

ANALYSIS AND OPINIONS

THE INDEPENDENT REVIEW OF UK TERRORISM LAW

DAVID ANDERSON

Independent review of the operation of UK anti-terrorism laws fuses three concepts unremarkable in themselves, but radical in combination. A person is selected on the basis of independence from Government; given unrestricted access to classified documents and national security personnel; and his conclusions – favourable or otherwise – promptly published not just to Ministers but to Parliament and the general public.

Any Government that invites review on those terms deserves respect simply for doing so. Approval from the Independent Reviewer is worth having, because that person has a full understanding both of the threat and of the measures taken to combat it. But criticism has the potential to be devastating, for the same reasons. By accepting review of this kind, Ministers make it harder for themselves to use the age-old brush-off: “If you had seen what I have seen...”. The Independent Reviewer *has* seen what they have seen and, unconstrained by the disciplines or loyalties of office, has every reason – unless he has gone rogue or gone native – to tell it as it is.

1. ORIGINS AND HISTORY OF INDEPENDENT REVIEW

The spur for this form of post-legislative scrutiny was the spread of Northern Ireland-related terrorism into Great Britain, closely followed by anti-terrorism laws. On 21 November 1974 the Birmingham pub bombings killed 21 people, doubling the IRA’s death toll in Great Britain for the year. Eight days later, the first Prevention of Terrorism (Temporary Provisions) Act completed its parliamentary passage. Based on older precedents,¹ that Act proscribed the IRA and made display of support for it illegal. It enabled the making of exclusion orders restricting persons to the territory of either Great Britain or, more usually, Northern Ireland. It gave the police wide new powers of arrest and detention, and further powers to conduct security checks on

* Q.C., UK Independent Reviewer of Terrorism Legislation.

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¹ In particular, the Prevention of Violence (Temporary Provisions) Act 1939.

travellers entering and leaving Great Britain and Northern Ireland. These powers were made subject to renewal by resolution of Parliament, every six months at first, and later every twelve.

These new and far-reaching powers provided the spur for independent review. The Home Secretary, Merlyn Rees, spoke in the renewal debate of March 1977 about the need to “reassure those who are not supporters of the IRA but who are concerned about civil liberties”, by the provision of “reassurance and information... in an independent fashion.”²

The first reviewers were hereditary peers of heroic stock: Lord Shackleton, son of the Antarctic explorer, and Earl Jellicoe, son of the First World War admiral. Review was placed on an annual basis in 1984 and since 1986, the office has been held, less heroically, by a senior lawyer with the rank of Queen’s Counsel. It is intended that the Independent Reviewer should not be a judge, but “a person whose reputation would lend authority to his conclusions, because some of the information that led him to his conclusions would not be published”.³

All Independent Reviewers have recommended changes to the law and to operational practice, and successive Governments have shown themselves ready to listen to their advice. On the recommendation of Lord Lloyd of Berwick, then a member of the UK’s highest court, the Terrorism Act 2000 consolidated anti-terrorism powers into a single comprehensive code, and made them permanent. The fortuitous timing of this Act gave it considerable influence on the explosion of legislation in other countries after the terrorist attacks of 11 September 2001.

By a grotesque coincidence, it was early in the European morning of 9/11 that the first reviewer of the 2000 Act – the former MP Lord Carlile Q.C. – was invited to take on the job. As he explained in his first report:

“... by the middle of that day, the terrible events at the World Trade Centre in New York City had occurred, and the breadth of the task in international as well as Northern Ireland terms was thus brought home to me.”⁴

Lord Carlile performed the role for more than nine years, coinciding with the most acute and prolonged threat from international terrorism that the UK has ever faced. That fact, coupled with his political acumen and his exceptional skills as a communicator, brought the post an unprecedented degree of recognition.

He was succeeded in February 2011 by the author, who has since produced 11 reports comprising more than 800 pages of text and 70 recommendations. All are available on my website,⁵ together with evidence given to parliamentary committees and other materials. Political considerations, and the intervention of the European Court of Human Rights, meant that my first three-year mandate was characterised,

² Hansard 9 March 1977 HC vol 927 no. 65 col 1487; no. 66 vols 1567–8.

³ Hansard 8 March 1984, vol 449 cols 405–6.

⁴ Lord Carlile Q.C., *Report on the operation in 2001 of the Terrorism Act 2000*, 2002, para 7.

⁵ <https://terrorismlegislationreviewer.independent.gov.uk>.

unusually, by the liberalisation of anti-terrorism law.⁶ That tide may now have turned. But anyone who assumes that the Reviewer's function is to torment the Government, or conversely to defend it, will be disappointed. I have sought, like my predecessors, only to give an informed, considered and independent view.

