THE TERRORISM ACTS IN 2016

REPORT OF THE INDEPENDENT REVIEWER OF TERRORISM LEGISLATION ON THE OPERATION OF THE TERRORISM ACTS 2000 AND 2006

by

MAX HILL Q.C.

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EXECUTIVE SUMMARY

- I succeeded my distinguished predecessor David Anderson QC on 1st March 2017. This is my first report as Independent Reviewer and is on the operation of the legislation existing in 2016, therefore prior to my appointment. This report will not include a detailed review of the terrorist attacks during 2017, partly because investigation and/or formal proceedings are ongoing, but will include any legislative changes to date. (Chapter 1)
- During 2016, the overall threat picture for the UK remained at Severe. Daesh continued to represent the most significant terrorist threat, but the UK faced a continuing threat of violence and terrorism from extremism, including the extreme right wing and far right. This was evidenced by the proscription of the extreme right wing group National Action in December 2016 and the terrorism-related murder of Jo Cox MP in June 2016. (Chapter 2)
- 71 organisations are proscribed under the Terrorism Act, and 14 organisations in Northern Ireland. During autumn 2017, 6 people were subject to TPIM notices. (Chapter 3)
- The Terrorism Act stop and search powers were used 483 times in Great Britain with an arrest rate of 9%. The powers were used 197 times in Northern Ireland. The power to stop and search without suspicion was once again not used. (Chapter 4)
- The frequency of use of Schedule 7 powers to examine people at ports and airports continued to decline, with 17,501 examinations in Great Britain in the year ending June 2017 compared to 23,719 examinations in the previous 12 months. (Chapter 5)
- The number of Terrorism Act arrests decreased compared to 2015, with Northern Ireland recording the lowest number of arrests in any year since 2001. The arrest power was once again used with far greater frequency in Northern Ireland than in Great Britain, but detention beyond 48 hours, common in Great Britain, is still rare in Northern Ireland. (Chapter 6)
- There were 62 trials for terrorism related offences in 2016. Of these, 54 persons were convicted and 8 acquitted. The concluded cases, including the cases of Thomas Mair and Anjem Chaudary, are summarised in the report and a brief review of Terrorism Acts offences and maximum sentencing is included. (Chapter 7)
- I have summarised my initial conclusions and recommendations in Chapter 8.
- There is a discussion on executive measures: proscription and financial sanctions (Guest chapter by Professor Clive Walker). This represents independent research by Prof Walker, but touches upon important issues which are at the heart of the IRTL's remit. (Annex 2)

1. INTRODUCTION

This report

1.1. My remit is to review our terrorism legislation annually, essentially the Terrorism Acts (TA) 2000[1] and 2006,[2] together with the Terrorism Prevention and Investigation Measures (TPIM) Act 2011[3] and the Terrorist Asset Freezing Act (TAFA) 2010.[4]

1.2. I succeeded my distinguished predecessor David Anderson QC on 1st March 2017. This is my first report as Independent Reviewer and is on the operation of the legislation existing in 2016, therefore prior to my appointment. The last annual report, produced by my predecessor David Anderson QC in December 2016,[5] was on the operation of the legislation in 2015. Because the Independent Reviewer has no operational role in the investigation of terrorism-related activity, which is the function of the Police, intelligence and security services, there is a necessary delay before I or my predecessors are able to produce our reports and recommendations. For the same reason, this report will not include the events of 2017 or the operation of our legislation during the period affected by the terrorist atrocities commencing with the multiple murders committed on Westminster Bridge in London on 22nd March 2017. The Independent Reviewer is not an active commentator on events as they happen. I'll come to all of the events, changes and challenges of 2017, but I shall do so in my annual report on the operation of the legislation during 2017, which I hope to prepare during the first half of 2018. I am conscious that anxious times call for comment and reflection as soon as this can be achieved. To this end I hope that my next report will come out sooner rather than later during 2018.

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[1] Terrorism Act 2000. Available at: https://www.legislation.gov.uk/ukpga/2000/11/contents (Accessed: 7 November 2017).
[2] Terrorism Act 2006. Available at: https://www.legislation.gov.uk/ukpga/2006/11/contents (Accessed: 7 November 2017).
[3] Terrorism Prevention and Investigation Measures Act 2011. Available at: https://www.legislation.gov.uk/ukpga/2011/23/contents (Accessed: 7 November 2017).
[4] Terrorist Asset Freezing etc. Act 2010. Available at: https://www.legislation.gov.uk/ukpga/2010/38/contents (Accessed: 7 November 2017).
[5] D. Anderson, *The Terrorism Acts in 2015*, December 2016.

1.3. The Independent Reviewer of Terrorism Legislation scrutinises the operation of the UK's counter-terrorism laws, and reports findings and recommendations to the Home Secretary. These reports are laid before Parliament and inform public debate on key counter-terrorism issues. They are often cited in legal cases, by Parliamentarians and the media, and recommendations have been influential on Government policy and operational practice.

1.4. The Independent Reviewer's role is to monitor UK counter-terrorism legislation for its fairness, effectiveness and proportionality. The work is underpinned by three central principles, without which it could not function. These principles, which were identified by my predecessor David Anderson QC in one of his reports, are: complete independence from Government; unrestricted access to classified documents and national security personnel; and a statutory obligation on Government to lay the Independent Reviewer's reports before Parliament.[6]

1.5. Commencing work on 1st March 2017, I have spent as much time as possible absorbing myself in the detail and the application of our terrorism legislation. This work has partly been undertaken at my desk in London, but I have also made my way around every relevant government department and organisation connected in whatever way to the policing and national security apparatus in the UK. My previous work as a self-employed barrister included engagement in the prosecution of terrorism cases since 2001, commencing as a junior member of the prosecution team in the criminal trial which followed the Real IRA bomb campaign which encompassed the detonation of improvised explosive devices in White City and Ealing Broadway in London, followed by Smallbrook in Birmingham.[7] This work continued every year until 2016, which ended with my participation as leading prosecution counsel in the trial of Daesh-inspired terrorists involved in transferring money from UK bank accounts with the involvement of an individual named Abrini, himself connected to the Bruxelles bombings of March

[6] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 1.4.
[7] R v Aiden Hulme & Noel Francis Maguire [2005] EWCA Crim 1196.

2016 after which he earned the soubriquet 'the man in the hat', having been captured on CCTV at Zaventum Airport.[8]

1.6. Once appointed Independent Reviewer, I have been able to build on my earlier knowledge through the open and unrestricted access afforded to me at all levels within government, policing and national security-related organisations. I record here my gratitude for the welcome I have received from all quarters and at all levels. However, the work of Independent Reviewer would be incomplete without wider engagement, beyond the apparatus of government. To that end, emulating the work of my predecessors, I have travelled across the country in order to meet with as many people as possible, with the sole purpose of hearing the views of all on the operation and impact of our legislation.[9] This work led to the publication of a 'Building Bridges' report by Forward Thinking in July 2017.[10] At Annex 1 I include a list of those whom I met in connection with the Building Bridges report. This list is as complete as possible, according to notes taken at many meetings, some of which were public and sometimes lacking a full list of attendees.

1.7. I add only this for the sake of clarity; engagement does not equate to endorsement. Whilst I find myself in agreement with many who speak to me at meetings within and without government, the essence of being Independent Reviewer is that I do my best to make up my own mind on the important issues present within our terrorism legislation.

1.8. My first action after appointment was to ask whether the three Special Advisers to my predecessor would be willing to stay in post in order to help me. To my great good fortune, all three accepted. They are my Senior Advisor Professor Clive Walker QC (Hon), together with practising barristers Hashi Mohamed (England & Wales) and Alyson Kilpatrick (Northern Ireland). To this exceptional trio I have made one addition

[8] See http://www.cps.gov.uk/news/latest_news/two_men_jailed_for_giving_money_to_brussels_bombings_suspect/, 12 December 2016.

[9] I intend to conduct round table consultations in Northern Ireland this coming year and will report further in the next Annual Report. I intended to do so this year but time did not permit it.

[10] Forward Thinking, *Community Roundtables: A report on the aftermath of the terrorist attacks in London and Manchester*, July 2017. Available at: http://www.forward-thinking.org/?post_documents=community-roundtables-a-report-on-the-aftermath-of-the-terrorist-attacks-in-london-and-manchester-foreword-by-max-hill-qc-independent-reviewer-of-terrorism-legislation.

during 2017 through the appointment of my Legal Assistant Fatima Jichi, a Bar Professional Training Course student partially sponsored by the Kalisher Trust. To all four members of my small team, I am heavily indebted and offer my thanks.

1.9. However, Chapters 1-8 of this report remain my responsibility and any errors are mine. Any recommendations or conclusions in Chapters 1-8 of this report are mine alone. At Annex 2 you will find independent research conducted by Professor Walker, as to which please see paragraph 3.7 of this report.

Legislative change

1.10. During 2016, all four of the statutes which I now review remained in force. There were no substantive changes.

1.11. Whilst my next report will deal with 2017 in greater detail, the following changes were made to the legislation so far this year:

(a) Schedule 8 of the TA 2000 was amended by Section 71 of the Policing and Crime Act 2017 to enable DNA profiles and fingerprints to be retained indefinitely where a person has convictions outside the United Kingdom.[11]

Section 68 of the 2017 Act (with more details in section 69) creates a new offence of breaching travel-related conditions of pre-charge bail (defined as 'travel restriction conditions') for those arrested on suspicion of committing a terrorist offence.

