7 Have Been Prevented?*, Intelligence and Security Committee, May 2009, §146. The same report noted that MI5's budget trebled between 2001 and 2010-11, that most of the extra money had been used to improve front-line counter-terrorism capability and that the extra resources provided since 2004 enabled it to increase its capability significantly: §161-162. It could still however only "*hit the crocodiles nearest the boat*": §163.

- 6.13. **Relocation** was not indispensable. A majority of control orders never featured relocation, and in other cases relocations were struck down by the courts. It is also the case that increased surveillance may in some cases be an alternative to relocation – though the two are not exact substitutes, since the purpose of covert surveillance is to detect rather than to disrupt.
- 6.14. That said, the disruptive effect of relocation was as prized for national security reasons as it was resented by families. The police stated to Parliament that the loss of the power “*will significantly increase the challenges that we have to face*”.²²⁶ It brought national security advantages that are not easily replicated by other means, as indicated by the two courts which, in 2011, upheld relocation as necessary conditions of a control order.

Were control orders enforceable?

- 6.15. The difficulties in prosecuting controlled persons for breach, and the often disappointing outcomes of those prosecutions, are catalogued at 3.58-3.63 and 4.14-4.15, above. The nadir, from the Home Office’s point of view, was the acquittal of a person who was put on trial in December 2007 for absconding from his control order, but acquitted by the jury – presumably on the basis that the mental problems which he claimed to have experienced while under a control order were considered to be a “*reasonable excuse*”.
- 6.16. Notwithstanding these difficulties, and the frequent small breaches by some controlled persons, control orders remained generally enforceable. The best evidence of this is the complete absence of absconds after June 2007, and the relatively minor nature of the breaches that were prosecuted in later years.

Were control orders counter-productive?

- 6.17. If a counter-terrorism strategy is to be effective in the long term, it requires that measures taken to address the threat must not unnecessarily exacerbate tensions or alienate communities. The risk of this is particularly high when the impact of the measure in question is extreme, or concentrated on certain communities, or when the measure is widely used.
- 6.18. The first two of those factors apply in relation to control orders. They were highly intrusive; all those subject to them were Muslims; and the great majority were of Asian or North African ethnicity. The third however does not: the total of 52 persons subject to control orders during the life of the scheme contrasts with the many hundreds of thousands who were stopped and searched under TA 2000 section 44 prior to its discontinuation in 2010 (some 255,000 of them in 2008-09

²²⁶ DAC Stuart Osborne, Hansard (Public Bill Committee) col 6, 21 June 2011.

alone),²²⁷ and the tens of thousands who are still examined every year at ports under TA 2000 Schedule 7.

6.19. The possible community impact of a control order was routinely considered both at the point of imposition of the order and during its lifespan. There is however little published evidence on the role of control orders as a source of radicalisation.

6.20. Control orders were presented to me as a source of grievance and resentment by some who were already radicalised. In addition Gareth Peirce, a solicitor experienced in acting for controlled persons, told the Joint Committee on Human Rights that:

“this may only affect a small group of people but in terms of its contribution to what one might call the folklore of injustice it is colossal.”²²⁸

It is certainly conceivable that accounts of the disruption caused by control orders to family life might have promoted a degree of disenchantment in the wider Muslim community.²²⁹

6.21. I have been told by people in a good position to know that control orders were not prominent among the grievances commonly advanced, and that as a focus for resentment they were far outranked in the hierarchy of counter-terrorism measures by the old TA 2000 section 44 stop and search in particular. There is limited support for this in the surprisingly sparse survey literature.²³⁰ Nor – though causation is difficult to assess – am I aware of any case in which the family of a controlled person can be said to have been radicalised as a consequence of a control order being imposed.

6.22. There is however no ground for complacency where TPIMs are concerned. If control orders made a relatively small contributor to radicalisation, it is no doubt because they were used only sparingly, and only against people whom there was reason to suspect were engaged in terrorism. The rigorous judicial scrutiny of all control orders may also have helped defuse suggestions of injustice. The widespread negative reaction to internment in Northern Ireland is a warning that restrictive measures of this kind could rapidly become counter-productive if they

²²⁷ Home Office Statistical Bulletin 18/10, 28 October 2010, Table 2.1.

²²⁸ *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, February 2010, HL Paper 64 HC 395, §42.

²²⁹ For such an account, see the article cited at 3.39, above.

²³⁰ Only 10.3% of Muslims surveyed by Muslim Voice UK in 2007 believed that control orders should be abolished: however 71.7% thought that controlled persons should be put on trial to see whether they were innocent or guilty. See *What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?*, Home Office Occasional Paper 88, March 2010, Table 4.

were used on a significantly greater scale, or against less dangerous targets, than has generally been the case to date.

Were control orders fair?

- 6.23. The administrative procedure by which control orders were made seems to me to have been a sound (if inevitably one-sided) one. The fairness of the system can however only be tested by reference to the ability of controlled persons to challenge the restrictions placed upon them in the courts.
- 6.24. Legislators, officials and judges put enormous effort into devising and refining a closed material procedure, based on the operation of Special Advocates, that is ECHR-compliant and that aspires to the highest standards of procedural fairness.
- 6.25. The fact that compliance with ECHR Article 6 was achieved, while commendable, is not a final answer to the question of fairness. As was stated recently in the Supreme Court:

“the lawfulness of a closed material procedure under Article 6 and under the common law are distinct questions.”²³¹

It remains the case that:

“The closed material excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it.”²³²

Accordingly, any closed material procedure “*involves a departure from both the open justice principle and the natural justice principles*”²³³ and “*deprive[s] a litigant of his fundamental common law rights*”.²³⁴

- 6.26. The departure from common law standards of fairness is of course less marked, and so less objectionable, to the extent that sufficient information is provided about the relevant allegations to enable the controlled person to give effective

²³¹ *Al-Rawi v SSHD* [2011] UKSC 34, §68 (Lord Dyson, with whom Lord Hope and Lord Kerr agreed).

²³² *Ibid.*, §35.

²³³ *Ibid.*, §14, echoed by Lord Brown who spoke at §83 of “*the grave inroads into our fundamental principles of open justice and fair trials that are made by closed procedures*”.

²³⁴ *Ibid.* §38. While the other Supreme Court Justices did not associate themselves with Lord Dyson’s comments, a clear majority did not believe that it was within the power of the courts under the common law (at least absent the consent of the parties) to adopt closed material procedures – even in civil cases where money, rather than the restriction of liberty, is at stake.

instructions in relation to them. That has been required, in control order cases, since the *AF (No. 3)* judgment of 2009. Nonetheless, a closed material procedure makes inroads into common law standards of fairness, as encapsulated in the open justice and natural justice principles, even in cases where *AF (No. 3)* disclosure is given.

- 6.27. The Special Advocates, whose experience of closed material procedures in the specific context of control orders is unrivalled, stated in their response to the Green Paper on Justice and Security:

“Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness.

..

Neither the provision of Special Advocates, however conscientious, nor (where applicable) the modifications to current CMPs required by the House of Lords decision in *AF (No. 3)*, are capable of making CMPs ‘fair’ by any recognisable common law standards.”

- 6.28. Those views are not shared by counsel instructed on behalf of the Home Secretary, who consider that the Special Advocates do a highly effective job with often unpromising material. Nor do they find an echo in the rulings of those judges to whom it falls to operate closed material procedures in the courts.²³⁵ Nonetheless, when combined with the comments of the Supreme Court in *Al-Rawi* they serve as a timely reminder that no procedure can be wholly fair in which a participant is enabled neither to hear nor (therefore) to rebut the detailed evidence adduced against him. National security may justify the making of inroads into the common law principles of open justice and natural justice.²³⁶ It is important however to accept that such inroads have been made.
- 6.29. That something resembling a fair litigation procedure was fashioned out of PTA 2005 during the six years of its operation is a tribute to the conscientiousness and attention to detail of the judges and advocates who operated the system, and their resourcefulness in seeking to reconcile the terms of the Act with the requirements of Article 6.²³⁷ In one vital respect – the requirement that controlled

²³⁵ As has been stated on high authority, “*The best judge of whether the proceedings have afforded a sufficient and substantial measure of procedural protection is likely to be the judge who conducted the hearing*”: *SSHD v MB* [2007] UKHL 46, [2008] 1 AC 440, §67 (Baroness Hale).

²³⁶ It is “*clearly established that, where there are real concerns about national security, the obligations of fairness may have to be modified or excluded*”: *R (Tucker) v Director-General of the National Crime Squad* [2003] EWCA Civ, §43 (Scott Baker LJ, citing Lord Denning and Lane LJ in *R v SSHD ex p Hosenball* [1977] 1 WLR 766).

²³⁷ See 3.64-3.83, above.

persons be given a sufficient gist of the allegations against them to enable them to give effective instructions to their Special Advocate – the intervention of the European Court of Human Rights was both crucial and beneficial.

- 6.30. Though it fell well short of the ideal, and for all the uncertainties and delays that it produced, the control order system did manage in the period under review to provide a substantial degree of fairness to the controlled person. However, I expect to have difficulty in repeating that conclusion to the extent TPIMs may in the future be granted without at least the minimum disclosure envisaged in *AF* (No. 3).

What is to be expected of TPIMs?