2. THE WORK OF THE INDEPENDENT REVIEWER

2.1. STATUTORY AND NON-STATUTORY FUNCTIONS

The statutory functions of the Independent Reviewer have varied as laws have come and gone. His main task is currently to review and report annually to the Home Secretary or Treasury on the operation of the four principal statutes in the field: the Terrorism Acts 2000 and 2006, the Terrorist Asset-Freezing &c. Act 2010 and the Terrorism Prevention and Investigation Measures (TPIMs) Act 2011.⁷ That task has been supplemented, most recently, by a commitment to review the deprivation of citizenship on national security grounds under the Immigration Act 2014.

Other, non-statutory reviews may be conducted from time to time, at the request of Ministers or on the Independent Reviewer's initiative.⁸ "Snapshot" reports have been produced on specific police operations.⁹ Reviews have also been directed to broader issues: notably the definition of terrorism, on which Lord Carlile reported in 2007, and the policy of deportation with assurances, upon which I have been asked to report. More significantly still, the Independent Reviewer was commissioned in mid-2014, with all-party agreement and statutory backing, to advise by May 2015 on the capabilities and safeguards that are needed in relation to intercept and the collection of communications data,¹⁰ with a view to informing the policy of the incoming Government.

2.2. METHOD OF APPOINTMENT

I was offered the part-time post of Independent Reviewer by three strangers. They gained access to my Chambers by subterfuge, having told my clerks that their

⁶ Thus, no-suspicion stop and search under Terrorism Act 2000 section 44 ended after Application 4158/05 *Gillan and Quinton v UK*; enhanced safeguards were placed on the retention of DNA following Application 30562/04 *S and Marper v UK*; and without intervention from Strasbourg the maximum pre-charge detention period was reduced from 28 to 14 days; control orders were replaced by the less onerous TPIMs; and the domestic threshold for the freezing of assets was raised.

⁷ Terrorism Act 2006, section 36; Asset-Freezing & c. Act 2010, section 31; Terrorism Prevention and Investigation Measures Act 2011, section 20.

⁸ The latter point was confirmed by the Home Secretary in 2011: JCHR 17th Report of 2010–2012, HL Paper 192 HC 1483, September 2011 para 40.

⁹ See the reports on Operation Pathway (2010) and Operation Gird (2011).

¹⁰ Data Retention and Investigatory Powers Act 2014, section 7.

employer, the Home Office, sought my legal advice. Once in the conference room, they revealed their identities and conveyed the wish of the Home Secretary – to whom I had no connection or political affiliation – that I should accept the job. They knew, but did not seem to mind, that I was acting at the time for an alleged former associate of Osama bin Laden, whose assets had been frozen with the support of the British Government.¹¹

That intriguing, if indefensible, method of appointment will not be repeated. In 2013 the post of Independent Reviewer was reclassified as a public appointment.¹² Under the applicable Code of Practice,¹³ a panel will in future draw up a list of appointable candidates by an open, fair and merit-based process, from which Ministers will choose. Whether to re-appoint an Independent Reviewer at the end of their three-year term of office will remain a decision for Government alone, subject to a 10-year limit on tenure.

2.3. WORKING METHODS

Like my predecessors, I believe that effective review requires the perusal of secret and unrestricted material from the civil service, intelligence agencies and police; interviews with key personnel; and time spent observing, among other things, police procedures and operational meetings concerning executive measures such as TPIMs, proscription and asset-freezing. For confidential reading and interviews, I am provided with a room in the Home Office which I use for about a day a week, more when a report is in the offing. My diary is kept by my clerks in Chambers, which remains my principal base.

I do not hold formal evidence sessions, but benefit from large numbers of informal meetings, interviews and conversations. My interlocutors are various, ranging from senior judges, intelligence chiefs, civil servants, watchdogs, prosecutors and police officers of all ranks to people who have been stopped at ports, arrested on suspicion of terrorism, imprisoned, placed in immigration detention or subjected to asset freezes, control orders and TPIMs. I am regularly briefed by MI5 in Northern Ireland and by the Joint Terrorism Analysis Centre (JTAC), whose assessments of the threat I can interrogate and use to inform my thinking and my reports. I communicate with NGOs, academics, human rights organisations and lawyers (including special advocates), both in person and via material that they share on twitter. I listen to mosque and community groups, forensic medical examiners and Prevent workers; and address security conferences, universities and schools. I attend, and contribute to, the training of police and independent custody visitors. When requested I brief

¹¹ Case C-402/05P *Kadi v Council and Commission* [2008] ECR I-6351; Case T-85/09 *Kadi v Commission* [2010] ECR II-5177. On appointment, I ceased acting for Mr Kadi.