(b) The Criminal Justice Act 1988 (Reviews of Sentencing) (Amendment) Order 2017, SI 2017/1751, adds 19 either way offences which trigger the terrorism notification requirements in Part 4 of the Counter-Terrorism Act 2008 to Schedule 1 of the original Review of Sentencing 2006 Order.

Part IV of the 2017 Order allows the Attorney General, with leave from the Court of Appeal, to refer certain cases to the Court of Appeal where he considers that a sentence imposed in the Crown Court was unduly lenient.

[11] Where the act constituting the offence would constitute a recordable offence under the law of England and Wales or Northern Ireland, or an imprisonable offence under the law of Scotland.

(c) Amendments were made to the TA 2000 and to Schedule 1 of the Anti-terrorism, Crime and Security Act (ATCSA) 2001 by Part 2 of the Criminal Finances Act 2017, including the introduction in Schedule 1 of the Act of a new power to administratively forfeit "terrorist cash" in new Part 2A and new civil recovery powers in new Parts 4A and 4B to seize, detain and forfeit terrorist assets and terrorist money held in bank and building society accounts.[12]

(d) The Prison (Amendment) Rules 2017, SI 2017/560, which are linked to the special offences in the legislation, allow for a special separation regime for extremist prisoners as envisaged by the Acheson Report. By r.46A, there will be separation centres, with allocation on any of the following grounds:[13]

i. the interests of national security;
ii. to prevent the commission, preparation or instigation of an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in a prison or otherwise;
iii. to prevent the dissemination of views or beliefs that might encourage or induce others to commit any such act or offence, whether in a prison or otherwise, or to protect or safeguard others from such views or beliefs, or
iv. to prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.

[12] The full picture of relevance to terrorism financing: s.36 sharing of information; s.37 further information orders; s.41 extension of powers to financial investigators; s.42 offences in relation to financial investigators; s.43 cross jurisdiction enforcement; schedule 2 para.1 amends s.37/Sched 5 and s.37A/Sched.5A of the TA 2000; schedule 3 forfeiture – amends ATCSA 2001 sch.1 and sch.4A; schedule 4: forfeiture of money held in bank – amends ATCSA 2001 sch.1; Schedule 5 – minor amendments eg to TA 2000 s.21CA and 21G, s.115, 121 and Sched.14.

[13] A direction must be reviewed every three months. The centres will be situated in three high security prison each holding up to 12 prisoners, most of whom will be Islamist extremists. One has already been established at HMP Frankland (Durham).

Response to the Independent Reviewer's Report on the Operation of the Terrorism Acts in 2015

1.12. The government's response to David Anderson QC's final annual report was published in July 2017.[14] This sets out some of the Home Secretary's most recent thinking on our terrorism legislation and the role of the Independent Reviewer. It is therefore appropriate to recount the central themes as expressed. The selection below is mine, because it reveals some of the many important and current issues which bear upon my work, but the full document bears careful scrutiny. In my brief selection below I have also tried to reflect the various recommendations made by David Anderson QC, in order to note the relevant response to each recommendation.

a. **The Threat Picture:** [p2] 'Terrorist groups have also shown an increasingly sophisticated grasp of modern media and messaging as propaganda tools, which allow them to reach out to individuals in their countries of residence. These groups, including Daesh, increasingly use online networking platforms to communicate, recruit and to plan attacks, or to seek to inspire attacks.'

b. **Statistics:** [p3-4] 'On the first of your four recommendations in this area, data is held by the National Counter-Terrorism Policing Operations Centre (NCTPOC) on the number of applications for a warrant for further detention under Schedule 8 to the Terrorism Act 2000.'

'In line with your second recommendation, the Home Office has investigated whether it would be feasible to publish data on refusals of access to solicitors in Great Britain under Schedule 8…While I agree that this data is of interest, given the small number of cases anticipated I have concluded that the benefits are likely to be disproportionate to the cost and burden of collecting it'.

'On your third recommendation I agree that it would be helpful for the published statistics on police counter-terrorism powers to reflect the updated 2011 census ethnicity categories.'

[14] *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation*, July 2017, Cm 9489.

'In line with your fourth recommendation, the Home Office will from 2017/18 publish statistics for use of the stop and search powers at sections 43 and 43A Terrorism Act 2000 across all police forces nationally.'

c. **Ambit of Independent Review:** [p4-5] 'I have concluded that it would not be appropriate to expand the remit of the Independent Reviewer to include any law to the extent that it relates to counter-terrorism. While I am clear that the remit should ensure robust and overarching oversight of our terrorism legislation, I am concerned that to expand it in a more loosely defined way may dilute the core role of the Independent Reviewer, would introduce uncertainty as to its boundaries, and would risk including matters that properly fall within the remit of other independent oversight bodies.'[15]

d. **Definition of Terrorism:** [p5] 'I agree that activity clearly falling outside the common-sense definition of terrorism should not be caught by terrorism laws, and that we should guard against a chilling effect on legitimate journalism and activism. However I am satisfied that the current statutory definition has not so far had this effect.'

e. **Proscribed Organisations:** [p5] 'I maintain a cautious approach to making changes to the proscription regime, and I am not prepared to make changes at this time. I am unconvinced that regular reviews of past proscription decisions would in practice prevent any injustice, while they could lead to perverse outcomes, and would have considerable practical and financial disadvantages.'[16]

'On your new recommendations, I agree that the Government should respect the statutory time limits for considering deproscription applications..'

'I note your recommendations around respecting the requirements of the statutory test for proscription, and around handling litigation in POAC.'[17]

[15] In fact it appears that the ambit of the Independent Reviewer may contract, as is the stated intention in the Sanctions and Anti-Money Laundering Bill 2017. For the detail, see Professor Walkers's Annex to this report.
[16] For comment please see Professor Walker's Annex to this report.
[17] Proscribed Organisations Appeal Commission.

f. **Port and Border Controls:** [p6] 'the value of Schedule 7 far exceeds that which is measurable in terms of arrests, seizures and evidence usable in court. Schedule 7 yields valuable intelligence relevant to the terrorist threat, as well as intelligence to inform the planning of disruptions and the recruitment of informants. It also has a helpful deterrent effect for those tempted to travel overseas for terrorism-related activities.'

'You recommend that the desirability of requiring objectively demonstrated grounds for the exercise of enhanced Schedule 7 powers should be kept under review in the light of dicta in *Beghal v DPP*. While the Home Office will continue to keep this issue under review, my view remains unchanged that introducing a requirement of suspicion would fundamentally undermine the utility of the power.'[18]

'On your recommendation that there should be a statutory bar to the introduction of Schedule 7 admissions to a subsequent criminal trial, I agree that it should be clear that such material is inadmissible, and will consider legislating accordingly'.

'In line with your recommendation we are taking steps to improve the quality of manifest data available.'

g. **Arrest and Detention:** [p7-8] 'Your report restates a number of previous recommendations in this area, as well as making one new recommendation, that PACE Code H be reviewed in line with the judgment of the Grand Chambers of the European Court of Human Rights in *Ibrahim and others v UK.'* 'The Home Office has worked with the police to review whether any legislative, policy or procedural changes are necessary in light of the judgment, including any changes to Code H, and we have concluded that they are not.'

'I am satisfied that Code H does properly reflect the approach taken by the Grand Chamber, in particular as paragraph 10 is clear about the circumstances in which cautions must be given, and covers circumstances such as in this case.'

'In my repose to your 2014 report I undertook to consider legislating, when an opportunity arises, to implement your recommendation that Schedule 8 be amended so that the detention clock can be paused for pre-charge detainees who are admitted to hospital. Although no suitable opportunity to legislate has yet arisen, I am happy to reaffirm that commitment.'

[18] See para 5.16 below for my recommendation in this regard.

'However, I maintain the view that the suggested amendments to paragraph 32 of Schedule 8 are not necessary, and may be unhelpful. 'where the purpose of an investigation is to uncover evidence , it may not always be possible to meet the threshold of establishing in advance a 'real prospect' of that evidence emerging during the period of further detention, even though police may reasonably suspect that it is present. Therefore to introduce such a requirement for the authorisation of a warrant for further detention could have the unintended consequence of undermining the purpose of the power, which is to facilitate the investigation and the gathering of evidence while the suspect remains in detention (and the public therefore protected), in the more complex investigations that can occur in terrorism cases.'

'Finally, on your longstanding recommendation that bail be introduced for suspects detained under Schedule 8, as you are aware the Government has taken a cautious approach. My view, and that of the former Home Secretary, has been that this would not be appropriate and could put the safety of the public at risk.'

h. **Criminal Proceedings:** [p8] 'Your recommendation of further dialogue between the government and international NGOs builds on one from your 2013 report, which I am happy to confirm the Government has implemented. Dialogue has been ongoing with the NGO sector for some time now, and the Government continues to engage with charities on a bilateral and multilateral basis to understand the operational realties they face.'

i. **Foreign Terrorist Fighters:** 'UK-linked individuals who travel to fight in Syria and Iraq pose a clear threat to our country's security, and we continue to work at a national and international level to mitigate the risk they pose.' 'For those who nonetheless still aspire to travel to the region and engage in terrorism-related activity we have a range of tools to disrupt their travel and to manage their return. This includes using the Royal Prerogative to remove passport facilities, using Temporary Exclusion Orders to manage their return, or when they are in the UK imposing travel restrictions and other measures through Terrorism Prevention Investigation Measures. Anyone who returns from the region must also expect to be examined by the police to determine if they have committed criminal offences, and there have already been several successful prosecutions for those who have returned. Whether

or not returners are prosecuted, we will take further action to understand and mitigate the risks they pose. This could include providing intense monitoring and psychological support through a de-radicalisation programme.'