- 6.31. TPIMs are a different animal from control orders. The raising of the threshold from reasonable suspicion to reasonable belief of involvement in terrorism-related activity is a positive development, though of limited practical significance since the higher threshold seems already to be met in practice. Of greater importance are two other changes: the ending of involuntary relocation, and the limitation of TPIMs (save in cases where fresh evidence comes to light) to two years.
- 6.32. It is important to understand that both these changes were voluntary political decisions. They were not a consequence of judicial disapproval of the previous system, either in the United Kingdom or in Strasbourg.
- 6.33. In each case, there were sound national security reasons to perpetuate the previous system. Relocation was undoubtedly effective, in some cases, as a means of disrupting and diffusing terrorist networks. Similarly, the ability to maintain restrictions for more than two years was of obvious utility in the case of persons who could still not be prosecuted or deported at the end of that period, and had not been deradicalised during it. Knowledge that the restrictions can (absent fresh evidence) last for only two years has the potential to strengthen the resolve of a terrorist who – confronted with an order of potentially indefinite length – might have proved more willing to compromise.
- 6.34. The decision to end relocation and to introduce the two-year limit could perhaps be argued to have practical benefits. Thus:
- There might be cases in which relocation could prove counter-productive, in terms of the resentment that it causes.
 - The two-year limit could have positive results, in terms of concentrating minds on the need for serious efforts to prosecute, deport or de-

radicalise controlled persons (though all of these are likely to remain difficult), rather than simply to control them.

- 6.35. In evaluating the package as a whole, it is also relevant that significant extra resources for covert investigative techniques, including human and technical surveillance, were allocated to police and MI5. This led Jonathan Evans, Director General of MI5, to deliver the carefully-worded verdict that “*as a result of the replacement legislation and the additional funding that has been made available, there should be no substantial increase in overall risk*”. However surveillance – which begins and ends with observation – is not a complete substitute for disruptive measures such as relocation.
- 6.36. Ultimately, the replacement of control orders by TPIMs was a political decision, taken on civil liberties rather than national security grounds. I do not criticise the Government for its attempts to balance those two factors, for as the Justice Secretary recently wrote:

“The primary role of any government is to keep its citizens safe and free. That means both protecting them from harm and protecting their hard-won liberties.”²³⁸

As so often, however, liberty has a price. The aim of the Coalition Government has been to ensure that the price of the change to TPIMs will be paid only in financial terms, rather than in a substantially increased risk of terrorism-related activity.

- 6.37. Unlike its predecessor, TPIMA 2011 will not be subject to annual review by Parliament. I welcome comments from those with experience of it, and look forward to monitoring its operation and to summarising it in my first report under the Act, early in 2013.

²³⁸ *Justice and Security Green Paper*, Cm 8194, October 2011, Foreword by Rt. Hon. Kenneth Clarke QC MP. Contrast the first sentence of the Green Paper itself: “*The first duty of government is to safeguard our national security.*”

7. RECOMMENDATIONS

- 7.1. The system under review no longer operates. The replacement system has only just begun and is not the object of this review. It was constructed, on the whole, with the lessons of control orders well in mind; but there is as yet no real experience of its operation.
- 7.2. In the circumstances, most of the recommendations below are of a general nature. More detailed recommendations must await experience of the TPIM regime.

Recommendations

1. **Every effort should be made to ensure that terrorists are tried in the criminal courts and that the use of executive measures such as TPIM notices is kept to a minimum. These efforts should include:**
 - a. **Departments and agencies promptly providing the police with any material in their possession which might be relevant to any reconsideration of prosecution; and**
 - b. **Continuing to seek a resolution to the complex issues surrounding the repeal or amendment of RIPA section 17, with a view to rendering intercept evidence admissible in criminal proceedings if it is feasible to do so.²³⁹**

2. **No TPIM notice should be made or retained in force in circumstances where prosecution, deportation or less intrusive executive measures would be a feasible alternative.²⁴⁰**

3. **No individual TPIM should be imposed unless the Secretary of State is satisfied that it is *necessary* for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity. In particular, the case for the necessity of measures such as**
 - a. **a requirement to comply with terms of occupancy of a residence supplied by the Home Office; and**
 - b. **a requirement to telephone a monitoring company on last return to the premises, in addition to the wearing of an electronic tag that will inform the authorities when return has taken place**

²³⁹ 2.9-2.11, 3.19-3.21 and 6.5, above.

²⁴⁰ *Ibid.*

may not be self-evident and should be scrutinised with particular care.²⁴¹

4. It should be recognised that a fair trial requires the subject of a TPIM to be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.²⁴²
5. A forum should be established, preferably (and if the Lord Chief Justice consents) under the chairmanship of a High Court judge experienced in control order and TPIM litigation, in which the long-standing concerns expressed by Special Advocates (relating in particular to communication with open advocates, practical ability to call evidence and challenge non-disclosure, consultation of closed judgments and issues relating to the adequacy and timing of disclosure in closed material proceedings) are considered in a constructive spirit by all interested parties. With specific reference to TPIMs, the objectives of such a process should include shortening the delays criticised in 2011 by the Court of Appeal and recommending change to rules or practices if it is considered that such changes are necessary.²⁴³
6. The quarterly reports provided for by TPIMA 2011 section 19 should be at least as detailed as the equivalent reports under PTA 2005. In particular:
 - a. References should routinely be given to all open judgments handed down during the period under review.
 - b. In the case of each judgment of the High Court on a review under TPIMA section 9, the number of months should be stated between the making of the TPIM and the handing down of the judgment.
 - c. Information regarding the location of TPIM subjects, broken down by region, should be supplied in future TPIM reports.²⁴⁴

²⁴¹ See 3.31-3.32 and 5.26, above.

²⁴² See 3.72-3.76 and 6.23-6.30, above.

²⁴³ See 3.69-3.77, above.

²⁴⁴ See 4.1-4.4, above.

7. The Joint Committee on Human Rights (and if they so wish, other Parliamentary Committees) are invited to consider with the Independent Reviewer how best, in the absence of a requirement for annual renewal debates, he could inform or assist them in keeping the necessity for and the operation of TPIMA 2011 under parliamentary review.²⁴⁵

²⁴⁵ See 5.9, above.

ANNEX 1

Obligations on controlled persons (not including contingency control orders), 10 December 2011

	TAG	Residence/Curfew	Tel Reporting	Visitors	Pre-arranged meeting	Prohibited associates	Permit police entry	24 hour powers	Comms	Specify mosque	Geographical restrictions	UK departure	Financial	Transfer of money/goods	Travel Docs	Most not leave GB	International ports	Daily to police station	Employment notification	No IT assistance	Must not lead prayers etc	Academic/training
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Case 1	X	8	X	X	X	X	X	X	X	X					X	X	X		X			X
Case 2	X	12	X	X	X	X	X	X	X	X	X		X	X	X	X	X		X			X
Case 3	X	9	X			X	X	X	X		X		X	X	X	X	X	X	X			X
Case 4	X	12	X		X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
Case 5	X	9	X		X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
Case 6	X	14	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
Case 7	X	12	X		X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
Case 8	X	12	X		X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
Case 9	X	12	X		X	X	X	X	X	X	X		X	X	X	X	X	X	X			X
TOTAL (FOR 9 CURRENT CONTROL ORDERS)																						
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
TOTAL	9	9	9	3	8	9	9	9	9	7	8	0	8	8	9	9	9	6	9	0	3	9

Average Length of Curfew: 11.9 Hours

KEY:

1. TAG

2. RESIDENCE SPECIFIED/CURFEW

3. REPORT DAILY (BY TELEPHONE) TO MONITORING COMPANY

4. RESTRICTED ENTRY OF VISITORS TO RESIDENCE

5. PRE-ARRANGED MEETINGS OUTSIDE THE RESIDENCE REQUIRE APPROVAL

6. LIST OF PROHIBITED ASSOCIATES

7. PERMIT ENTRY TO POLICE OFFICERS

8. FIRST 24 HOURS TO SECURE COMPLIANCE

9. RESTRICTION ON COMMUNICATIONS EQUIPMENT IN THE RESIDENCE (VARIATIONS BETWEEN COMMS OBLIGATION)

10. ATTEND SPECIFIED MOSQUE/S

11. GEOGRAPHICAL RESTRICTIONS - boundaries or excluded areas

12. NOTIFY HOME OFFICE OF INTENDED DEPARTURE FROM UK

13. FINANCIAL OBLIGATIONS – HOLD ONLY ONE ACCOUNT

14. PRIOR APPROVAL FOR TRANSFER OF MONEY / GOODS ABROAD (APART FROM PERSONAL LETTERS)

15. SURRENDER TRAVEL DOCUMENTS

16. MUST NOT LEAVE THE UK

17. PROHIBITION FROM ENTERING INTERNATIONAL PORTS

18. REPORT DAILY TO SPECIFIED POLICE STATION

19. NOTIFY HOME OFFICE OF EMPLOYMENT

20. MUST NOT PROVIDE IT RELATED TECHNICAL ADVICE/ ASSISTANCE

21. NOT TO LEAD PRAYERS IN MOSQUE/ OR ANYWHERE EXCEPT FOR OWN RESIDENCE

22. PRIOR APPROVAL FOR ACADEMIC STUDY AND TRAINING

ANNEX 2

Sample control orders

Form: POT001 (schedule)

Prevention of Terrorism Act 2005, section 2

SCHEDULE

This schedule sets out the obligations imposed on:

XXXX

OBLIGATIONS

- 1) You shall permit yourself to be fitted with, and shall thereafter at all times wear, an electronic monitoring tag (“the tag”). You must not damage or tamper with the tag, the tag monitoring equipment and/or the telephone provided by the monitoring company (including the associated line).
- 2.1) You shall reside at XXXX (“the residence”). “Residence” encompasses only the house at this address and does not include any private outside garden associated with it.
- 2.2) You shall remain in the residence at all times (“the curfew period”) save for a period of 12 hours between 07.00 and 19.00. This is subject to any directions given in writing referred to at obligation (8.3) below.
- 3.1) Each day, you must report to the monitoring company (as notified to you) via the telephone provided by the monitoring company:
 - (i) on the first occasion you leave the residence after a curfew period has ended; and
 - (ii) on the last occasion you return to the residence before a curfew period begins.