¹² Public Appointments Order in Council, April 2013.

¹³ Code of Practice for Ministerial Appointments to Public Bodies, April 2012.

journalists by referring them to my own reports or other open-source materials, in the hope, sometimes realised, of improving the accuracy with which domestic terrorism issues are reported.

The work takes me to all parts of the United Kingdom, visiting police counter-terrorism units, detention centres, community groups and specialist facilities such as the National Borders Targeting Centre in Manchester. I have observed the operation of port controls in 15 airports, seaports and rail terminals, from Coquelles to Cairnryan. Regular trips to Northern Ireland allow me to be briefed by the security forces, prosecutors, lawyers and monitoring bodies, to observe police patrols, to talk to detainees, to hear the concerns of civil society organisations and to give evidence to the Northern Ireland Policing Board. I have made fact-finding trips to the European institutions, the United States, Canada, Germany, the Netherlands, Israel/Palestine, Jordan and Algeria. I have attended the closed hearing of a control order case and discussed legal issues relating to terrorism with MPs at Westminster and with Justice Ministers in the devolved administrations. I have private meetings with Government Ministers (including the Home Secretary, Secretary of State for Northern Ireland and Security Minister) and, when requested, with their shadows.

Much of what I do is informed by the regular reading lists provided by my Special Adviser, Professor Clive Walker, alongside commentaries and reviews based on his own research. A junior Home Office official arranges trips, organises meetings within government and helps me negotiate the often boggy bureaucratic landscape. Helpful NGOs, academics, lawyers and others direct me to people or issues I should know about. Beyond that I am on my own. Undoubtedly this means that there are topics to which I fail to do justice. It also means that every conclusion I express, for better or worse, is based exclusively on my own reading and encounters.

I give occasional interviews to radio and TV channels in the UK, both mainstream and those with a specific ethnic or religious focus. This brings more benefits than I initially expected. It keeps the Government on its toes: attention is never more prompt than when it is known that I will be discussing sensitive issues in a public forum. It ensures attention from politicians, for whom media exposure is a highly-valued currency. Last but not least, live interviews allow the Reviewer to dispense information, reassurance or concern to an audience that pays for his work through its taxes but lacks time or inclination to look up his reports.

3. CHANNELS OF INFLUENCE

Such worth as independent review may have cannot be assessed by simply counting the recommendations accepted by Government. The absence of recommendations can itself be of value: where elements of the law work well and do not need substantial alteration, it is right (and may be reassuring) to say so. Of the recommendations that are made, not all are directed to Government, or require implementation by the

authorities;¹⁴ some are in the nature of long-term aspirations;¹⁵ and yet others are made in full expectation of rejection.¹⁶ It may also be difficult to tell, from a blandly-phrased response, to what extent a recommendation has been accepted: this is not an entirely negative comment, since more is sometimes done behind the scenes than is admitted to on the record.

3.1. DIRECT INFLUENCE ON GOVERNMENT

There are areas, often technical and out of the public eye, in which a Reviewer can speak directly to Government and Government will simply do as it is advised. In that category belong the 12 recommendations that I made during my first three years in relation to the procedures for operating the Terrorist Asset-Freezing &c. Act 2010, each of which has been promptly accepted and implemented by the Treasury.

Reaction to some further-reaching recommendations may be prompted by external events. I proposed in March 2014 that the TPIM Act 2011 should be tightened up so as to provide for a higher standard of proof, increased geographical constraints on subjects and enhanced powers in relation to deradicalisation. The scope of TPIMs, and their predecessor measure control orders, had been the subject of considerable political controversy, and I was careful to ground my proposals on operational experience. Each of those recommendations was accepted in a Government Bill of November 2014, but only after the threat level was increased and action was demanded to deal with the threat from returning Syrian fighters.

Direct influence may also be exerted privately and so undisclosedly, for example through comments on a draft Code of Practice, discussions with intelligence chiefs or conversations with a Minister about the likely practical consequences of a clause being contemplated for inclusion in a Government Bill. Nor is such influence confined to Government; opposition spokespersons for example may quiz the Independent Reviewer in order to help inform their own policy positions, particularly on legal or operational issues with which they have little familiarity.

Closer to the coalface, it is a routine experience to see copies of the Reviewer's reports, sometimes freshly-printed but often well-thumbed, on desks in Whitehall and in police headquarters. The executive branch is no monolith, and the capacity for

¹⁴ For example, the recommendations to the police in my *Operation Gird* report of May 2011, and the recommendation that those affected by the misuse of port powers should lodge complaints and contribute to the Government's consultation: *The Terrorism Acts in 2011* (June 2012), 9.34.