1.13. As in previous years, a number of recommendations made by the Independent Reviewer were accepted. I have attempted to indicate the main areas in which my predecessor made such recommendations. I have chosen to underline the final section of the Home Secretary's response, above, because there is understandable public concern and comment whenever I or others say what I perceive to be the same thing, namely that we have a range of available measures for prosecuting returning foreign terrorist fighters, including most importantly prosecution in every case where there has been the commission of criminal offences, but also including de-radicalisation and other monitoring and support in those cases where prosecution is not appropriate.

Statistics

1.14. Statistics on the operation of the Terrorism Acts can be found in three principal publications and their accompanying data tables:

(a) The Home Office's quarterly releases, which report on the operation of police powers under TA 2000 and TA 2006 in Great Britain (England, Wales and Scotland).[19]

(b) The bulletin produced for the same purpose by the Northern Ireland Office;[20] and

(c) The Police Recorded Security Situation Statistics, published by the Police Service of Northern Ireland (PSNI) on an annual basis, with monthly updates.[21]

[19] See relevant to the reported period Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016*, 9 March 2017.
[20] See Northern Ireland Office, *Northern Ireland Terrorism Legislation: Annual Statistics 2015/16,* 1 November 2016.
[21] See Police Service of Northern Ireland, *Police recorded security situation statistics, 1 January 2016 to 31 December 2016*, January 2017. See also PSNI, *Stop and Search Statistics, Financial Year 2016/17*, 31 May 2017.

The counter-terrorism machine

1.15. The Government's counter-terrorism strategy, known as CONTEST, has been described by my predecessor in one of his previous reports.[22] This strategy is currently under review by the Government and I will wait for this to conclude before commenting further in my next report.

[22] D. Anderson, *The Terrorism Acts in 2012*, July 2013, Chapter 3.

2. THREAT PICTURE

The global picture

2.1. I have found it useful to approach the issue of the threat from terrorism within the UK by commencing with the worldwide picture, in common with previous Independent Reviewer Reports. In 2016 as in every previous year, comparing the domestic and international picture demonstrates how fortunate the UK has been, both in terms of the overall threat picture from terrorism in its many forms, and in terms of the effectiveness of our police and intelligence services in keeping the UK population safe from harm. I appreciate of course that the picture changes in some very important respects when we come to consider 2017, and I am entirely conscious of the need to reflect upon and react to the terrible attacks on London and Manchester during 2017, but that is not the focus of this Report.

2.2. For the global picture in 2016, I have used data prepared for the US State Department by the National Consortium for the Study of Terrorism and Responses to Terrorism (START):[23]

(a) There were 11,072 terrorist attacks worldwide, resulting in more than 25,600 deaths (including 6,700 perpetrator deaths), more than 33,800 injuries and more than 15,500 people kidnapped or taken hostage.

(b) This is a 9% decrease in the number of attacks compared to 2015, a 13% decrease in the number of resulting deaths and a 10% decrease in the total number of people injured. There was however a 26% increase in the number of people kidnapped or taken hostage.

(c) Terrorist attacks took place in 104 countries, with 55% of all attacks taking place in Iraq, Afghanistan, India, Pakistan and the Philippines and 75% of all deaths due to terrorist attacks taking place in Iraq, Afghanistan, Syria, Nigeria and Pakistan.

[23] National Consortium for the Study of Terrorism and Responses to Terrorism, *Annex of Statistical Information: Country Reports on Terrorism 2016: Final report prepared for the United States Department of State,* July 2017. Available at: https://www.state.gov/documents/organization/272485.pdf.

(d) The most commonly used terrorist tactic in 2016 involved explosives (54%), followed by armed assaults (21%). Both tactics and specific types of weapons used in terrorist attacks were consistent as between 2015 and 2016.The use of vehicles as contact weapons decreased in 2016 to 14 attacks, compared to 29 attacks in 2015. However, these resulted in more than 110 deaths in 2016, compared to 28 in 2015.

(e) Where information on perpetrators of terrorist attacks was reported, 19% were carried out by Daesh (resulting in a total of 9114 deaths) and 13% by the Taliban (resulting in a total of 3615 deaths). The number of terrorist attacks carried out by the Taliban decreased by 23% compared to 2015 and the total number of resulting deaths decreased by 20%. The number of attacks attributed to ISIS outside of Iraq and Syria increased by 80%, from 44 in 2015 to 79 in 2016.[24]

2.3. Analysing these statistics which form the worldwide picture of terrorism in 2016, it is clear that Muslims have been the most numerous victims of terrorism, far outnumbering members of other faiths in many of the countries where terrorism-related activity is most prevalent. For example, Iraq, which has experienced more terrorist attacks than any other country since 2013 and twice as many terrorist attacks in 2016 as the next highest-ranked country, Afghanistan, saw a 23% rise in total attacks in 2016 and a 40% increase in total deaths.

2.4. Turning to the picture in the European Union countries, Europol reports a total of 142 failed, foiled and completed attacks reported by eight EU Member States (down from 211 attacks in 2015).[25] More than half (76) of these were reported by the United Kingdom, all of which were acts of Northern Ireland-related terrorism (see below for the picture in Northern Ireland).[26] France reported 23 attacks, Italy 17, Spain 10, Greece 6,

[24] This does not include attacks attributed to other organisations that have pledged allegiance to ISIS.
[25] European Union Agency for Law Enforcement Cooperation (Europol), *EU Terrorism Situation and Trend Report (TE-SAT) 2017*. ISBN 978-92-95200-79-1.
[26] Europol compiles its reports using its own definition of terrorism which differs from section 1 of the Terrorism Act 2000. For example, the murder of Jo Cox MP by Thomas Mair in the UK in 2016, although within the definition of 'terrorism' as set out in section 1, does not seem to be included in the Europol statistics. The Europol statistics can be contrasted to those presented in the 2015 Report by my

Germany 5, Belgium 4 and the Netherlands 1 attack. These attacks included the Brussels bombings, the Nice truck attack and the Berlin Christmas market attack.

2.5. For the majority of the reported attacks the affiliation was ethno-nationalism and separatism (99). For all 76 attacks reported in the UK,[27] the affiliation was separatism.[28] The other countries reporting terrorist attacks linked to separatist terrorism are France (18) and Spain (5).

2.6. Thirteen attacks were classified as religiously-inspired terrorism, reported by France (5), Belgium (4) and Germany (4). This category is the one leading to the most casualties (374 out of 379) and fatalities (135 out of 142). The Netherlands reported one right-wing terrorist attack. Italy, Greece and Spain together reported 27 terrorist attacks by left-wing and anarchist groups.[29]

Threat to the UK[30]

2.7. In the UK, the national threat level for international terrorism is set and assessed, not by the Government but by JTAC (Joint Terrorism Analysis Centre).[31] For the sake of balance, and because of the prevalence of the threat, I **recommend** that JTAC in future should also consider activity including domestic extremism. The threat level for Northern Ireland-related terrorism in Northern Ireland, and Great Britain, is set by MI5. During 2016, the overall threat level for the UK remained at Severe, meaning that an attack was highly likely.[32] Daesh continued to represent the most significant terrorist threat, but not the only threat. Beneath that overall headline, the threat level for

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predecessor who used statistics provided by Peter Nesser of the Norwegian Defence Research Establishment (FFI). He reported only 16 plots planned or launched in 2015 compared to 211 plots reported in 2015 by Europol (see para 2.4 of the 2015 Report).

[27] *Ibid.*

[28] Defined in the Europol TE-SAT 2017 Report [p55] as follows: 'Separatist groups seek to carve out a state for themselves from a larger country, or annex a territory from one country to that of another.'

[29] Europol, *TE-SAT Report 2017*.

[30] The 2016 annual report on the Government's counter-terrorism strategy which summarises the terrorist threat has not been released at the time of writing, November 2017.

[31] JTAC do not assess the threat from domestic extremism and do not take this into account when setting the UK threat level. The threat for domestic extremism is assessed by Counter Terrorism and Policing National Operations Centre (CTPNOC) Intelligence on a biannual basis.

[32] *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation*, July 2017, Cm 9489, p2.