You may not use the telephone provided by the monitoring company for any purposes other than complying with this obligation or as directed by the Home Office.
- 3.2) You must report in person to a designated police station (notified to you in writing by the police on the service of this order) each day, at a time and in a manner also to be so notified to you.
- 3.3) The Home Office will notify you in writing if the designated police station changes or if the time at which or manner in which you must report to that station changes. You must comply with any such new requirements.
- 4) You shall not permit any of the individuals listed under obligation (6.1) to enter or remain in the residence at any time.
- 5) You shall not, outside of the residence:
 - (a) meet any person by prior arrangement, other than:

- (i) your wife, parents, brothers and sisters;
- (ii) your nominated legal representative as notified to the Home Office;
- (iii) members of the emergency services or healthcare or social work professionals who are operating in their professional capacity;
- (iv) any person aged 10 or under;
- (v) any person for health or welfare purposes at an establishment notified to and agreed by the Home Office before your first visit to it;
- (vi) any person for academic or training purposes at an establishment notified to and agreed by the Home Office before your first attendance in accordance with obligation (17) below;
- (vii) any person for employment purposes at a place of employment notified to and agreed by the Home Office before your first attendance in accordance with obligation (18) below;

or

- (b) attend any pre-arranged meetings or gatherings (other than attending prayers at your permitted mosque), save with the prior agreement of the Home Office. You must supply such information as is considered necessary by the Home Office for it to consider any request for such agreement. If the agreement is made subject to conditions, you must comply with those conditions. For the avoidance of doubt, a meeting shall be deemed to take place outside of the residence if one or more parties to it are outside of the residence (and a meeting comprises you meeting with one or more other individuals). The prior agreement of the Home Office does not prevent that agreement being withdrawn at any time or any conditions attached to it being altered.

6.1) You shall not, directly or indirectly at any time or in any way, associate with or have any communications from or with the following individuals:

- XXXX
- XXXX
- XXXX
- XXXX
- XXXX

6.2) You shall not, directly or indirectly at any time or in any way, communicate with or have any communication from or with any individual who is outside of the United Kingdom without the prior agreement of the Home Office (which may be subject to conditions with which you must comply). In relation to these individuals, you must supply the name, address and date of birth of the individual with whom you wish to communicate; the proposed mode of communication and details associated with that mode of communication; and the proposed date of the communication. If agreement is given subject to conditions, you must comply with those conditions.

6.3) The prior agreement of the Home Office shall not be required for subsequent communication with the same individual by the same mode of communication to the same telephone number/postal address, but the Home Office may withdraw that agreement at any time or alter any conditions attached to it.

7.1) You must, within seven days of service of this control order, provide the Home Office with details of any building, land, vehicle, or other place in the United Kingdom that you own, control, or have any other interest in, other than your residence as stated in

obligation (2). If, after service of this order, you subsequently obtain ownership, control, or any other interest in any building, land, vehicle or other place in the United Kingdom you must provide details of this to the Home Office within 2 working days of your obtaining any such interest.

- 7.2) You must permit any police officer, at any time, on production of their proof of identity, entry to your residence or any building, land, vehicle or other place in the United Kingdom that you own, control, or have any other interest in. You must allow a police officer to:
- (a) search your residence or any other place mentioned above for the purpose of ascertaining whether obligations imposed by or under this control order have been, are being or are about to be contravened;
 - (b) remove anything found in your residence or any other place mentioned above for the purpose mentioned in obligation (7.2(a)) or to ensure that the control order is complied with;
 - (c) subject anything so removed to tests or retain it for the duration of the control order;
 - (d) modify (at any place) anything found in the residence or any other place mentioned above to ensure that it does not breach any of the obligations imposed by or under this control order;
 - (e) install such equipment in the residence as may be considered necessary to ensure compliance with the obligations imposed by or under this control order; and
 - (f) take your photograph.
- 7.3) You must permit entry to your residence to persons authorised by the Home Office or persons from the monitoring company at any time on production of their proof of identity for the installation and maintenance of such equipment in your residence as may be considered necessary to ensure compliance with the obligations imposed by or under this control order.
- 8.1) You shall comply with such prohibitions or restrictions on your movement as may be required by directions given in writing at any time by a police officer or other person authorised by the Home Office. Such prohibitions or restrictions shall cease to be effective 24 hours after the giving of the directions, or on earlier direction.
- 8.2) Upon service of this order or any modification requiring your relocation to a new residence, you shall permit yourself to be escorted to your residence (either your current or new residence as the case may be) by a police officer and must comply with any directions given by a police officer in writing as part of this escort.
- 8.3) In order to secure compliance with obligation (2) you shall comply with directions given in writing, by a police officer or other person authorised by the Secretary of State, relating to any occupancy rules associated with the residence.”
- 9.1) Subject to obligations (9.2) to (9.5) you shall not (whether directly or indirectly) use, have, acquire or keep (whether in or outside the residence) or bring or permit into the residence any of the following articles without the prior permission of the Home Office:
- (a) any equipment capable of connecting to the internet (either directly or indirectly);
 - (b) any computer/s or computer component/s;

- (c) any equipment and/or item/s that could be used to store digital data;
 - (d) any encryption software;
 - (e) any fixed line telephone/s or mobile phone/s with the exception of one fixed line telephone in the residence and the dedicated telephone line maintained by the monitoring company; one mobile telephone that is not capable of connecting to the internet; and one SIM card
 - (f) SIM card/s save for that referred to in obligation (9.1)(e) above;
 - (g) fax machine/s; and
 - (h) pager/s.
- 9.2) You may permit a third party to bring the following articles(s) into your residence whilst you are in the residence if the articles(s) are switched off (where applicable) and not used at any time whilst you are in the residence and the third party agrees to make the articles(s) available for inspection for the purposes of obligation (10.3) below:
- (a) mobile telephone/s;
 - (b) any equipment and/or item/s that could be used to store digital data;
 - (c) SIM card/s;
 - (d) portable gaming device/s; and
 - (e) pager/s.
- 9.3) In order to ensure your compliance with obligation (9.1) and the conditions in obligation (9.2), any of the articles referred to in obligations (9.1) and (9.2) must on request be delivered up to a person authorised by the Home Office or a police officer for inspection (which may require removal). This will include the provision to the person authorised by the Home Office or to any police officer of any user names, passwords or pin codes required to unlock or activate any such article or function of such an article.
- 9.4) The prohibition against permitting the articles mentioned at obligation (9.1) into your residence (and the conditions in obligations (9.2) and (9.3)) does not apply to such devices / equipment belonging to police officers; employees of the electronic monitoring company; persons authorised by the Home Office; any person required to be given access to the property under the tenancy agreement and/or for the maintenance of the water, electricity, gas and /or telephone supply who are operating in their professional capacity; or members of the emergency services or healthcare or social work professionals who are operating in their professional capacity.
- 9.5) You must disclose to the Home Office or your designated police officer:
- (i) the number, make, model and IMEI number of any mobile phone and the number of any SIM card permitted under obligation (9.1)(e) in your possession, custody or control, as soon as reasonably practicable and in any event within 24 hours of the service of this order;
 - (ii) the number, make, model and IMEI number of any replacement mobile phone and the number of any replacement SIM card permitted under obligation (9.1)(e) that comes into your possession, custody or control as soon as reasonably practicable and in any event within 24 hours of it coming into your possession, custody or control.
- 10.1) Subject to obligation (10.2), you may attend one mosque of your choosing from those within your permitted area.

- (a) details of all accounts in which you have an interest or which you use at the time of service of this control order, within 2 days of such service and notification of which will be your permitted account;
 - (b) closing statements showing the end of your interest in any such account other than your permitted account, within 14 days of service of this control order;
 - (c) details of any permitted account opened subsequent to the service of this control order (together with the closing statement of any previous permitted account), within 2 days of its opening; and
 - (d) statements in relation to the permitted account on a monthly basis, to be provided within 7 days of their receipt.
- 13.2) You shall not transfer any money, or arrange for another to transfer any money, or send or arrange for another to send any documents or goods to a destination outside the UK without the prior agreement of the Home Office.
- 13.3) You are prohibited from possessing in excess of £150 in cash in any currency.
- 14.1) Immediately following service of this order, you must surrender your passport/s, identity card or any other travel document to a police officer or person authorised by the Home Office.
- 14.2) You shall not apply for or have in your possession or available for your use any passport, identity card, travel document(s) or travel ticket which would enable you to travel outside Great Britain.
- 15) You must not leave Great Britain.
- 16) You are prohibited from entering or being present at any of the following:
- (a) any part of an airport or sea port; or
 - (b) any part of a railway station that provides access to an international rail service
- without the prior permission of the Home Office.