¹⁵ For example my hope for "a root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement established criminal laws and procedures", cited approvingly by the Supreme Court in *R v Gul* [2013] UKSC 64, para 34.

¹⁶ For example, my recommendation that those arrested under the Terrorism Act 2000 should be able to apply for police bail: *The Terrorism Acts in 2011*, June 2012, 7.71–7.73. It was duly rejected, though the issue is currently before the European Court of Human Rights in Application nos. 29062/12 and 26289/12 *Duffy and Magee v UK*.

independent thought is not surrendered on entry to the public service. My base in the Home Office gives me valuable opportunities for informal discussions with civil servants; ideas that commend themselves to policy advisers within Government can achieve wider currency by that route.

3.2. INFLUENCE IN CONJUNCTION WITH OTHERS

Less direct but just as significant are the other, multiple channels through which influence can flow. Anti-terrorism law is the crucible for some of society's most heated debates about the function of the state. The subject-matter can be emotive, and the stakes for liberty, security and community cohesion are high. On the central legal and policy issues, many people have a view; and the views of reasonable people can differ. The Independent Reviewer may legitimately hope that his own conclusions will be considered with particular care by Government: for his assessments are informed by full knowledge both of the threat and of the capacity available to counter it. But it cannot be presumed that his recommendations will simply be adopted by a Government which has the same knowledge and which is additionally subject to constraints of a financial and political nature.

Hence the advantage of working alongside other channels of influence. These include community groups, NGOs, lawyers, media, the courts and Parliament, the latter now developing increasing influence of its own thanks to the activities of high-profile and independently-minded committees such as the Home Affairs Select Committee (HASC) and the Joint Committee on Human Rights (JCHR).¹⁷ Few of those channels have decisive influence in isolation, any more than does the Independent Reviewer: it is their inter-relationship with each other and with the Government that is crucial.

That comment may be applied even to the courts – on the face of it, the most powerful and direct of all channels of influence. When the judicial House of Lords declared the indefinite detention of undeportable foreign terror suspects to be incompatible with Convention rights, it was rightly hailed as an outstanding example of a court setting limits on what is acceptable in dealing with terrorism.¹⁸ But as intended by the scheme of the Human Rights Act 1998, the judgment functioned merely as an invitation to the Government to think again. It responded by devising control orders: severe and potentially indefinite inhibitions of another albeit lesser kind. A judgment from Strasbourg, at least, might appear to be an irresistible command; and such judgments have prompted significant changes to procedures for dealing with DNA retention, closed evidence, anti-terrorism stop and search and

¹⁷ See R. Kelly, "Select Committees: Powers and Functions" and M. Hunt, "The Joint Committee on Human Rights" in A. Horne, G. Drewry and D. Oliver (eds.), *Parliament and the Law* (Hart, 2013), ch. 7 and 9.

¹⁸ *A v SSHD* [2004] UKHL 56. The judgment has been seen as a high-water mark: A. Tomkins, "National security and the role of the court: a changed landscape?" (2010) 126 LQR 543–567.

deportation with assurances.¹⁹ But the European Court does not design replacement measures;²⁰ the domestic duty of the United Kingdom courts is only to take its judgments into account;²¹ and the practical force of the international duty under Article 46 of the Convention, once considered sacred even by Convention sceptics,²² has been called into question by the prisoners' voting saga, by the comments of a former Lord Chief Justice²³ and by the Conservative Party's political commitment to review the UK's relationship with the European Court of Human Rights.

Of course, the influence of the Independent Reviewer cannot compare with that of Parliament or of the courts – and nor should it. But the Reviewer may, independently of any influence that he may be able to exert in his own right, be able to contribute to the work of both. Thus:

- (a) Opinions reached on the basis of the Independent Reviewer's interviews and researches, crucially including access to classified material, can influence the conclusions of parliamentary committees and the content of parliamentary debates – though less so in the case of the more politically charged debates, in which the Reviewer's reports, though often given prominence,²⁴ tend to be selectively brandished rather than used as a source of insight.
- (b) The Independent Reviewer's ability to look at the operation of anti-terrorism laws in a non-contentious atmosphere, and without restricting himself to such cases as may happen to be brought and such facts as the parties to those cases may have chosen to place in evidence, can similarly be of assistance to the courts in forming or confirming their own conclusions.

The capacity to add value by either of these routes is naturally dependent on the Independent Reviewer being perceived to be thorough, trustworthy and sensible.