Northern Ireland-related terrorism in Great Britain was raised in May 2016 to Substantial; the threat in Northern Ireland remains Severe. Further, the UK faced a continuing threat of violence and terrorism from extremism, including the extreme right wing and far right. Evidence for this is provided by the proscription of the extreme right wing group National Action in December 2016, [33] and the terrorism-related murder of Jo Cox MP in June 2016.[34]

Threat from Islamist terrorism

2.8. I shall focus on the threat level during 2017 in greater detail in my next annual report, but it is interesting to note that the UK threat level was elevated from Severe to Critical twice only during 2017,[35] namely for a period of approximately 48 hours very shortly after the Manchester Arena attack, and for a like period after the discovery of a partially-detonated explosive device on a London Underground train at Parsons Green. The first was a reaction to the newly-commenced investigation led by Greater Manchester Police, and the move upwards from Severe to Critical was justified because in the earliest days of that investigation it was unknown whether the perpetrator Abedi was a lone actor - to use the current phrase - or part of a wider conspiracy. The level of sophistication of the Arena attack - an Improvised Explosive Device (IED), assembled from parts which were gathered over time and stored ready for use, which resulted in 22 deaths and 119 injuries - justified an assessment which was absent after Westminster Bridge, Finsbury Park and even London Bridge, the first two of which were lone actors, and the third albeit multi-handed was rapidly contained by the Metropolitan Police. The second elevation of the threat level was for the same reason as in Manchester, as it was not known if the perpetrator of the Parsons Green attack was a lone actor, and the perpetrator was at large.

[33] Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/1238. Since then, Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action) have been banned as related groups: Proscribed Organisations (Name Change) (No. 2) Order 2017, SI 2017/944.

[34] Although I have seen no evidence directly linking Mair and National Action, the latter demonstrated support for Mair's crime. This includes tweets posted by the group in 2016, in connection with the murder of Jo Cox(which the prosecutor described as a terrorist act), stating "Only 649 MPs to go" and a photo of Thomas Mair with the caption "don't let this man's sacrifice go in vain" and "Jo Cox would have filled Yorkshire with more subhumans!", as well as an image condoning and celebrating the terrorist attack on the Pulse nightclub inOrlando and another depicting a police officer's throat being slit. [Home Office, *Proscribed terrorist groups or organisations,* Updated 2 October 2017]

[35] At the time of preparing this report, November 2017.

2.9. The short-term elevation of the UK national threat level from Severe to Critical is not the same as declaring a state of emergency, which, depending on the regulations invoked, might require a derogation from Article 15 of the ECHR.[36] During 2016, we have seen such a derogation elsewhere in Europe, namely in France after the attacks in Paris in November 2015 which included the Bataclan theatre. That state of emergency remained in force without interruption for almost exactly two years, in fact until 31st October 2017 when it expired and was not renewed.[37] However, we should note that although the state of emergency in France has lifted, the national Parliament has sought to enact many of the emergency provisions, therefore 'normalising' what were introduced as emergency measures.[38]

2.10. As I shall explore in more detail in my annual report for 2017, we have been seeing a divergence of the threat, involving the use of IEDs and the slightly more 'sophisticated' attacks of the past decade, as well as the emergence of inspired (i.e. radicalised in some form) actors, whether lone or not, deploying low-cost, low sophistication attacks, often after they have been exposed to online propaganda and/or radicalised online. This has been accompanied by, even enabled by, the rapid and recent expansion in online communications platforms, which are now used by terrorists. Not so many years ago, those planning terrorist attacks were still using text messages or Blackberries, they were meeting in person in each other's homes, in local open spaces, and during shopping trips for the everyday items they needed to make the IEDs they planned to deploy. And, equally important, there would usually be clear influence exerted over would-be terrorists by radicalisers or trainers, those who spent time with their acolytes inspiring them to take life and even to end their own life in so doing.

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[36] See Article 15, ECHR, paragraph 1: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

[37] See http://www.gouvernement.fr/action/renforcer-la-securite-interieure-et-la-lutte-contre-le-terrorisme.

[38] Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (JORF n°0255, 31 October 2017). Available at: https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=0446A22A73D3B9B9098857267D48CA60.tplgfr25s_1?cidTexte=JORFTEXT000035932811&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000035932808.

2.11. As the statistics for 2016 show, almost all of these plots (in the UK at least) continued to be successfully detected and disrupted by the Police and security services. When the evidence comes to court, we have seen many examples of young men – mostly they are young men – who have moved from a basic understanding and adherence to their religion, to an extreme, radical understanding of what are said to be religious tenets justifying murder. What they claim to do in the name of religion is actually born from an absence of real understanding about the nature of the religion they claim to follow. But the point is that radicalisers just a few years ago would suborn these young men (in person i.e. face to face), often rootless young men prone to casual criminality, and brainwash them into a plan for action. That still goes on. But we are now seeing something comparatively new, running alongside.

2.12. Whilst we must all wait for the full facts of the 2017 attacks in London and Manchester to emerge, it seems that some of those who committed terrorist murders on our streets may have reached their murderous state having been influenced by what they read and what they see online, just as much as by whom they meet. Even where large amounts of extremist material have been consumed, many radicalised individuals still come into contact with one or more radicalisers, who are themselves often using online platforms. It is this element of 'remote radicalisation' which is acutely difficult to spot.

2.13. Where these awful crimes are facilitated by the use of social media, we want to close down the criminals' ability to communicate. And yet, we must recognise that policing the internet, and controlling social media comes at a very high price if it interferes with the freedom of communication which every citizen enjoys, and which is also enshrined in Article 10 of the European Convention on Human Rights. To go further, would we risk unenforceable infringements on ECHR rights, and/or would we push the current abundance of evidence proving terrorist activity online to go offline or underground, into impenetrable places within the dark web from which clear evidence rarely emerges, and where the placement of a robust counter-narrative to terrorism is hard to effect and harder to gauge?

2.14. This is uncertain territory. Driving material, however offensive, from open availability into underground spaces online would be counter-productive if would-be terrorists could still access it. And once this material goes underground, it is harder for law

enforcement to detect and much harder for good people to argue against it, to show how wrong the radical propaganda really is.

2.15. Can we legislate to rid ourselves of online terrorism? My answer is that Parliament has already done so in meaningful ways including such offences as the dissemination offence under section 2 of the 2006 Act. I go no further for the purposes of this Report, because we await the outcome of the Government's counter-terrorism strategy review which has been ongoing during 2017, and which has I am sure been looking to see whether any amendments might hone existing offences given recent technological advances. I am confident that the review is also considering whether sentencing provisions in 2017 are apt for our world, for example where Parliament drew a line in 2000, and where 17 years is a long time in 'tech' terms.

2.16. Finally for now, it is important to consider the interface between general criminality and terrorism. There is useful research on this topic, on which I may seek to expand in my report for 2017.[39]

Threat from Northern Ireland-related terrorism

2.17. The Security Service (MI5) has assessed the threat level in Northern Ireland from Northern Ireland related terrorism to be Severe, meaning that a terrorist attack is highly likely. In May 2016, the threat level in Great Britain for terrorism related to Northern Ireland was raised from Moderate to Substantial, which means an attack is a strong possibility.[40]

2.18. The PSNI has recorded that, 'compared to the preceding ten years between 1996/97 and 2005/06, the level of security related incidents in Northern Ireland has been lower and has remained relatively consistent during the past decade. During 2015/16 the number of shooting incidents that occurred was the lowest since records began in

[39] R. Basra, P. R. Neumann, and C. Brunner, *Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus*, 2016. Available at: http://icsr.info/wp-content/uploads/2016/10/Criminal-Pasts-Terrorist-Futures.pdf. See also Europol, *European Union Serious and Organised Crime Threat Assessment 2017.* Available at: https://www.europol.europa.eu/activities-services/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017.

[40] See https://www.gov.uk/terrorism-national-emergency/terrorism-threat-levels, 7 November 2017.

1969. This is reflected in the number of casualties from paramilitary style shootings which were at their lowest since 2007/08. However, a significant threat still remains as evidenced by the increased number of security related deaths and paramilitary style assaults over the past two years and the continued number of bombing incidents.'[41] The attack methodologies and capabilities used by Dissident Republican (DR) groups in Northern Ireland in 2016 included firearms or small IEDs such as pipe bombs but they have also employed larger and/or potentially more destructive devices such as vehicle-borne IEDs (VBIEDs) and explosively formed projectiles (EFPs) and that all groups retain access to a range of firearms and explosives; there is an ever-present threat of under-vehicle IED attacks.[42]

2.19. Between 1 January 2015 and 31 December 2016 the PSNI recorded 6 security related deaths (all of whom were civilians);[43] 49 shooting incidents and 27 bombing incidents;[44] 0 incendiary incidents;[45] 64 casualties as a result of paramilitary style assaults (mostly Loyalist) and 20 casualties resulting from paramilitary style shootings (almost all Republican).[46]

Threat from other terrorism

2.20. The increase in police awareness of extreme and far right activity in the UK is reflected in the rise in the number of arrests this year relating to members of such groups, on which I will expand in my next report.[47]

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[41] PSNI, *Police recorded security situation statistics, 1 January 2016 to 31 December 2016*, January 2017.
[42] Europol, *TE-SAT Report* 2017.
[43] A security related death is one which is considered, at the time of the incident, to be attributed directly to terrorism
[44] A bombing incident includes where a bombing device explodes or is diffused.
[45] An incendiary incident differs from a bombing incident in that an incendiary is used to start a fire and not cause an explosion. They usually consist of a cassette, timer battery and material to cause fire (i.e. petrol, gas or other accelerant) and are usually targeted at commercial property.
[46] PSNI, *Police recorded security situation statistics, 1 January 2016 to 31 December 2016*, January 2017. The figures quoted were derived from the updated Accompanying Spreadsheet: *Police Recorded Security Statistics in Northern Ireland: Historic information up to and including October 2017* (published 10 November 2017).
[47] I am notified whenever terrorism-related arrests are conducted. This trend will be seen when the statistics for arrests during the last quarter of 2017 are released.