For the avoidance of doubt, 'any part' referred to in obligations (16)(a) and (b) includes but is not limited to:

- (i) any car park;
- (ii) arrival / departure lounge;
- (iii) collection / drop off point; or
- (iv) any building or place

which is located at or the primary purpose of which is to serve an airport, seaport or railway station which provides access to an international rail service.

- 17.1) You must not commence any training course or academic study course provided by a third party, unless and until:
- a) you have provided the Home Office with the following information at least 14 days prior to the commencement of the training course or academic study course:

- (i) the name and address of your training course provider or academic study course provider;
 - (ii) the nature and location of your training course or academic study course;
 - (iii) if known, the date on which you expect the training course or academic study course to commence and the timings of the training course or academic study course;
- b) you have received approval in writing from the Home Office for you to undertake the training course or academic study course.
- 17.2) Where any approval referred to in obligation (18.1(b)) is subject to conditions, you must comply with those conditions.
- 17.3) Where, on service of this control order, you are already undertaking a training course or academic study course provided by a third party, you must provide the Home Office, within 7 days of such service, with the details required under obligation (17.1 (a)) – with the actual date of commencement substituted for the expected date at 17.1(a)(iii). You must immediately cease your involvement in the training course or academic study course if you receive notification in writing from the Home Office to do so.
- 18.1) Within 7 days of service of this control order, you must provide the Home Office with confirmation that you are not employed, or the following details of any current employment (or employment you have applied for or are intending to commence):
- (i) the name and address of your employer; and
 - (ii) the nature and location of your work.
- 18.2) If any of the details provided under obligation (18.1) change, you must notify the Home Office of the new details within 2 working days of the change.
- In this obligation, ‘employment’ includes all paid work, including self-employment (and all directorships whether paid or unpaid); and ‘employer’ and ‘employed’ are construed accordingly (with ‘employer’ including any trading name or business).
- 18.3) The Home Office will notify you in writing of areas of employment which are referred to in this obligation as “notified areas of employment”. You must not commence any employment in a notified area of employment unless and until:
- (a) you have provided the Home Office with:
 - (i) the name and address of your intended employer;
 - (ii) the nature and location of your work; and
 - (iii) if known, the date on which you expect the employment to commence; and
 - (b) you have received approval in writing from the Home Office for the new employment (which may be subject to conditions, with which you must comply).
- 18.4) Where, on service of this control order, you are already employed in a “notified area of employment”, you must, if you receive notification in writing from the Home Office to do so, cease such employment immediately. .

18.5) In relation to any new employment which is not in a “notified area of employment” that you have applied for or have commenced since the service of this control order, you must provide the Home Office with:

- (i) the name and address of your new or intended employer; and
- (ii) the nature and location of your work

within 7 days of your new employment commencing or, if earlier, within 7 days of your applying for the new employment.

18.6) If you cease to be employed, you must notify the Home Office within 2 working days of ceasing to be employed.

Form : POT001 (schedule)

Prevention of Terrorism Act 2005, section 2

SCHEDULE

This schedule sets out the obligations imposed on: XXXX

OBLIGATIONS

The following obligations form part of the Control Order and are imposed on you by virtue of section 1(3) of the Prevention of Terrorism Act 2005.

Upon service of the control order and thereafter for the duration of this control order:

- (1) You shall permit yourself to be fitted with and shall thereafter at all times wear an electronic monitoring tag (“the tag”). You must not damage or tamper with the tag, the tag monitoring equipment and/or the telephone provided by the monitoring company (including the associated line).
- (2.1) You shall reside at XXXX (“the residence”). “Residence” encompasses only the house at this address and any private outside garden associated with it.
- (2.2) You shall remain in the residence at all times (“the curfew period”) save for a period of 13 hours between 07:00 and 20:00 and for a further period of 7 hours between 22:00 and 05:00. This is subject to any directions given in writing referred to at obligation (6) below.
- (3.1) Each day, you must report to the monitoring company (as notified to you) via the telephone provided by the monitoring company:
 - (i) on the first occasion you leave the residence after a curfew period has ended; and
 - (ii) on the last occasion you return to the residence before a curfew period begins.

You may not use the telephone provided by the monitoring company for any purposes other than complying with this obligation or as directed by the Home Office.

- (4.1) You shall not, directly or indirectly at any time or in any way, associate with or have any communications from or with the following individuals:

- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX

- (5.2) You must permit any police officer, at any time, on production of their proof of identity, entry to your residence or any building, land, vehicle or other place in the United Kingdom that you own, control, or have any other interest in. You must allow a police officer to:
- (a) search your residence or any other place mentioned above for the purpose of ascertaining whether obligations imposed by or under this control order have been, are being or are about to be contravened;
 - (b) remove anything found in your residence or any other place mentioned above for the purpose mentioned in obligation (5.2(a)) or to ensure that the control order is complied with;
 - (c) subject anything so removed to tests or retain it for the duration of the control order;
 - (d) modify (at any place) anything found in the residence or any other place mentioned above to ensure that it does not breach any of the obligations imposed by or under this control order;
 - (e) install such equipment in the residence as may be considered necessary to ensure compliance with the obligations imposed by or under this control order; and
 - (f) take your photograph.
- (5.3) You must permit entry to your residence to persons authorised by the Home Office or persons from the monitoring company at any time on production of their proof of identity for the installation and maintenance of such equipment in your residence as may be considered necessary to ensure compliance with the obligations imposed by or under this control order.
- (6.1) You shall comply with such prohibitions or restrictions on your movement as may be required by directions given in writing at any time by a police officer or other person authorised by the Home Office. Such prohibitions or restrictions shall cease to be effective 24 hours after the giving of the directions, or on earlier direction.
- (6.2) Upon service of this order or any modification requiring your relocation to a new residence, you shall permit yourself to be escorted to your residence (either your current or new residence as the case may be) by a police officer and must comply with any directions given by a police officer in writing as part of this escort.
- (7.1) Subject to obligations (7.2) to (7.6), you shall not (whether directly or indirectly) use, have, acquire or keep (whether in or outside the residence) or bring or permit into the residence any of the following articles without the prior permission of the Home Office:
- a) any equipment capable of connecting to the internet, with the exception of one permitted computer connected to the internet through a fixed-line internet connection;
 - b) any computer/s or component/s thereof, with the exception of the one permitted, internet-capable, non-wireless-capable desktop computer that is referred to in obligation (7.1)(a);

- c) any encryption software that is new and/or additional to the encryption software intrinsic to your permitted computer's operating system;
 - d) any fixed line telephone/s and/or mobile telephone/s with the exception of one fixed line telephone in the residence and the dedicated line maintained by the monitoring company; one mobile telephone that is not capable of connecting to the internet; and one SIM card;
 - e) SIM card/s save for that referred to in obligation (7.1)(d) above;
 - f) fax machine/s; and
 - g) pager/s.
- (7.2) You may permit a third party to bring the following articles into your residence whilst you are in the residence if the article(s) are switched off (where applicable) and not used at any time whilst you are in the residence and the third party agrees to make the article(s) available for inspection for the purposes of obligation (7.3) below:
- a) mobile telephone/s;
 - b) any equipment and/or item/s that could be used to store digital data;
 - c) SIM card/s;
 - d) portable gaming device/s; and
 - e) pager/s.
- (7.3) You must notify the Home Office of any equipment or item that could be used to store digital data within 24 hours of it coming into your possession, custody or control.
- (7.4) In order to ensure your compliance with obligations (7.1), (7.2) and (7.3), any of the articles referred to in obligations (7.1), (7.2) and (7.3) must on request be delivered up to a person authorised by the Home Office or a police officer for inspection (which may require removal). This will include the provision to the person authorised by the Home Office or to any police officer of any user names, passwords or pin codes required to unlock or activate any such article or function of such an article. Furthermore, you must notify the Home Office within 24 hours of when you obtain the one permitted computer that is referred to in obligation (7.1)(a) and (b) and you must notify the Home Office within 24 hours of connecting the one permitted computer to the internet.
- (7.5) The prohibition against permitting the articles mentioned in obligation (7.1) (and the provisions in obligations (7.2), (7.3) and (7.4)) does not apply to such articles belonging to police officers; employees of the electronic monitoring company; persons authorised by the Home Office; any person required to be given access to the property for the maintenance of the water, electricity, gas and /or telephone supply who are operating in their professional capacity; or members of the emergency services or healthcare or social work professionals who are operating in their professional capacity.
- (7.6) You must disclose to a police officer or person/s authorised by the Home Office:
- i. the number, make, model and IMEI number of any mobile telephone and/or the number of any SIM card permitted under obligation (7.1) in your possession, custody or control, as soon as reasonably practicable and in any event within 24 hours of the service of this order;
 - ii. the number, make, model and IMEI number of any replacement mobile telephone and/or the number of any replacement SIM card permitted under obligation (7.1) that comes into your possession, custody or control

as soon as reasonably practicable and in any event within 24 hours of it coming into your possession, custody or control.