It would be an interesting piece of research to test these claims of influence over the past 35 years. The work of successive Independent Reviewers has often been referred to in Parliament, though comparisons are rendered difficult by the disappearance of annual renewal debates and the fact that some Independent

¹⁹ See, respectively, *S and Marper v UK* [2008] ECHR 1581, *A v UK* [2009] ECHR 301, *Gillan and Quinton v UK* [2010] ECHR 28 and *Othman (Abu Qatada) v UK* [2012] ECHR 56.

²⁰ Though it is becoming bolder: see P. Leach, "No longer offering fine mantras to a parched child? the European Court's developing approach to remedies" in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (CUP, 2013), ch. 6.

²¹ Human Rights Act 1998 section 2; *R(Hicks) v MPC* [2014] EWCA Civ 3, paras 69–81.

²² *SSHD v AF (No. 3)* [2009] UKHL 28, per Lord Hoffmann at para 70.

²³ Lord Judge, "Constitutional Change: Unfinished Business", lecture at University College London, 4 December 2013, paras 44–48.

²⁴ See for example the opposition day debate in which the Independent Reviewer's 2013 report on TPIMs was cited for a variety of propositions by nine speakers including the Home Secretary, the Security Minister, their respective Shadows and two former Home Secretaries: Hansard HC, 21 January 2014 cols 221–263.

Reviewers have been members of the Upper House. More than 30 court cases since 2003 have referred to statistics, evidence or opinions published by the Independent Reviewer, sometimes giving them considerable weight.²⁵ That reflects the increasing profile and judicialisation of anti-terrorism law, as well as the willingness of counsel to research and refer to the Independent Reviewer's work.

Two case studies from my own recent experience may demonstrate current practice. They show, each in their own way, how the work of the Independent Reviewer can affect the wider landscape. They also make the case for seeing different channels of influence not as competitors to each other but as subtly inter-related, often divergent but at their most effective when influencing and flowing alongside each other.²⁶

3.3. CASE STUDY 1: SECRET EVIDENCE

The potential of the Independent Reviewer to use access to classified material to inform the parliamentary debate and thus to influence its outcome is illustrated by the process that led to the Justice and Security Act 2013.²⁷ Among other things, that Act made available to the High Court a “*closed material procedure*” or CMP, for use both in deportation/exclusion judicial reviews and in damages claims against the organs of the State. In a CMP, evidence relating to national security can be adduced and taken into account by the judge despite it having been shown not to the affected individual or her lawyers but only to a security-cleared special advocate, instructed on the individual's behalf but unable to take instructions once proceedings have entered their “*closed*” phase.

Progress towards the Act began with a Green Paper of October 2011. The subject-matter fell outside my statutory responsibilities but was tangentially relevant to them, in that similar closed material procedures already operated for legal challenges to control orders, asset freezes and proscription orders. Perhaps for that reason, the JCHR invited me to give evidence on the proposals in January 2012. Two issues arose which were dependent on access to secret information not available to members of the JCHR. The first was whether, as the Government asserted, there were civil cases for whose fair resolution a CMP was necessary. The second was whether the intelligence

²⁵ Recent examples of such cases are *R (Roberts) v MPC* [2014] EWHC 69 (ethnic bias in stop and search), *R v Gul* [2013] UKSC 64 (definition of terrorism, as to which the Reviewer's concerns were said to “*merit serious consideration*”: para 62), *Elosta v MPC* [2013] EWHC 3397 (access to solicitor) and *Beghal v DPP* [2013] EWHC 2537 (port stops), currently before the Supreme Court. The European Court of Human Rights has relied extensively on the reports of Lord Carlile (*Gillan and Quinton v UK* [2010] ECHR 28), as did the High Court in numerous control order cases.

²⁶ Compare the approach of F. De Londras and F. Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms” (2010) 30 *Oxford Journal of Legal Studies*, pp. 19–47.

²⁷ See A. Tomkins, “Justice and Security in the United Kingdom” (2014) *Israel Law Review* (forthcoming: working paper available online via SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274017).

relationship with the USA was affected, as the Government again asserted, by UK courts having assumed the power to disclose into open proceedings US intelligence material to which the “*control principle*” applied and to whose disclosure the US objected.²⁸

On the first issue, the briefings that I initially requested could not answer all my questions and were insufficiently full for me to express a definite view. As I told the JCHR, I was unsure whether this simply indicated excessive caution on the part of the security establishment, or whether, more concerning, the Government lacked the evidence to support its case.²⁹ These public comments appear to have galvanised the Government. I was given unfettered access to seven cases, reading all the secret material and discussing the issues both with Government departments and agencies and with the independent barristers representing them. I concluded, cautiously, that there was a small but indeterminate category of national security-related claims in respect of which it was preferable that the option of a CMP – for all its inadequacies – should exist.³⁰ That conclusion, though not uncritically accepted by the JCHR,³¹ proved influential in the subsequent parliamentary debates.