2.21. In 2016, this threat was brought to focus following the murder of Jo Cox MP by Thomas Mair on 16 June 2016. During the course of the murder Mair was heard by a number of witnesses to say repeatedly "Britain First", "Keep Britain independent", "Britain will always come first". [48] Mair was charged with Murder and sentenced to Life Imprisonment. The murder undoubtedly fell within the definition of 'terrorism' as set out in section 1 Terrorism Act 2000.

2.22. In December 2016 the UK proscribed the group National Action, being perhaps the most active and well organised extreme right wing group in this country.[49] This is the first right wing group to be proscribed in the UK since wartime.[50] The explanatory memorandum states that National Action is a racist neo-Nazi group that was established in 2013,[51] and the allegations against it are based on promoting or encouraging terrorism rather than direct involvement in violence (section 3 of TA 2000, as amended by the TA 2006).[52]

2.23. Alongside this, there has been a rise in xenophobic offences in the UK. Statistics collected by the Home Office show a number of sharp increases or spikes in racially or religiously aggravated offences. They occurred in June 2016 (the EU Referendum result), March 2017 (Westminster Bridge attack), May 2017 (Manchester Arena attack) and June 2017 (London Bridge / Borough Market and Finsbury Park Mosque). What is troubling is that the rise in such crimes does not seem to return to the same baseline after each spike. In August 2017, the number of racially or religiously aggravated offences recorded by the police was just under 5,000 compared to just over 3,000 in January 2016.[53]

2.24. Tell MAMA, an independent third-party hate crime reporting service for those who have experienced anti-Muslim hate incidents and crimes, documented 642 verified anti-

[48] See https://www.cps.gov.uk/publications/prosecution/ctd_2016.html#a18
[49] Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/2138.
[50] All publications of the BUF were banned on 10 July 1940, under Defence Regulation 18b(1AA).
[51] The debates are at House of Commons vol 618 col 911 14 December 2016.
[52] Under s3 of TA 2000, the Home Secretary is empowered to proscribe organisations that she believes to be 'concerned in terrorism'. An organisation is 'concerned with terrorism' if it (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.
[53] *Hate Crime, England and Wales, 2016/2017,* Home Office Statistical Bulletin 17/17, 17 October 2017.

Muslim crimes or incidents in 2016,[54] a 47% increase from 2015 (437 crimes or incidents). Tell MAMA also receives data on Islamophobic hate crimes and incidents from 18 police forces in the UK and have recorded a total of 2,840 Islamophobic crimes and incidents from these police forces. The forces with the largest number of Islamophobic crimes or incidents were the Metropolitan Police Service (1,296), Greater Manchester Police (409) and the British Transport Police (230).[55]

2.25. CST, the Community Security Trust protecting the Jewish community in this country, recorded 1,309 antisemitic incidents in 2016, the highest annual total CST has ever recorded. The total of 1,309 incidents is an increase of 36% from the 2015 total of 960 antisemitic incidents. CST reported 'Every month from May to December 2016 saw a monthly incident total above 100 incidents, an unprecedented run of consistently high totals over an eight-month period. For comparison, in the decade prior to 2016 monthly totals above 100 incidents had only happened six times. On average, CST currently records more than double the number of antisemitic incidents per month than was the case four years ago'.[56]

2.26. In Europe, a number of new far-right or extremist groups were founded and several others banned. In Germany, a member of the Reichsbürger movement shot and injured a police officer during a house eviction in August 2016, and in October 2016 one police officer was shot and killed and three others injured in the federal state of Bavaria when police attended his premises to confiscate his weapons. In February 2016 six individuals were convicted following an attempted arson attack on a mosque in the Dutch city of Enschede.[57]

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[54] These incidents are classified as 'offline', meaning that they occurred in-person between a victim (or property) and a perpetrator.

[55] *Tell MAMA Annual Report*, 02 November 2017. Note: It is not entirely clear if in each and every case a formal crime report has been created or whether these are reports made to the organisation.

[56] *Antisemitic Incidents Report 2016*, Community Security Trust, 2017. Note: It is not entirely clear if in each and every case a formal crime report has been created or whether these are reports made to the organisation.

[57] Europol, TE-SAT Terrorism situation and trend report. For a wider review of such activities see Ministry of the Interior, Berlin, *Bundesamt für Verfassungsschutz, 2016 Annual Report on the Protection of the Constitution (Facts and Trends)*, 2017. Available at https://www.verfassungsschutz.de/en/public-relations/publications/annual-reports.

Conclusion

2.27. All of the above will form the backdrop to the events of 2017. Whilst the UK consistently avoids long-term elevation of the national threat level to the highest category, avoids recourse to Article 15 derogation and the declaration of a national state of emergency as seen in France, and benefits from policing and intelligence work which successfully disrupts terrorism-related activity almost every time, nonetheless the trends for the threat from terrorism here and abroad demand attention and will be a necessary part of my next annual report.

3. PROSCRIBED ORGANISATIONS & EXECUTIVE ORDERS

Proscribed Organisations

3.1. There are 71 organisations proscribed under the Terrorism Act 2000. There are also 14 organisations in Northern Ireland that were originally proscribed under previous legislation. A list of these organisations has been provided by the Home Office.[58]

3.2. Five organisations were proscribed in 2016:

(a) Global Islamic Media Front (GIMF) including GIMF Banlga Team, also known as Ansarullah Bangla Team (ABT) and Ansar-al Islam.
(b) Jamaah Anshorut Daulah (JAD).
(c) Mujahidin Indonesia Timur (MIT).
(d) Turkestan Islamic Party (TIP), also known as East Turkestan Islamic Party (ETIP), East Turkestan Islamic Movement (ETIM) and Hizb al-Islami al-Turkistani (HAAT).[59]
(e) National Action.[60]

3.3. The International Sikh Youth Federation (ISYF) was removed from the list of proscribed groups in March 2016 following receipt of an application to deproscribe the organisation.[61]

3.4. The Government laid an Order, in December 2016, which provided that 'Jabhat Fatah al-Sham' (Front for the Conquest of the Levant) should be treated as an alternative name for the organisation which is already proscribed under the name Al Qa'ida.[62] Jabhat al-Nusrah li-ahl al Sham (Victory Front for the People of the Levant) is already listed as an alternative - SI 2013/1795. These are variants of what used to be the al Nusrah Front which claimed to have split from AQ in July 2016 and assumed this new title.

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[58] Home Office, *Proscribed terrorist groups or organisations,* Updated 2 October 2017.
[59] Hansard HC 13 July 2016 vol 613 col 306.
[60] Hansard HC 14 December 2016 vol 618 col 911.
[61] For more on deproscription, please see Professor Walker's Annex to this report.
[62] Proscribed Organisations (Name Change) Order 2016, SI 2016/1187.

Executive Orders

3.5. My predecessor David Anderson QC in his letter as outgoing Independent Reviewer, to the Home Secretary, dated 30 January 2017, proposed 'a discretionary thematic review of the operation of executive orders in the field of counter-terrorism (terrorism prevention and investigation measures under TPIMA 2011; terrorist asset freezing under TAFA 2010; temporary exclusion orders and police passport removal powers under CTSA 2015).'[63]

3.6. Professor Clive Walker, the longest-serving and Senior Special Advisor to the Independent Reviewer, has very considerable academic expertise in writing about terrorism, as seen in his leading textbook.[64] Last year, my predecessor invited Professor Walker to contribute a Guest Chapter to the Annual Report, choosing Returning Foreign Fighters as the topic.[65] This year, I have followed suit, and asked Professor Walker to consider two topics, proscription and the financial listing regime governed by the Terrorist Asset Freezing Act. Professor Walker's Guest Chapter appears below, at Annex 2.

3.7. I have found it enormously useful, in my first year as Independent Reviewer, to rely upon Professor Walker in this way. In fact, this collaboration permits this Annual Report to cover almost all of the ground encompassed by the four statutes which I review. It is not incumbent on me to report annually across the piece in this way, but I hope it is helpful. The Annex represents independent research by Professor Walker, rather than the direct pronouncements of the Independent Reviewer, but it touches upon important issues which are at the heart of the IRTL's remit i.e. to inform the public and political debate on anti-terrorism law. It does so by selecting the crucial theme of procedural fairness and review (including by the IRTL) in two sectors of executive action against terrorism which invite further discussion. One is proscription and de-proscription, issues raised repeatedly by my predecessor. The other is financial sanctions, now the subject of the Sanctions and Anti Money Laundering Bill 2017-19.

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[63] Counter-Terrorism and Security Act (CTSA) 2015.
[64] C. Walker (2014). *Blackstone's Guide to the Anti-Terrorism Legislation*. 3rd ed. Oxford: Oxford University Press.
[65] D. Anderson, *The Terrorism Acts in 2015*, December 2016, Annex 2.

3.8. I shall have more to say personally about the proscription regime in my next annual report. This is because I have been able to follow the work of the Proscription Review Group (PRG), which sits within the Home Office but includes engagement with other relevant departments. During 2017, I have attended PRG meetings when able. This will be a feature of my annual report for 2017.

3.9. As of 31 August 2017, there were six TPIM notices in force, five in respect of British citizens. All six subjects were relocated.[66] I have chosen not to include the operation of the TPIM Act within this report. This is because I intend to focus on the TPIMS regime for my next annual report, in particular because the use of this legislation has been thrown into relief during 2017 with the prospect of returnees from so-called Islamic State after the fall of Mosul and Raqqa, in Iraq and Syria respectively.