(8) You must not at any time enter:

- (a) the area of XXXX;
- (b) the City XXXX; and
- (c) the area bordered by XXXX.

without the prior permission of the Home Office.

(9) You are prohibited from entering or being present at any of the following:

- (d) any café/shop or other premises which carries on any business (whether or not for profit or reward) of providing internet capable computers for use by customers or clients;
- (e) any shop or other premises which carries on any business that exclusively or mainly provides currency exchange and/or money transfer facilities whether domestic or international;
- (f) any shop or other premises which carries on any business that exclusively or mainly acts as a travel agency; and
- (g) any shop or other premises which carries on any business that exclusively or mainly provides rental or sale of computer or telecommunications hardware.

without the prior permission of the Home Office.

(10) You shall not have any interest in or use more than one financial account (you 'permitted account') ("financial account" includes bank accounts, building society accounts, savings accounts and store card accounts) Your permitted account must be held with a bank or other approved financial institution within the UK. The following information must be provided to the Home Office:

- a) details of all accounts in which you have an interest or which you use at the time of service of this control order, within 2 days of such service and notification of which will be your permitted account;
- b) closing statements showing the end of your interest in any such account other than your permitted account, within 14 days of service of this control order;
- c) details of any permitted account opened subsequent to the service of this control order (together with the closing statement of any previous permitted account), within 2 days of its opening; and
- d) statements of the permitted account on a monthly basis, to be provided within 7 days of their receipt.

(11.1) You shall not transfer any money, or arrange for another to transfer any money, or send or arrange for another to send any documents or goods to a destination outside the UK without the prior agreement of the Home Office.

(11.2) You are prohibited from possessing in excess of £150 in cash in any currency.

- (12.1) Immediately following service of this order, you must surrender your passport/s, identity card or any other travel document to a police officer or person authorised by the Home Office.
- (12.2) You shall not, without the prior permission of the Home Office, apply for or have in your possession or available for your use any passport, identity card, travel document(s) or travel ticket which would enable you to travel outside Great Britain.
- (12.3) You shall not, without the prior permission of the Home Office, apply for or have in your possession or available for your use any travel ticket which would enable you to travel outside of your permitted area (as set out in obligation (8)).
- (13) You must not leave Great Britain.
- (14) You are prohibited from entering or being present at any of the following:
- (a) any part of an airport or sea port; or
 - (b) any part of a railway station that provides access to an international rail service

without prior permission from the Home Office.

For the avoidance of doubt, any part referred to in obligation (14)(a) and (b) includes but is not limited to:

- (i) any car park;
- (ii) arrival / departure lounge;
- (iii) collection / drop off point; or
- (iv) any building or place

which is located at or the primary purpose of which is to serve an airport, seaport or railway station which provides access to an international rail service.

- (15.1) You must not commence any training course or academic study course provided by a third party, unless and until:
- a) you have provided the Home Office with the following information at least 14 days prior to the commencement of the training course or academic study course:
 - i) the name and address of your training course provider or academic study course provider;
 - ii) the nature and location of your training course or academic study course;
 - iii) if known, the date on which you expect the training course or academic study course to commence and the timing of the training course or academic study course;
 - b) you have received approval in writing from the Home Office for the training course or academic study course.
- (15.2) Where any approval referred to in obligation (15.1(b)) is subject to conditions, you must comply with these conditions.

(15.3) Where, on service of this control order, you are already undertaking a training course or academic study course provided by a third party, you must provide the Home Office, within 7 days of such service, with the details required under obligation (15.1 (a)) – with the actual date of commencement substituted for the expected date at 15.1(a)(iii). You must immediately cease your involvement in the training course or academic study course if you receive notification in writing from the Home Office to do so.

(16.1) Within 7 days of service of this control order, you must provide the Home Office with confirmation that you are not employed, or the following details of any current employment (or employment you have applied for or are intending to commence):

(a) the name and address of your employer; and

(b) the nature and location of your work.

(16.2) If any of the details provided under obligation (16.1) change, you must notify the Home Office of the new details within 2 working days of the change.

In this obligation, ‘employment’ includes all paid work, including self-employment and all directorships whether paid or unpaid; and ‘employer’ and ‘employed’ are construed accordingly (with ‘employer’ including any trading name or business).

(16.3) The Home Office will notify you in writing of areas of employment which are referred to in this obligation as “notified areas of employment”. You must not commence any employment in a notified area of employment unless and until:

(a) you have provided the Home Office with:

(i) the name and address of your intended employer;

(ii) the nature and location of your work; and

(iii) if known, the date on which you expect the employment to commence; and

(b) you have received approval in writing from the Home Office for the new employment (which may be subject to conditions, with which you must comply).

(16.4) Where, on service of this control order, you are already employed in a “notified area of employment”, you must, if you receive notification in writing from the Home Office to do so, cease such employment immediately. .

(16.5) In relation to any new employment which is not in a “notified area of employment” that you have applied for or have commenced since the service of this order, you must provide the Home Office with:

(i) the name and address of your new or intended employer; and

(ii) the nature and location of your work

within 7 days of your new employment commencing or, if earlier, within 7 days of your applying for the new employment.

(16.6) If you cease to be employed, you must notify the Home Office within 2 working days of ceasing to be employed.

ANNEX 3

Home Office costs

The table below shows the costs to the Home Office of control orders for 2006-07 to 2010-11.

Please note that all figures have been rounded to the nearest £100.

	2006-07	2007-08	2008-09	2009-10	2010-11
Total cost to the Home Office of control orders⁽¹⁾	1,940,300	4,615,600	2,707,600	3,195,400	2,858,500
Legal costs to the Home Office ⁽²⁾	1,530,900	3,766,200	1,837,300	2,254,400	2,099,300
Cost to the Home Office of accommodation, subsistence, council tax, telephone and utility bills for controlled persons	87,000	246,300	203,300	315,400	231,200
Staff and administrative costs to the Home Office	322,400	603,100	667,000	625,600	528,000

- (1) These figures refer to the financial years 2006-07 to 2010-11. They include: the cost of Home Office staff working on control orders; administrative costs relating to the management of control orders; legal advice and other legal costs; accommodation, subsistence, Council Tax and utility bills and telephone line rental/phone cards provided to controlled persons in the course of the administration of the control order; and the fees paid to the Independent Reviewer of the Prevention of Terrorism Act 2005. The costs for 2006-07 are based partly on estimates.
- (2) These figures represent legal costs to the Home Office (including costs of special advocates) and do not include legal costs associated with control orders incurred by other public authorities – for example the costs of court and judicial time or costs to the Legal Services Commission. (See also paragraph 3.55 above and Annex 4.)

ANNEX 4

Legal Services Commission costs

The table below shows the costs to the Legal Services Commission of control orders for 2006-07 to 2010-11.

	2006-07	2007-08	2008-09	2009-10	2010-11
Total cost to the Legal Services Commission of control orders ⁽¹⁾	210,000	730,000	830,000	1,020,000	240,000

(1) The figure was supplied by the Legal Services Commission (LSC) and represents the costs of controlled persons' open legal representation (the Home Office pays the cost of the Special Advocates who represent controlled persons in closed court proceedings). The total figure spent on legal representation on behalf of controlled persons in this period is likely to be higher. When solicitors apply for legal aid on behalf of their client they receive a certificate from the LSC stating that the LSC will pay their legal costs in that case. The solicitors will then incur expenditure but will not necessarily invoice the LSC until the case is closed. The great majority of certificates issued by the LSC in relation to control orders proceedings remained live at the time the figure was prepared, therefore the figure given does not reflect the full extent of the legal costs of controlled persons' open legal representation. Whilst the LSC could not provide an exact figure it is likely that a proportion of the LSC costs may also overlap with the costs to the Home Office of control order legal proceedings. This is because Home Office costs include the amount spent on paying the legal costs of the controlled persons where this had been ordered by the court. The LSC will only usually be made aware that the Home Office has been ordered to pay all or part of the costs in a case at the point that a case is closed. Therefore the LSC figure may include some costs already paid by the Home Office that are yet to be recouped. Additional information may be held by the LSC.

ANNEX 5

Quarterly reports 2011

Thursday, 17 March 2011

HOME OFFICE

Control Order Powers (11th December 2010 – 10th March 2011)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 14(1) of the Prevention of Terrorism Act 2005 (the 2005 Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period.

The level of information provided will always be subject to slight variations based on operational advice.

The future of the control order regime

On 26 January 2011 I made a statement to Parliament setting out the Government's intention to replace control orders with a less intrusive and more targeted regime of terrorism prevention and investigation measures. Legislation to achieve this will be introduced in due course. Additional resources for covert investigative techniques will be made available to complement the new system. The full control order regime will continue to operate until the replacement measures are in force. I have now renewed the powers in the 2005 Act until 31 December 2011, following the debates in the House of Commons on 2 March and in the House of Lords on 8 March.