On the second issue, I questioned agencies and prosecutors on their concerns about intelligence-sharing. I relayed my assessment to the JCHR, which remarked:

“Without access to the relevant personnel or intelligence information, there is no way of testing what is said. We find ourselves wholly dependent in this respect on the Independent Reviewer of Terrorism Legislation, who does enjoy such access and who has given evidence to us about the answers he has received to the questions he has put in order to test the Government’s assertions.”³²

Later, spurred on by sceptical NGOs and parliamentarians, I sought US views at first hand in Washington DC, where I spoke to senior lawyers and officials at the White House, National Security Council, Justice Department, State Department and intelligence agencies. After questioning me in detail on my return,³³ the JCHR again accepted my evidence that there was “*nervousness on the part of intelligence partners about the risk of their shared intelligence being disclosed*”.³⁴

My conclusions on both these sensitive issues were largely helpful to the Government. In other respects, however, I believed that the Government was asking

²⁸ In particular, *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin); [2010] EWCA Civ 65.

²⁹ D. Anderson Q.C., Memorandum of 26 January 2012, paras 5–10; Supplementary Memorandum to the JCHR, 19 March 2012, para 7.

³⁰ D. Anderson Q.C., Supplementary Memorandum to the JCHR, 19 March 2012, para 19.

³¹ JCHR Report on the Justice and Security Green Paper, April 2012, paras 56–80; JCHR Report on the Justice and Security Bill, November 2012, paras 33–45.

³² JCHR Report on the Justice and Security Bill, April 2012, para 152.

³³ Oral Evidence of D. Anderson Q.C. to the JCHR, 16 October 2012, QQ 72–84.

³⁴ JCHR Report on the Justice and Security Bill, November 2012, para 77.

for too much. In particular, it seemed to me essential that judges should be able to decide whether a CMP was needed for dealing with secret evidence, without the answer being dictated to them by one party to the litigation. I also thought it important to acknowledge that non-governmental parties would sometimes have an interest in requesting a CMP. I expressed these views in public to the JCHR³⁵ and in private both to Ministers and Shadow Ministers. The JCHR agreed;³⁶ amendments to that effect were supported by the Opposition and, after some Government defeats and concessions, eventually became law.

Much of what I said on these policy issues originated elsewhere, in the headwaters of legal practice and academic study. But the Independent Reviewer, alongside the JCHR, was well placed to channel these powerful tributaries and direct them into Westminster. During the parliamentary debates on the Justice and Security Bill, 14 MPs and 17 members of the House of Lords made a total of 87 references to my evidence. Around half of those references related to my conclusions on classified matters, and half to other views that I had given at the request of the JCHR. The Shadow Justice Secretary acknowledged at report stage that the Opposition “*has been influenced to a large extent by the views of the independent reviewer of terrorism legislation*”;³⁷ and a sponsoring Government Minister, having nominated the Independent Reviewer for what he described as “*the prize for the most quoted person in these debates*”,³⁸ added that he had been “*influential in persuading the Government to change their position on a number of issues*”.³⁹

This episode shows both how parliamentary committees can provide a platform for the Independent Reviewer, and how in return their own deliberations can be assisted by the close questioning of a Reviewer who has access to material that they do not.⁴⁰ The quality of scrutiny may thus be improved by a degree of co-ordination between the Independent Reviewer and select committees. With this in mind, it has occasionally been useful for the Independent Reviewer to speak to parliamentary committees about how their terrorism-related reviews might be focussed, and how he might best assist.

³⁵ Oral Evidence of D. Anderson Q.C. to the JCHR, 19 June 2012, QQ 6–15.

³⁶ JCHR Report on the Justice and Security Bill, November 2012, paras 46–62.

³⁷ Sadiq Khan MP, Hansard HC 4 March 2013, col 687.

³⁸ Lord Wallace, Hansard HL 21 November 2012, col 1843.

³⁹ Lord Wallace, Hansard HL 26 March 2013, col 1061.

⁴⁰ See *Control Orders in 2011*, March 2012, Recommendation 7. My invitation to the JCHR to consider how I could best inform or assist them in keeping the TPIM system under parliamentary review was taken up, resulting in a detailed evidence session followed by the JCHR’s post-legislative scrutiny report into the Terrorism Prevention and Investigation Measures Act 2011, published on 23 January 2014.