3.10. In preparation for the next report, I have attended the majority of TPIM Review Group meetings (TRGs) throughout 2017. TRGs convene at the premises of the Security Service, and comprise relevant representatives from the Security Service, the Home Office, the Counter Terrorism Command of the Metropolitan Police and officers from the Counter-Terrorism Unit (CTU) in the area selected for the TPIM subject to reside (a consequence of the relocation measure introduced to TPIMs in 2015).[67] For each TPIM, the TRG meets at three-monthly intervals (sometimes less), when very careful consideration is given to every aspect of the TPIM in force, including:

- the necessity of maintaining and - where necessary - extending the TPIM
- any representations made on behalf of the TPIM subject (who is always legally represented during TPIM hearings in the High Court, both in Open and Closed sessions)
- the individual measures, each in turn
- the exit strategy, in other words timely preparation for returning the TPIM subject to his home life at the end of the TPIM.

[66] Home Office, *Memorandum to the Home Affairs Committee about the Terrorism Prevention and Investigation Measures Act 2011*, October 2016, Cm 9348.
[67] Part 2 of the Counter-Terrorism and Security Act 2015.

4. STOP AND SEARCH

Summary

4.1. Stop and search powers exist under the following sections of the Terrorism Act 2000:

(a) s43 in respect of the search of a person an officer reasonably suspects to be a terrorist,

(b) s43A in respect of the search of a vehicle an officer reasonably suspects is being used for the purposes of terrorism, and

(c) s47A in respect of searches in specified areas or places where an officer reasonably suspects that an act of terrorism will take place.

4.2. All have been subsequently amended by the Protection of Freedoms Act 2012. There is a Code of Practice (one for England, Wales and Scotland, another for Northern Ireland) for the Exercise of Stop and Search Powers (SI 2012 No.1794), brought into force on 10th July 2012.

Section 43/43A

4.3. Figures for the use of s43 are published in Great Britain only for the Metropolitan Police Service (MPS) area. My predecessor recommended that other forces publish figures as well and the Home Secretary in her response agreed (see reference in para 1.12(b) above). No such results are available for 2016.

London

4.4. 483 searches were conducted by the MPS in 2016. This was lower than the average for recent years. The arrest rate in 2016 was 9%, higher than the recent average but lower than in 2015.[68]

[68] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table S.01. Historic data collated by David Anderson in his 2015 Report using equivalent tables from previous years, and updated by the Home Office Statistics.

Year	Searches (MPS)	Arrests
2010	995	n/a
2011	1051	32 (3%)
2012	614	35 (6%)
2013	491	34 (7%)
2014	394	25 (6%)
2015	521	57 (11%)
2016	483	44 (9%)

4.5. The self-defined ethnicity of persons stopped under s43 in London is as follows:[69]

Year	White	Asian	Black	Chinese /Other	Mixed /not stated	Total
2010	43%	30%	11%	7%	9%	999
2011	35%	37%	9%	8%	11%	1052
2012	39%	31%	12%	7%	11%	614
2013	34%	32%	14%	9%	10%	491
2014	41%	22%	12%	9%	16%	394
2015	30%	27%	13%	10%	21%	521
2016	28%	27%	11%	12%	22%	483

4.6. The number of resultant arrests in 2016 following a s43 stop is as follows for each ethnicity:[70]

[69] *Ibid.*, table S.02.
[70] *Ibid.*

Self-defined ethnicity	Searches	Resultant arrests
White	136	10 (7%)
Asian	132	11 (8%)
Black	55	8 (15%)
Chinese/Other	56	-
Mixed	17	1 (6%)
Not stated	87	14 (16%)
Total	483	44 (9%)

4.7. 18% of those stopped refused to state their ethnicity, and this group produced a high resultant arrest rate of 16%. These figures are similar to those seen last year.

Northern Ireland

4.8. In Northern Ireland in 2016:[71]

(a) 91 people were stopped and searched under s43, similar numbers to previous years.

(b) A further 11 were stopped under s43A

(c) 92 people were stopped under ss 43 and 43A (up from 78 in 2015), and 31 under ss 43 and/or 43A in combination with other powers (Justice and Security (Northern Ireland) Act 2007 s21, Justice and Security (Northern Ireland) Act 2007 s24 and Misuse of Drugs Act s23).

[71]PSNI, *Police Recorded Stop and Search Statistics in Northern Ireland, Financial Year 2016/17 (1st April 2016 to 31st March 2017),* 31 May 2017, Section 1 Table 1. This table presents quarterly statistics for 2016/17. I have used these to calculate the 2016 data.

Section 47A

4.9. The circumstances where s47A can be used to authorise stop and search powers are specified in the relevant part of the section. These are where a senior officer -

a) reasonably suspects that an act of terrorism will take place, and

b) reasonably considers that -

i. the authorisation is necessary to prevent such an act:

ii. the specified area or place is no greater than is necessary to prevent such an act , and

iii. the duration of the authorisation is no longer than necessary to prevent such an act.

4.10. No authorisations were issued anywhere in the United Kingdom during 2016 for use of the use of this stop and search power under s47A of the TA 2000.

5. PORT AND BORDER CONTROLS

Introduction

5.1. As I shall make clear in this chapter, the exercise of the powers contained within Schedule 7 of the Terrorism Act 2000 remains a preoccupation for many, including the individuals and organisations with whom I have engaged during my travels around the UK this year. Schedule 7 has also been, in the words of my predecessor, 'a centrepiece of each of my five previous reports on the operation of the Terrorism Acts'.[72]

5.2. I endorse earlier scrutiny of these powers. However, I hope it will be understood if I restrict - comparatively speaking - my first report on Schedule 7, because it will be appropriate to apply focus in this area during my next annual report, which will deal with the terrorism-related activity we have seen in London and Manchester since March 2017. That said, it is entirely necessary to deliver an accurate statistical analysis for 2016, from which some issues emerge.

5.3. The exercise of Schedule 7 powers brings at least three immediate consequences for travellers who are temporarily stopped at our ports and borders:

- The obligation to answer questions
- The taking of biometric data, and
- The temporary removal and downloading of the contents of digital devices, mostly mobile phones.

5.4. These consequences lead in turn to the following, in particular:

- Resentment amongst certain groups of citizens, particularly Muslims, leading to
- Allegations of discrimination on the grounds of ethnicity, and
- Demands to change the exercise of current powers by adding a requirement to demonstrate suspicion as an initial reason for stopping and questioning individuals.

[72] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 7.2.

5.5. Against this background however, two notable facts emerge when we look back over recent years:

(a) The quality of manifest data for passengers on some but not all modes of transport at borders has improved,[73] and

(b) The use of Schedule 7 powers has actually sharply declined year on year, to the extent that this is demonstrated by the numbers of passengers affected each year. That said, serious questions remain as to the effectiveness of the powers, and to answer the question 'what is the right number of Schedule 7 stops, and what number is too many?'. I understand that further research is being conducted into the reasons behind the recent reduction in numbers.[74]

5.6. During my first months in post as Independent Reviewer, I have engaged with Ports and Border teams at the National Ports Conference - held in Birmingham during May 2017 - as well as at the Counter Terrorism Borders Operations Centre (part of the Counter Terrorism Police Operations Centre, CTPOC).

Frequency of use in Great Britain

5.7. Five years ago, in 2012 there were more than 61,000 port stops. The number was half of that by 2015 three years later, down to 31,000. In 2016, a further reduction, down to 24,000. A further substantial reduction by mid-2017, down to 17,000.[75] This is a remarkable trend, caused no doubt by multiple factors, which must include better

[73] See *The Government Response to the Annual Report 2015,* July 2017, p7: 'On the quality of manifest data at seaports and on the international rail network, since Exit Checks were introduced in April 2015, on-departure data is received for all passengers from international rail and maritime carriers operating scheduled commercial routes from the UK (other than those routes within the Common Travel Area). For international rail passengers travelling to the UK, 100% of those passengers must present to a juxtaposed immigration control in Belgium or France where they are subject to counter-terrorism watchlisting. Similarly 59% of all maritime passengers must present to a juxtaposed immigration control in France and be subject to checks before they arrive in the UK. Only 5% of all international maritime passengers arrive in the UK without any pre-arrival notification or examination.'

[74] OSCT and NCTPOC are working jointly to establish an evidence-base to better understand the reasons for this decline.

[75] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table S.04.

capture of passenger manifest data across the UK, and better use of targeting techniques, even though reasonable suspicion is still not required for a stop.[76]

Length of examination and result	Year of examination (Year ending 30 June)					
	2012	**2013**	**2014**	**2015**	**2016**	**2017**
Number of examinations	**61,049**	**55,037**	**40,663**	**30,757**	**23,719**	**17,501**
of which: Under the hour	59,012	52,801	38,764	28,888	21,996	16,022
Over the hour	2,037	2,236	1,899	1,869	1,723	1,479
Number of resultant detentions	**541**	**650**	**500**	**1,649**	**1,760**	**1,522**

5.8. The seizure of biometric data has hovered in the several hundreds of cases, but less than a thousand a year; 769 in 2010, 462 in 2014 and 511 in 2015.[77] The Biometrics Commissioner, Professor Paul Wiles, provides oversight in this area, and I defer to his recent report.[78]

5.9. But looking at the figures for 'resultant detentions' above, we see the reverse of the shared decline in the total number of examinations. So, in 2012 there were 61,000 examinations but only 541 resultant detentions. By mid-2017, we see 17,000 examinations but 1522 resultant detentions, a threefold increase over five years.