The exercise of the control order powers in the last quarter

As explained in previous quarterly statements, control order obligations are tailored to the individual concerned and are based on the terrorism-related risk that individual poses. Each control order is kept under regular review to ensure that the obligations remain necessary and proportionate. The Home Office continues to hold Control Order Review Groups (CORGs) every quarter, with representation from law enforcement and intelligence agencies, to keep the obligations in every control order under regular and formal review and to facilitate a review of appropriate exit strategies. During the reporting period, no CORGs were held in relation to the orders in force at the time. This is because meetings were held just before, and are due to be held just after, the reporting period. Other meetings were held on an ad-hoc basis as specific issues arose.

During the period 11 December 2010 to 10 March 2011, two non-derogating control orders were made, with the permission of the court, and served. One non-derogating control order was made, with the permission of the court, and revoked without ever being served following the identification of an administrative error. A further non-derogating control order was made in respect of the same individual, with the permission of the court, but was not served during the reporting period. Two control orders have been renewed in accordance with section 2(6) of the 2005 Act in this reporting period.

In total, as of 10 March, there were ten control orders in force, all of which were in respect of British citizens. All of these control orders were non-derogating. Three individuals subject to a control order were living in the Metropolitan Police Service area; the remaining individuals were living in other police force areas.

One set of criminal proceedings for breach of a control order was concluded during this reporting period following a CPS decision that prosecution was no longer in the public interest.

During this reporting period, 53 modifications of control order obligations were made. 21 requests to modify control order obligations were refused.

Section 10(1) of the 2005 Act provides a right of appeal against a decision by the Secretary of State to renew a non-derogating control order or to modify an obligation imposed by a non-derogating control order without consent. No appeals have been lodged with the High Court during this reporting period under section 10(1) of the 2005 Act. A right of appeal is also provided by section 10(3) of the 2005 Act against a decision by the Secretary of State to refuse a request by a controlled person to revoke their order or to modify any obligation under their order. During this reporting period two appeals were lodged with the High Court under section 10(3) of the 2005 Act. In one of these appeals, an interlocutory application for an injunction was also made, seeking an order staying the effect of the modification until a full hearing had taken place and judgment handed down.

One court order was made in relation to proceedings under section 10(1) of the 2005 Act during this reporting period. On 8 March 2011 the court dismissed BH's appeal against the renewal of his control order but allowed it in so far as it related to obligations imposed by the order. The obligations were modified by agreement between the parties and annexed to the court order.

On 10 March 2011 an oral judgment was handed down in relation to the injunction application referred to above. The injunction was refused and directions were set for an expedited appeal.

Thursday, 16 June 2011

HOME OFFICE

Control Order Powers (11th March 2011 – 10th June 2011)

The Secretary of State for the Home Department (Theresa May): Section 14(1) of the Prevention of Terrorism Act 2005 (the 2005 Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period.

The level of information provided will always be subject to slight variations based on operational advice.

The future of the control order regime

On 23 May 2011, the Terrorism Prevention and Investigation Measures Bill was introduced in the House of Commons. A copy of the Bill can be found on Parliament's web site. The home page for the Bill is:

<http://services.parliament.uk/bills/2010-11/terrorismpreventionandinvestigationmeasures.html>

The Bill makes provision for the abolition of control orders and their replacement with a new, less intrusive and more focused regime. The control order system will continue to operate until its replacement is in force.

The exercise of the control order powers in the last quarter

As explained in previous quarterly statements, control order obligations are tailored to the individual concerned and are based on the terrorism-related risk that individual poses. Each control order is kept under regular review to ensure that the obligations remain necessary and proportionate. The Home Office continues to hold Control Order Review Groups (CORGs) every quarter, with representation from law enforcement and intelligence agencies, to keep the obligations in every control order under regular and formal review and to facilitate a review of appropriate exit strategies. During the reporting period, three CORGs were held in relation to the orders in force at the time. Other meetings were held on an ad-hoc basis as specific issues arose.

During the period 11 March 2011 to 10 June 2011, one new non-derogating control order was made, with the permission of the court, and served. One non-derogating control order which was made, with the permission of the court, during a previous quarter was served during this quarter. A control order already in force at the beginning of this reporting period was revoked on the direction of the court and a new order made and served in its place. Two control orders have been renewed in accordance with section 2(6) of the 2005 Act in this reporting period.

In total, as of 10 June, there were 12 control orders in force, all of which were in respect of British citizens. All of these control orders were non-derogating. Three individuals subject to a control order were living in the Metropolitan Police District; the remaining individuals were living in other police force areas.

One set of criminal proceedings for breach of a control order was concluded during this reporting period following a CPS decision that prosecution was no longer in the public interest in light of the revocation of the control order to which they were related. During this reporting period, 60 modifications of control order obligations were made. 25 requests to modify control order obligations were refused.

Section 10(1) of the 2005 Act provides a right of appeal against a decision by the Secretary of State to renew a non-derogating control order or to modify an obligation imposed by a non-derogating control order without consent. Three appeals have been lodged with the High Court during this reporting period under section 10(1) of the 2005 Act. A right of appeal is also provided by section 10(3) of the 2005 Act against a decision by the Secretary of State to refuse a request by a controlled person to revoke their order or to modify any obligation under their order. During this reporting period two appeals were lodged with the High Court under section 10(3) of the 2005 Act.

On 5 April 2011 a judgment was handed down by the Court of Appeal in *BM v Secretary of State for the Home Department* [2011] EWCA CIV 366, in relation to the appeal brought by BM against the decision of the High Court to uphold his control order. The Court of Appeal allowed BM's appeal. It found that the High Court did not consider the correct legal test at the initial review of the control order because it only considered whether the control order was necessary at the date of the hearing and not at the date it was made. It further found that, on the basis of the evidence before it, the control order was flawed from the outset. The Court of Appeal made clear that it only considered the open evidence against BM in reaching this decision. The judgment recognised that the Secretary of State argued that the control order was justified on the totality of the evidence, including closed evidence that was not before them, but found that they should consider only the open evidence that was before them so as to avoid delaying the outcome of this case. The Court of Appeal directed that the control order should be revoked 48 hours after hand-down with retrospective effect from the date on which it was made.

On 20 May 2011 a judgment was handed down by the High Court in *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (admin) in relation to the appeal brought by CD under section 10(3) of the 2005 Act against the decision to refuse to remove an obligation that would require him to relocate away from his previous area of residence. The judge dismissed the appeal, concluding that the relocation obligation was a necessary and proportionate measure to protect the public from the risk of what is an immediate and real risk of a terrorist related attack. The judge also found that the Secretary of State should contribute to the travel costs of CD's family. He made clear that the finding in this case does not mean that a contribution to travel costs should be made in every case of relocation.

Most full judgments are available at <http://www.bailii.org/>.

HOME OFFICE

Control Order Powers (11th June 2011 – 10th September 2011)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 14(1) of the Prevention of Terrorism Act 2005 (the 2005 Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period.

The level of information provided will always be subject to slight variations based on operational advice.

The future of the control order regime

The Terrorism Prevention and Investigation Measures (TPIM) Bill, which makes provision for the abolition of control orders and their replacement with a new, less intrusive and more focused regime, is continuing its Parliamentary passage. A copy of the Bill can be found on Parliament's web site. The home page for the Bill is:

<http://services.parliament.uk/bills/2010-11/terrorism-prevention-and-investigation-measures.html>

The control order system will continue to operate until its replacement is in force.

The Government's counter-terrorism and security powers review concluded that there may be exceptional circumstances where more stringent measures may be required to protect the public than those available under the TPIM Bill. Such circumstances would be a very serious terrorist risk that cannot be managed by any other means. The Government committed to preparing draft emergency legislation for introduction should such circumstances arise. The draft Enhanced TPIM Bill was published on 1 September so that it can be subject to pre-legislative scrutiny.

The exercise of the control order powers in the last quarter

As explained in previous quarterly statements, control order obligations are tailored to the individual concerned and are based on the terrorism-related risk that individual poses. Each control order is kept under regular review to ensure that the obligations remain necessary and proportionate. The Home Office continues to hold Control Order Review Groups (CORGs) every quarter, with representation from law enforcement and intelligence agencies, to keep the obligations in every control order under regular and formal review and to facilitate a review of appropriate exit strategies. During the reporting period, one CORG was held in relation to some of the orders in force at the time. CORGs in relation to the remaining cases were held just before this reporting period. Other meetings were held on an ad-hoc basis as specific issues arose.

During the period 11 June 2011 to 10 September 2011, no non-derogating control orders were made or served. Two control orders have been renewed in accordance with section 2(6) of the 2005 Act in this reporting period. One control order was revoked during this reporting period as it was no longer considered necessary. One control order, made in a previous quarter but never served, expired during this reporting period.

In total, as of 10 September, there were 11 control orders in force, all of which were in respect of British citizens. All of these control orders were non-derogating. One individual subject to a control order was living in the Metropolitan Police District; the remaining individuals were living in other police force areas.

Three individuals were charged with breaching their control order obligations during this period.

During this reporting period, 76 modifications of control order obligations were made. 22 requests to modify control order obligations were refused.

Section 10(1) of the 2005 Act provides a right of appeal against a decision by the Secretary of State to renew a non-derogating control order or to modify an obligation imposed by a non-derogating control order without consent. Two appeals have been lodged with the High Court during this reporting period under section 10(1) of the 2005 Act. A right of appeal is also provided by section 10(3) of the 2005 Act against a decision by the Secretary of State to refuse a request by a controlled person to revoke their order or to modify any obligation under their order. During this reporting period no appeals were lodged with the High Court under section 10(3) of the 2005 Act.