3.4. CASE STUDY 2: PORT POWERS

Schedule 7 to the Terrorism Act 2000 empowered the police to detain travellers through a port for up to nine hours, for the purpose of determining whether they are terrorists. No suspicion has hitherto been required at any stage. Failure to answer questions is a criminal offence, and PACE-style safeguards are largely absent. Prized by the authorities, not least as an intelligence-gathering tool, Schedule 7 did not feature in the Coalition Government's 2011 announcement of reforms. Legal challenges to the exercise of the power were few, and generally unsuccessful: in one 2011 case, permission to apply for judicial review was refused on the basis that:

“The legislation or its predecessor has been in existence since 1974. Its effectiveness and the need for its existence has been confirmed by the annual reports of Lord Carlile. I do not doubt that the claimant feels he has been wrongly and unfairly treated...But the power is necessary in a democratic society and. the contrary is not arguable.”⁴¹

Though since overtaken by events, the court's words are a reminder that the Independent Reviewer – like other forms of review – can be as useful in justifying the status quo as in making the case for change. Review can shine a searchlight but can also operate as a veil, shielding anti-terrorism powers from other forms of scrutiny.

Struck by the breadth of the power and the ill-feeling that it can engender, I recommended in my Terrorism Act reports of 2011 and 2012 that there should be a full public consultation and review of Schedule 7. At that stage the main pressure for reform came from Muslim groups such as the Federation of Student Islamic Societies, which made some successful freedom of information requests, and from Liberty which backed a challenge in Strasbourg. Eventually the Home Secretary agreed to the public consultation and review that I had twice recommended. That process was however tightly focussed on six proposed changes, for which parliamentary time was found in an omnibus Bill.⁴² Though sensible liberalising measures, which among other things reduced the maximum duration of the power to six hours, these changes did not touch on the major issues: the no-suspicion threshold, the compulsion to answer questions, the practice of proceeding with interviews without waiting for solicitors and the claimed power – first publicised in my reports, then taken up by the press – to download and retain the contents of travellers' mobile phones without the need for suspicion or warrant. I flagged my principal concerns to the JCHR in 2012.⁴³ The downloading issue was highlighted in my 2013 report,⁴⁴ and prompted the addition of a new Government amendment to the Bill. However Schedule 7 issues continued to attract only limited media or parliamentary interest.

⁴¹ *R(K) v SSHD 10027/2011*, Collins J.

⁴² The Anti-Social Behaviour Crime and Policing Bill 2013, Schedule 6.

⁴³ Oral evidence of 16 October 2012, Q86.

⁴⁴ *The Terrorism Acts in 2012*, July 2013, 10.65–10.80.

In mid-August 2013, the pressure was raised by an unexpected event. The police detained under Schedule 7 Mr. David Miranda, who it was thought might be carrying through Heathrow Airport top secret material taken by Edward Snowden from the NSA. This was scarcely a typical use of the power; but interest in Schedule 7 became intense, to the point where I was called upon 16 times in a single day to explain it to broadcasters from Britain and around the world. As so often, political interest fed off the media. The JCHR made recommendations on all the major issues, agreeing with my latest annual report that suspicion should be required for some manifestations of the Schedule 7 power but not for the initial stop.⁴⁵ HASC expanded the scope of its investigation into counter-terrorism to take evidence on Schedule 7.⁴⁶ A series of new amendments were tabled to the Bill. With the public encouragement of a Home Office Minister, members of HASC and other parliamentarians, I produced to HASC some recommendations, based on my own observations and discussions, for further amendment to Schedule 7.⁴⁷ Perhaps as a consequence of the time I had spent observing operations at the port, those observations were in one respect – the level of suspicion to be required for exercise of the more advanced Schedule 7 powers – less bold than those of the JCHR.⁴⁸

As this was happening a new and powerful channel of influence began to open up, carved this time by the forces of litigation. In May 2013, the European Court of Human Rights declared admissible the challenge to Schedule 7 that had been initiated two years earlier by Liberty.⁴⁹ In August 2013, Schedule 7 was declared ECHR-compliant in *Beghal*;⁵⁰ but the Supreme Court made a critical reference to the power in October,⁵¹ and heard Ms Beghal's appeal in November 2014. A year earlier, the High Court held in *Elosta*⁵² that a person detained at a port has the right not only to consult a solicitor but to have the solicitor attend an interview, and that a reasonable delay might be required for this purpose. The reports of the Independent Reviewer were relied upon by all parties to each of the cases just mentioned, and feature also in each of the judgments. Mr Miranda's own claim for judicial review was determined in February 2014, in a judgment which amply demonstrates the breadth of the current statutory definition of terrorism.⁵³

⁴⁵ Legislative Scrutiny: Anti-Social Behaviour Crime and Policing Bill, 11 October 2013, HL Paper 56 HC 713, chapter 4.