5.10. This is not a particularly worrying pattern, indeed it may go to prove what I mentioned earlier, namely the rising efficiency both in terms of passenger data capture and the use of targeting techniques, so we are seeing that there is reason for resultant

[76] See D. Anderson, *The Terrorism Acts in 2015*, December 2016 recommendation, paragraph 10.11. See also para 1.10(f) above for Home Secretary response, June 2017.
[77] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 7.9.
[78] Commissioner for the Retention and Use of Biometric Material, *Annual Report 2016,* September 2017.

detention in an increasing though still small number of cases relative to the overall picture of port and border stops.[79]

5.11. Nonetheless, important questions remain, including the ongoing issue of satisfactory rules governing the retention of both biometric data taken from individuals and electronic data downloaded from their devices.[80] To these we must add the legal challenges to Schedule 7, the *Miranda* and *Beghal* cases. I shall return to *Beghal* in particular, below.

Examinations by ethnicity

5.12. The figures in Great Britain show that recent proportions are roughly equal between total examinations for white and Asian persons; 29% and 28% respectively.[81] However, the overall proportions can be misleading. The Asian population of the UK is a small minority of the overall UK population, therefore the number of Asians examined under Schedule 7 is disproportionately high when compared to white persons and when expressed as a proportion of persons sharing the same ethnicity.[82]

[79] Note the impact of the Anti-Social Behaviour, Crime and Policing Act 2014 on Sch 7 statistics: this requires that any examination which extends beyond one hour must become a formal detention, and has likely contributed to the increase in detentions.
[80] Commissioner for the Retention and Use of Biometric Material, *Annual Report 2016,* September 2017.
[81] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table S.04.
[82] For comparison, see the Civil Aviation Authority Passenger Survey Report 2016 data: Asian 5.2%, Black 2.2%, Chinese 1.5%, Mixed 1.5%, White 87.9%, and Other 1.7%. CAA Passenger Survey Report 2016: A survey of passengers at Birmingham, East Midlands, Gatwick, Heathrow, Liverpool, London City, Luton, Manchester and Stansted Airports, Tables 12.1–12.9. Data from the airports were combined to calculate the estimates.

Ethnicity	Year of examination (Year ending)					
	2012	2013	2014	2015	2016	2017
Total examinations						
White	41%	39%	41%	33%	25%	29%
Mixed	3%	4%	5%	6%	4%	4%
Black or Black British	9%	9%	8%	8%	7%	8%
Asian or Asian British	26%	22%	21%	26%	30%	28%
Chinese or Other	18%	18%	17%	21%	24%	20%
Not stated	3%	8%	7%	6%	9%	11%

5.13. In contrast to the statistics for Schedule 7 examinations, when those cases develop into Schedule 7 detentions we see that almost one third (31%) are Asian persons, whereas the proportion of white persons drops to 12%.[83] Is this evidence for the proposition that port and border stops are conducted by ethnicity without more? Some of those whom I have met in my travels around the country, see below, believe this to be the case. However, I suggest it is not as simple as that.

[83] *Ibid.*

Ethnicity	Year of examination (Year ending 30 June)					
	2012	2013	2014	2015	2016	2017
Detentions						
White	9%	8%	11%	11%	12%	12%
Mixed	3%	4%	7%	7%	6%	7%
Black or Black British	26%	20%	20%	10%	8%	11%
Asian or Asian British	34%	33%	34%	37%	34%	31%
Chinese or Other	18%	23%	24%	27%	25%	22%
Not stated	10%	12%	5%	8%	16%	17%

5.14. Following the *Beghal* case, the Code of Practice was amended.[84] The following is of particular relevance:

"Selection Criteria

Although the selection of a person for examination is not conditional upon the examining officer having grounds to suspect that person of being concerned in terrorism, the decision to select a person for examination must not be arbitrary. An examining officer's decision to select a person for examination must be informed by the threat from terrorism to the United Kingdom and its interests posed by the various terrorist groups, networks and individuals active in, and outside the United Kingdom.

Considerations that relate to the threat of terrorism, include factors such as, but not exclusively:

- *known and suspected sources of terrorism*

[84] *Examining officers and review officers under Schedule 7 to TA 2000: Code of Practice*, March 2015. Amended by: Home Office, *Circular 001/2016: schedule 7 to the Terrorism Act 2000*, 15 March 2016.

- *individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected*
- *any information on the origins and/or location of terrorist groups*
- *possible current, emerging and future terrorist activity*
- *the means of travel (and documentation) that a group or individuals involved in terrorist activity could use*
- *emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity*
- *observation of an individual's behaviour*

It is only appropriate for race, ethnic background, religion and/or other "protected characteristics"[85] (whether separately or together) to be used as criteria for selection if present in association with factors which show a connection with the threat from terrorism."[86]

5.15. **Recommendation;** The Government has maintained its refusal to accept my predecessor's recommendation for the introduction of a suspicion threshold for the exercise of Schedule 7 powers.[87] I do not depart from the forceful logic behind my predecessor's recommendation. However, rather than simply re-stating the recommendation, bringing the likelihood of another rejection by Government, we should strive to make some progress, particularly given the current form of the Code of Practice, cited above. No officer may conduct a random examination or detention of a person under Schedule 7. No officer may use ethnicity alone for the exercise of such powers. Every officer is bound by the terms of the Code of Practice, which require that one or more of the 'selection criteria' is present before any examination/detention can take place. The logic behind this should be the subject of further discussion and testing. Therefore, in the absence for the time being of a reasonable suspicion

[85] Protected characteristics as defined in the Equalities Act 2010 and set out in para 4 of the Code of Practice.
[86] Paragraph 19 of the Code of Practice. See Home Office, *Circular 001/2016: schedule 7 to the Terrorism Act 2000*, 15 March 2016.
[87] See e.g. D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 7.26.

threshold, I recommend that these advances in the Code of Practice be **at least enshrined in the adoption of a universal threshold, namely 'reasonable grounds to support' the exercise of Schedule 7 powers by the application of the criteria within the Code of Practice.** Adoption of such a test would not satisfy all, but it would be a step in the right direction, demonstrating the absence of either examination/detention based on ethnicity alone or the exercise of powers in a random fashion.[88] There would be some practical ramifications for making the change I have recommended, including the question of how officers would or should demonstrate adherence both to the Code and to the test I have proposed, and including the consequences of non-compliance. My point, for the purposes of this report, is that however useful and effective Schedule 7 powers may be, selection for examination must not be arbitrary. It is in the interests of those who exercise these powers in thousands of cases each year to demonstrate their non-arbitrary use. My predecessor's recommendation sought to underline this fundamental issue, and my recommendation shares that aim.

Northern Ireland

5.16. In 2015/2016, there were 4,405 examinations at ports and airports in Northern Ireland. None of the examinations resulted in a detention.[89]

5.17. In his final report (December 2016) David Anderson QC noted that of the 34,500 Schedule 7 examinations at ports across the United Kingdom in 2014/15, more than 10% (3,496) were in Northern Ireland. Of the 34,500 persons examined in 2014/15, there were 1,821 persons detained but none of the detentions were in Northern Ireland ports. Likewise, in 2013/14 nobody was detained in Northern Ireland. David Anderson QC commented that this was 'remarkable' and while he had in the past reviewed

[88] I recognise that this proposal carries consequences, stemming from the fact that the Code of Practice is not enshrined in primary legislation, unlike the Sch 7 powers themselves. The current legal impacts of the code under para.6 are: (2) The failure by an officer to observe a provision of a code shall not of itself make him liable to criminal or civil proceedings. (3) A code - (a) shall be admissible in evidence in criminal and civil proceedings, and (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.

[89] Northern Ireland Office, *Northern Ireland Terrorism Legislation: Annual Statistics 2015/16, 1 November 2016*, Table 16.

Schedule 7 operations in Northern Ireland, he believed it worth investigating further with port officers.[90]

5.18. Since then, PSNI has advised the Northern Ireland Policing Board that PSNI ports officers do not encounter the same level of difficulties as at some other UK ports regarding language barriers due to the lack of international carriers. Therefore most examinations of persons at ports are completed within one hour, negating the requirement for a detention. PSNI highlighted that while none of the 3,496 persons examined under Schedule 7 in 2014/15 were detained beyond an hour, this did not mean that all 3,496 were released within one hour as some were wanted or of interest to other enforcement agencies such as HMRC or Immigration. Where this occurred, as soon as it transpired that they were wanted or of interest to another agency, use of schedule 7 immediately ceased and the person was handed over.

5.19. I am conscious that Brexit foreshadows an important debate on the future relevance and utility of Schedule 7 powers, concerning the as yet undecided issue of a 'hard' or 'soft' border between Northern Ireland and Ireland. For reasons which I hope are obvious, I intend to defer further consideration of this issue to my next annual report. The safety of everyone within the UK from any inbound passenger who would harm this country or those within it, must remain amongst our greatest concerns.