Seven judgments have been handed down in relation to control order cases during this reporting period; five by the High Court and two by the Court of Appeal.

On 13 June 2011 a judgment was handed down by the High Court in relation to the appeal brought by BG under section 10(1) of the 2005 Act. In *BG v Secretary of State for the Home Department* [2011] EWHC 1478 (Admin), the High Court upheld the Secretary of State's decision.

On 18 July 2011 the High Court handed down a judgment following the Court review of the imposition of a control order under section 3(10) of the 2005 Act. In *Secretary of State for the Home Department v BF* [2011] EWHC 1878 (Admin) the High Court upheld the decision to make the control order.

On 22 July 2011, the High Court handed down a judgment in relation to an appeal by a controlled individual under section 10(3) of the 2005 Act. In *BM v Secretary of State for the Home Department* [2011] EWHC 1969 (Admin), the High Court upheld the Secretary of State's decision.

The High Court handed down a further judgment on 25 July 2011 in relation to two individuals who were each subject to control orders for only a short period of time. In *Secretary of State for the Home Department v CB and BP* [2011] EWHC 1990 (Admin), the Court ruled that it was appropriate for it to exercise its case management powers to, in effect, terminate the court review of the imposition of their control orders. The Court also ordered the discharge of the anonymity orders made in these cases. Abid NASEER (CB) and Faraz KHAN (BP) have been granted permission by the High Court to appeal the decision to terminate the Court proceedings.

On 29 July 2011 the High Court handed down a judgment following the Court review of the imposition of a control order under section 3(10) of the 2005 Act. In *Secretary of State for the Home Department v CD* [2011] EWHC 2087 (Admin), the High Court upheld the decision to make the control order.

The first judgment handed down by the Court of Appeal in this reporting period relates to the appeal brought by AM against the decision of the High Court to uphold his control order. In *AM v Secretary of State for the Home Department* [2011] EWCA Civ 710, handed down on 21 June 2011, the Court of Appeal dismissed AM's appeal.

The Court of Appeal also handed down judgment in this reporting period in the context of the appeal brought by AH, an individual formerly subject to a control order. In *AH v Secretary of State for the Home Department* [2011] EWCA Civ 787, handed down on 6 July 2011, the Court of Appeal dismissed AH's appeal.

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Monday, 19th December 2011

HOME OFFICE

Control Order Powers (11th September 2011 – 10th December 2011) & Control Order Powers (11th December 2011 – 14th December 2011)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 14(1) of the Prevention of Terrorism Act 2005 (the 2005 Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period. Paragraph 5 of Schedule 8 to the Terrorism Prevention and Investigation Measures Act 2011 (the 2011 Act) requires the Secretary of State to report to Parliament covering the period that begins immediately after the end of the last three-month period and ends immediately before commencement.

The level of information provided will always be subject to slight variations based on operational advice. This report covers both reporting periods.

The transition to TPIMs

The 2011 Act commenced on 15 December 2011. A copy of the Act can be found on Parliament's web site. The home page for the Act is:

www.legislation.gov.uk/ukpga/2011/23/contents/enacted

The 2005 Act has now been repealed but the control orders in force at the time of commencement of the 2011 Act will remain in effect for a 42 day transitional period concluding on 25 January 2012 unless revoked before then. This is to allow for an orderly, managed and – above all – safe transition to the new system.

The exercise of the control order powers in the relevant periods

As explained in previous quarterly statements, control order obligations are tailored to the individual concerned and are based on the terrorism-related risk that individual poses. Each control order is kept under regular review to ensure that the obligations remain necessary and proportionate. The Home Office continues to hold Control Order Review Groups (CORGs) every quarter, with representation from law enforcement and intelligence agencies, to keep the obligations in every control order under regular and formal review and to facilitate a review of appropriate exit strategies. During the reporting periods, two CORGs were held in relation to the control orders in force at the time. Other meetings were held on an ad-hoc basis as specific issues arose.

During the period 11 September 2011 to 10 December 2011, no non-derogating control orders were made or served. Two control orders were revoked during this period and two control orders have been renewed in accordance with section 2(6) of the 2005 Act. No non-derogating control orders were made, served, revoked or renewed during the period 11 December 2011 to 14 December 2011.

In total, as of 10 and 14 December, there were 9 control orders in force, all of which were in respect of British citizens. All of these control orders were non-derogating.

Two individuals were charged with breaching their control order obligations during this period. One further individual was acquitted of two counts of breaching a control order; the jury failed to return a verdict on the remaining 13 counts against the same individual.

During the period 11 September 2011 to 10 December 2011, 76 modifications of control order obligations were made. 19 requests to modify control order obligations were refused. No further modifications were made or requests refused during the period 11 December 2011 to 14 December 2011.

Section 10(1) of the 2005 Act provides a right of appeal against a decision by the Secretary of State to renew a non-derogating control order or to modify an obligation imposed by a non-derogating control order without consent. Two appeals have been lodged with the High Court during this reporting period under section 10(1). A right of appeal is also provided by section 10(3) of the 2005 Act against a decision by the Secretary of State to refuse a request by a controlled person to revoke their order or to modify any obligation under their order. During this reporting period one appeal was lodged with the High Court under section 10(3), and then withdrawn.

One judgment has been handed down by the High Court during this reporting period in relation to a control order case.

On 3 October 2011, the High Court handed down a judgment in relation to five appeals brought by a controlled individual under section 10(3) of the 2005 Act. In *AM v Secretary of State for the Home Department* [2011] EWHC 2486 (Admin) the High Court upheld the Secretary of State's decisions.

Most open judgments are available at <http://www.bailii.org/>

ANNEX 6

Table of information from quarterly reports

CONTROL ORDER STATISTICS 2011
Source: Home Office Quarterly Reports

Activity by quarter

Quarter	Q1 Dec-Mar	Q2 Mar-Jun	Q3 Jun-Sep	Q4 Sep-Dec	TOTAL
Served	2	3	0	0	5
Renewed	2	2	2	2	8
Revoked	0	1	1	2	4
Mods granted	53	60	76	76	265
Mods refused	21	25	22	19	87
S 10(1) appeals	0	3	2	2	7
S 10(3) appeals	2	2	0	1	5
Charged	0	0	3	2	5
Convicted	0	0	0	0	0

Notes:

- Quarters began on 11th and ended on 10th of the month save for December, ending on 14th
- Order revoked in Q2 was replaced by a new order served in Q2
- S10(1) appeals are against renewals or modifications
- S10(3) appeals are against refusals to revoke or modify
- Charges/convictions relate only to breaches of control orders. No controlled person was charged with or convicted of a separate terrorist offence during 2011.

Number, citizenship and location of controlled persons

Date	10 Mar	10 Jun	10 Sep	14 Dec
Number	10	12	11	9
British	10	12	11	9
London	3	3	1	?

Notes:

- "British" includes dual nationals
- "London" means Metropolitan Police Service Area

ANNEX 7

Charges for breach of control orders, 2011

Case	Obligation(s) breached	Charge(s)	Date of arrest	Date of charge	Status at present
Case A	Telephone monitoring company, police station reporting	Contravening his control order obligations	5 May 2011	30 June 2011 (charged with additional breach on 21 July 2011)	Trial 19 September 2011. Acquitted of two counts, and the jury failed to return a verdict on the remaining counts. The GPS, concluded it would not be in the public interest to seek a re-trial.
Case B	Telephone monitoring company, contacting prohibited associate	Contravening his control order obligations	20 April 2011 and 1 August 2011	6 July 2011 (charged with an additional breach on 1 August 2011)	Case discontinued on 19 December 2011, on evidential grounds.
Case C	Telephone monitoring company, curfew	Contravening his control order obligations	20 July 2011 and 31 August 2011	31 August 2011	Not guilty plea entered. Trial originally scheduled for 9 January 2012 has been adjourned to April 2012.
Case D	Telephone monitoring company	Contravening his control order obligations	14 September 2011 and 6 October 2011	6 October 2011	Trial scheduled to take place during w/c 12 March 2012.
Case E	Geographical boundary, use of internet cafés, telephone monitoring company, police station reporting, curfew, pre-arranged meeting, unauthorised mobile phone, unauthorised computer storage device	Contravening his control order obligations	11 October 2011	11 October 2011	Trial scheduled to take place during w/c 24 September 2012.

ANNEX 8

Home Office summary of control order judgments, 2011

Court reviews in 2011 of the imposition of a control order under section 3(10) of the Prevention of Terrorism Act 2005

Secretary of State for the Home Department v BF [2011] EWHC 1878 (Admin)

In *Secretary of State for the Home Department v BF* [2011] EWHC 1878 (Admin), handed down on 18 July 2011, the High Court considered whether the statutory test for imposing the control order was met during its automatic review under section 3(10) of the 2005 Act. The Court found that there was reasonable suspicion of involvement in terrorism-related activity and that a control order and the constituent obligations were necessary to protect the public from a risk of terrorism. BF argued that the Secretary of State has a duty, as a matter of public law, to BF (and to all other persons subject to a control order) to provide him with a reasonable opportunity to show that the obligations contained in the control order were no longer necessary; and that the Secretary of State had failed to do that. The Court found that no such public law duty exists.