⁴⁶ My oral evidence was given on 12 November 2013, HC 231-iii, QQ70–72, 80–81.

⁴⁷ Recommendations of the Independent Reviewer on Schedule 7 to the Terrorism Act 2000, supplementary written evidence to HASC, 20 November 2013, annexed to *The Terrorism Acts in 2013*, July 2014.

⁴⁸ The JCHR explained its differences with my approach to the suspicion threshold in a further report of 6 January 2014.

⁴⁹ Application no. 32968/11 *Malik v UK*, admissibility decision of 28 May 2013.

⁵⁰ [2013] EWHC 2573 (Admin).

⁵¹ *R v Gul* [2013] UKSC 64, para 64, referring to “*the possibility of serious invasions of personal liberty*”.

⁵² [2013] EWHC 3397 (Admin).

⁵³ *R (Miranda) v SSHD and MPC* [2014] EWHC 255.

The High Court's judgment in *Elosta* has already prompted both a change in practice and a Government amendment to Schedule 7. The recommendation of the Divisional Court in *Beghal* that a statutory bar should be placed on the use in criminal proceedings of answers given under compulsion (use which is most unlikely to be sought or permitted in any event) has so far been less warmly received. But the recent arrival of the Anti-Social Behaviour Crime and Policing Act 2014 will not be the last word on Schedule 7. It remains to be seen what will be made of Schedule 7 by the Court of Appeal, Supreme Court and European Court of Human Rights in the cases now pending before them.

These case studies show that streams of influence run through a variety of channels, intersecting and reinforcing one another. Whilst the Independent Reviewer is only one channel among many, the post is distinctive in its combination of broad perspective and access to secrets.⁵⁴ The Reviewer's ability to influence Government directly can thus be supplemented by parliamentary and judicial processes in which his observations and recommendations may be found helpful.

4. CONCLUSION

The subject of post-legislative scrutiny has seen much debate in recent years,⁵⁵ but consistency of practice remains elusive. It is for consideration whether other areas of UK law, or indeed the anti-terrorism laws of other countries, might benefit from a similar type of scrutiny, whether on the UK model or as more clearly defined in Australia, the country with the closest equivalent to UK-style independent review.⁵⁶

There have been various suggestions for reform. The appointment of a review panel, first floated in 1984 (when it was rejected for security rather than financial reasons)⁵⁷ and again under consideration, could bring greater diversity of approach. However the division and delegation of work could also lead to a diminution in the range and focus displayed by previous Reviewers; the strong personal relationships on which successful tenure of the post depends would be difficult for a panel to maintain; strong candidates for the current role might be less attracted by the idea of sitting on

⁵⁴ The powers and resources of Parliament's Intelligence and Security Committee, which also has access to classified material, were increased by the Justice and Security Act 2013. The scope of its oversight however remains limited to the intelligence agencies. I have recommended that more confidence be placed in trusted Members of Parliament, so as to enable more meaningful debates to take place there on national security issues.

⁵⁵ The principal developments following the Constitution Committee's report of 2004 and Law Commission's report of 2006 are well summarised in the House of Commons library note "Post-Legislative Scrutiny" (Standard Note SN/PC/05232), 23 May 2013.

⁵⁶ Independent National Security Law Monitor Act 2010. Some advantages of this statute, including the ability of the Monitor to keep the entirety of relevant legislation under review to a timetable devised by him after consultation with others, were identified in *The Terrorism Acts in 2013* (July 2014), chapter 11.

⁵⁷ Hansard HL 8 March 1984 vol 449 cols 397–408.

a committee; and in the worst case, reports might become the bland products of compromise. A panel approach could be more appropriate in the case of review for which wider expertise than that of a lawyer is required: for example, the currently unreviewed “Prevent” programme to combat extremism and radicalisation.

In my opinion the post should not be made full-time: it is the ability to continue practising in an independent profession that has enticed strong candidates to accept the post in the past, and that provides the surest protection against the strong pressures encountered in it, sometimes from unexpected directions. But recent increases in the workload have made it necessary to consider providing for the assistance of a small, security-cleared secretariat.

The office of Independent Reviewer has been an unusual but durable source of scrutiny. It is peculiarly appropriate for an area in which potential conflicts between state power and civil liberties are acute, but information is tightly rationed. Successive Independent Reviewers have used their unique access to reassure the public, to inform the debate and where appropriate to raise the alarm. It is to be hoped that they will continue to do so.