Secretary of State for the Home Department v CD [2011] EWHC 2087 (Admin)

In *Secretary of State for the Home Department v CD* [2011] EWHC 2087 (Admin), handed down on 29 July 2011, the High Court considered whether the statutory test for imposing the control order was met during its automatic review under section 3(10) of the 2005 Act. The Court upheld the decision to make the control order on the grounds that there was reasonable suspicion of involvement in terrorism-related activity and that the control order and each of the obligations were necessary when the order was made, and continued to be necessary at the time of the hearing.

Secretary of State for the Home Department v CB and BP [2011] EWHC 1990 (Admin)

In *Secretary of State for the Home Department v CB and BP* [2011] EWHC 1990 (Admin), handed down on 25 July 2011, the Court ruled that it was appropriate for it to exercise its case management powers to, in effect, terminate the court review of the imposition of control orders (which had since been revoked) on Abid NASEER (CB) and Faraz KHAN (BP). This was due to the resource implications of hearing full court reviews of control orders that were in place for a very limited period of time given that the only matter at stake in a hearing - if the imposition of the orders was overturned - would be the ability for the individuals to claim damages. The Court considered that a civil damages claim could be brought in any event so there was no purpose in a hearing taking place under section 3(10) of the 2005 Act. The Court also ordered the discharge of the anonymity orders made in these cases. NASEER and KHAN have been granted permission by the High Court to appeal the decision to terminate the Court proceedings.

Modification appeals under section 10(3) of the Prevention of Terrorism Act 2005

CD v Secretary of State for the Home Department [2011] EWHC 1273 (admin)

In *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (admin), handed down on 20 May 2011, the High Court dismissed an appeal brought by CD against the Secretary of State's decision to refuse to remove an obligation that required him to reside away from his previous area of residence. The judge concluded that the relocation obligation was a necessary and proportionate measure to protect the public. The judge also found that

the Secretary of State should contribute to the travel costs incurred by CD's family in visiting him.

BM v Secretary of State for the Home Department [2011] EWHC 1969 (Admin)

In *BM v Secretary of State for the Home Department* [2011] EWHC 1969 (Admin), handed down on 22 July 2011, the High Court upheld the Secretary of State's decision to require BM to live in a city outside London. Although the Court considered that relocation in this case does amount to a serious infringement of Article 8 rights, the Court accepted the reasons for the relocation and found that any such infringement was both necessary and proportionate.

AM v Secretary of State for the Home Department [2011] EWHC 2486 (Admin)

In *AM v Secretary of State for the Home Department* [2011] EWHC 2486 (Admin), handed down on 3 October 2011, the High Court dismissed five appeals by AM against the Home Secretary's refusal to modify his control order. The Court concluded that the current obligations were proportionate, and were necessary to protect the public from terrorist related activities conducted by AM.

Renewal appeals under section 10(1) of the Prevention of Terrorism Act 2005

BG v Secretary of State for the Home Department [2011] EWHC 1478 (Admin)

In *BG v Secretary of State for the Home Department* [2011] EWHC 1478 (Admin), handed down on 13 June 2011, the High Court upheld the Secretary of State's decision to renew BG's control order for a second time, finding that the control order continued to be necessary to protect the public from a risk of terrorism. The Court also ruled that each of the obligations was necessary when the order was made and continued to be necessary at the time of the hearing.

Appeals in the Court of Appeal

BM v Secretary of State for the Home Department [2011] EWCA CIV 366

In *BM v Secretary of State for the Home Department* [2011] EWCA CIV 366, handed down on 5 April 2011, the Court of Appeal allowed BM's appeal against the decision of the High Court to uphold his control order. The Court of Appeal found that the High Court did not consider the correct legal test at the initial review of the control order because it only considered whether the control order was necessary at the date of the hearing and not at the date it was made. It further found that, on the basis of the evidence before it, the control order was flawed from the outset. The Court of Appeal made clear that it only considered the open evidence against BM in reaching this decision. The judgment recognised that the Secretary of State argued that the control order was justified on the totality of the evidence, including closed evidence that was not before the Court, but found that the Court should consider only the open evidence that was before it so as to avoid delaying the outcome of the case. The Court directed that the control order be revoked 48 hours after hand-down of the judgment with retrospective effect from the date on which it was made. The control order was revoked and a new control order imposed in April 2011.

AM v Secretary of State for the Home Department [2011] EWCA Civ 710

In *AM v Secretary of State for the Home Department* [2011] EWCA Civ 710, handed down on 21 June 2011, the Court of Appeal dismissed AM's appeal against the decision of the High Court to uphold his control order. The Court of Appeal found that there was nothing in any of the grounds of appeal and that the High Court's reasoning in its judgment was meticulous.

AH v Secretary of State for the Home Department [2011] EWCA Civ 787

In *AH v Secretary of State for the Home Department* [2011] EWCA Civ 787, handed down on 6 July 2011, the Court of Appeal dismissed AH's appeal against the decision by the High Court to uphold his control order (on a hearing under section 3(10) of the 2005 Act). The Court of Appeal unanimously found that there was no error of law in the first instance judgment either in relation to the finding that disclosure had been sufficient to comply with Article 6 (right to a fair trial), or that the 14 hour curfew in this case did not breach Article 5 (right to liberty).

ANNEX 9

Home Office table of differences between control orders and TPIMs

	Control orders	Terrorism prevention and investigation measures
Legal Test	Legal test for imposition of control order: <u>reasonable suspicion</u> of involvement in terrorism-related activity; order must be necessary to protect the public.	Legal test for imposition of TPIM: <u>reasonable belief</u> of involvement in terrorism-related activity; measures must be necessary to protect the public.
Duration	Order lasts maximum of 12 months. Renewable if necessary to protect the public; no max number of renewals where necessity test satisfied. Orders have been in place in a small number of cases for over 4 years.	Order lasts maximum of 12 months extendable once, giving <u>maximum time limit of 2 years</u> . Evidence of further engagement in terrorism-related activity required to justify a further notice beyond 2 years.
Obligations (general)	A wide range of obligations can be imposed where they are judged necessary and proportionate to disrupt terrorism-related activity.	A narrower range of obligations could be imposed.
Curfew/Overnight residence requirement	Maximum curfews of 16 hours for non-derogating control orders with electronic tagging available to monitor compliance.	A requirement to reside overnight at a specified residence – limited stays at other locations allowed with prior permission. Electronic tagging available to monitor compliance.
Relocation	Option to relocate individuals to Home Office provided accommodation – potentially several hours travel away from current residence.	No power to relocate away from local area without agreement. (There is a power to provide alternative accommodation within the locality of the home address.)
Communication	Option to have complete prohibition of access to mobile phones, computers and the internet (and associated technology/equipment).	All individuals will have a right to use one mobile phone without internet access and one landline. All individuals will be able to have access to the internet through one home computer. Use of equipment will be subject to necessary controls e.g. regular inspection and notification of passwords.
Association	Option to prohibit association with any named individuals where necessary. Option to prohibit prearranged meetings or visitors without prior permission.	Option to prohibit association with named individuals retained. Association with any other person requires notification
Work/study	Option to require notification and/or	Option retained.

	Control orders	Terrorism prevention and investigation measures
	approval of work and study.	
Boundary	Option to impose a very restrictive geographical boundary – limiting the individual to a relatively narrow area and excluding him from areas of significant concern.	No geographical boundaries. Power to exclude from particular places – streets and specified areas or descriptions of places (e.g. Airports).
Travel abroad	Option to prevent travel abroad.	Option to prevent travel abroad without permission of Secretary of State.
Police reporting	Option to require daily reporting to the police.	Option retained.
Financial	Option to prevent transfer of funds abroad.	Option to place restrictions on transfers of property and requirements to disclose details of property.
Derogation	Derogating control orders possible – if Government was to derogate from Article 5 (right to liberty) of the European Convention on Human Rights – imposing 24 hour curfew (house arrest).	No power to make derogating orders.
Prospects of prosecution	Police must keep prospects of prosecution under review, consulting CPS as necessary	Police must keep prospects of prosecution under review, consulting CPS as necessary. Police under statutory duty to inform Home Office of outcome.

ANNEX 10

TRG terms of reference

The terms of reference of the TRG are to bring together the departments and agencies involved in making, maintaining and monitoring TPIM notices on a quarterly basis to keep all cases under frequent, formal and audited review – in particular:

- To ensure that each TPIM notice itself remains necessary as well as ensuring that each measure is necessary and proportionate. This includes consideration of whether the measures as a whole and individually:
 - are effectively preventing or restricting the subject’s engagement in terrorism-related activity;
 - are still necessary to protect the public from a risk of terrorism;
 - need to be varied to address new or emerging risks; and
 - remain proportionate, taking into account any changing circumstances.
- To monitor the impact of the measures on each subject (including on his/her mental health and physical well-being) and the impact on the subject’s family and to consider whether the measures as a whole and individually require variation as a result.
- To keep the prospect of prosecution for an offence related to terrorism under review, with the police reporting on their ongoing review of the case (with input from the CPS as appropriate).
- To review the TPIM subject’s compliance with the TPIM notice, including any action taken in respect of any breaches.
- To consider exit strategies and whether there are other options for managing or reducing the risk posed by each subject.



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