Community roundtables

5.20. Many participants at my own community engagement meetings, for example in Leicester, Bradford, Manchester and London, were preoccupied with the legal provisions which empower officers to stop travellers at border controls nationwide.[91] Views on these legal powers, necessary in order to exercise a measure of control over those who enter this country, are symptomatic of the general view often expressed to me, namely that there is 'one law for Muslims, and another for the rest'. In discussion, I found that many were confused as to the reach of our legislation, and found it hard to

[90] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 7.13.
[91] Forward Thinking, *Community Roundtables Report*, July 2017.

accept that legislation is intended for all citizens and not just for one segment of society.

5.21. Leicester - It was felt that Muslims are being disproportionately profiled under Schedule 7 powers, with one Muslim man noting 'he is nervous every time he sets foot in an airport'. In a context where security services already lack the trust and confidence of some community organisations, there was criticism levied towards the lack of oversight and scrutiny of Schedule 7 powers to ensure interventions are lawful and proportionate. The view was also expressed that the Government has shared personal information of those stopped under Schedule 7 with foreign governments, leading to unnecessary stops/searches abroad and limited recourse in British courts when issues have arisen abroad, e.g. Muslims have been stopped in Indian airports and cited humanitarian concerns over their treatment.[92]

5.22. London - The threshold for using Schedule 7 is seen by some to be too low in light of the extensive powers it grants authorities. It is also perceived to disproportionately target British Muslims. Concerns were voiced as to the need for specific safeguards from Schedule 7 powers required for journalists and NGO workers in light of the confidential information they may carry.[93] Reflecting on current terrorism legislation, several individuals raised concerns over Schedule 7. It was felt that the threshold for being stopped and searched under Schedule 7 was unclear, especially in light of the extensive powers it grants. The ability of police to hold someone on what was asserted to be only a'1%' general suspicion was felt to impinge heavily on civil liberties, particularly on those of Muslim men who were felt to be overwhelmingly targeted. Further concerns related to privacy and the ability of the police to view and download all data on a phone or laptop. This was seen to be excessively intrusive in light of the low bar of suspicion required to use the power, granting full access to someone's professional and personal life. For cultural reasons, such as sensitivity around pictures of a wife without their headscarf, it was said that there were additional reasons why

[92] *Ibid.* Anecdotally, it was suggested to me that '75% of people stopped in British airports under Schedule 7 have been asked to spy on their communities', feeding into the narrative that the only relationship between communities and government is one based on surveillance.
[93] For more on this, see C. Walker, 'Investigative Journalism and Counter Terrorism Laws' (2017) 31 Notre Dame Journal of Law, Ethics and Public Policy 129-174.

handing over devices containing personal data to the authorities could be distressing for some British Muslims.[94]

Convictions

5.23. During 2016 there were three convictions for wilfully failing to comply with a duty imposed by Schedule 7 of the Terrorism Act 2000 (see Chapter 7 on Criminal Proceedings).

[94]Forward Thinking, *Community Roundtables Report*, July 2017.

6. ARREST AND DETENTION

Introduction

6.1. Section 41 of the Terrorism Act 2000 empowers a police officer to arrest without warrant a person whom he or she reasonably suspects to be a terrorist. A 'terrorist' is defined as a person who has committed specified terrorist offences or a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism". Therefore, suspicion of the commission of relevant acts of terrorism need not be demonstrated at the time a section 41 arrest is made. Rather, what is required is a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. A person arrested under section 41, may be detained without charge for up to 48 hours without judicial intervention. If detention is to extend beyond 48 hours it must be extended by a Judge, who grants a Warrant of Further Detention (WOFD). The extension may be for up to but no more than a *total* of 14 days. Section 41 is therefore different from other arrest powers, in particular because it permits arrest without suspicion of a particular offence, and because a person may be detained without the possibility of bail pending charge, for up to 14 days.

6.2. The Terrorism Act (TACT) regime differs from the wider and more general regime under the Police and Criminal Evidence Act 1984 (PACE), which I need not set out in detail here as it is well known. Of interest however is the interrelationship between the PACE and TACT regimes. Arrest in relation to terrorism-related activity does not have to be effected by using the TACT regime, and in practice the police often use PACE arrest powers (in fact with increasing frequency, something I intend to examine in more detail in my next report).

6.3. I have searched for an example, in a real case, where the police have permissibly switched between the two regimes. What follows is a real case history, redacted to protect the identity of the person arrested and detained:

(The detained person) *was dealt with in custody under TACT legislation having been arrested for section 5 TACT.*[95] *The initial grounds for arrest and decision to detain under TACT legislation were sound based on his actions, the location and a quick view of open source material suggesting he sympathised with the situation in Syria, and may have an extreme mind-set. However the investigation did not unearth any evidence that his actions had a racial, political, religious or ideological motivation. There was no evidence of radicalisation, religious extremism, links to any proscribed groups, attack planning. No offences under the TACT legislation were identified. What (the police) did keep finding was evidence of poor mental health, evidence that he wanted to commit suicide and evidence that he was politically interested in humanitarian issues, more anti-violence than anything else. Both the senior investigating officer (SIO), and the case officer felt that it would be wrong to apply for the WOFD when all the evidence pointed away from TACT and supported the hypotheses of an intention to die.*

From a procedural perspective it was a consideration from a relatively early stage that (the police) may simply be dealing with a vulnerable individual who was not a terrorist and that if that materialised then there were obvious crime offences that had been committed. Clearly (the police) were not in a position to make this assessment until enough investigative work had been carried out. Through engagement with CPS, the CTD[96] *made local CPS (an appropriately DV lawyer)*[97] *aware of the situation so that as (the police) approached a decision of the necessity for a WOFD, a review could be conducted of simple crime offences. Once the SIO was satisfied that enough key digital media had been viewed and that there was no evidence of terrorism offences then (the detained person) was released but immediately charged with crime matters as per the advice sought from local CPS. Once detained for crime matters, (the detained person) was transferred to a local appropriate custody suite in preparation for court.*

6.4. This is but one recent example. During my own visits to custody suites for Terrorism Act detainees, I have understood that custody managers are aware of the full detail of

[95] A person commits an offence under s5 TA 2006 if, with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention. The offence carries a maximum discretionary sentence of Life Imprisonment.
[96] Counter-Terrorism Division
[97] Developed Vetted individuals are able to inspect secret intelligence material.

both TACT and PACE custody regimes, and alive to the possibility in any case of ceasing TACT detention when appropriate. I therefore **recommend that further work is done to analyse and to understand the use of the distinct arrest and detention powers within TACT and PACE respectively.**

Arrests in 2016

6.5. In **Great Britain**, there were 37 arrests in 2016 under s41 Terrorism Act 2000, compared to 55 in 2015 (a 33% decrease).[98]

6.6. There were however a total of 260 arrests for terrorism-related offences in 2016, therefore the majority of arrests (86%) did not use TACT. It follows that PACE arrest powers were used in these cases.[99]

6.7. I have noted the distinction between the use of TACT and PACE regimes. However, careful consideration and transparency should be used to define what is a 'terrorism-related offence'. It is not always clear what exactly counts as a terrorist-related arrest. Once one moves outside the use of the s41 arrest power and the TACT offences, the categorisation is decided by the National Counter Terrorism Police Operations Centre, which applies its own ideas about terrorism and domestic extremism. I **recommend** clarity in this important area, and I intend to look at this further in my next annual report.

6.8. There is at least one obvious reason why further engagement with the police in this area would be worthwhile: the issues of how powers are selected impacts upon the consequences in terms of oversight and detention periods as well as bail before charge; the latter being available in respect of PACE cases, but not available in respect of TACT cases. My predecessor recommended amendment of the TACT regime to permit bail before charge, but that recommendation has not been accepted.[100]

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[98] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table A.01.
[99] *Ibid*.
[100] *The Government Response to the Annual Report 2015,* July 2017, p8.

6.9. For the purpose of noting the statistic without more at this stage, it will be seen that there has been a 257% increase in the use of TACT for arrests in the year ending June 2017 compared to the previous 12 months, compared to a 68% increase in overall arrests for terrorism related offences.[101] This is a startling increase, until we remember the terrorist atrocities this year commencing with Westminster Bridge in London on 22nd March 2017.[102] I shall consider this in detail in my next annual report.

6.10. In **Northern Ireland**, there were 123 arrests under s41 Terrorism Act 2000 in 2016, down from 169 in 2015 and 222 in 2014. In fact, this is the lowest number of arrests in any year since 2001.[103]

Periods of detention in 2016

6.11. In **Great Britain**, of the 37 persons arrested in 2016 under TA 2000 s41:

(i) Just 14% were held in pre-charge detention for less than 48 hours (after which time, a WOFD is required from the court). This compares to 25% in 2015, 31% in 2014, 54% in 2013 and a total of 59% between September 2001 and the end of 2015.

(ii) 57% were held for less than a week, compared to 93% in 2015 and an average of 88% since September 2001.

(iii) 16 people we held beyond a week, six of those were released only on the last day of the 14-day maximum period. This compares to just four people in 2015 and eight people in 2014.[104]

6.12. It is worth reflecting on maximum periods of pre-charge detention in greater detail, to note how this has changed over the years. The current regime, as explained above,

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[101] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to June 2017: data tables*, 14 September 2017, table A.01.

[102] For a discussion on this issue, see Chapter 5 of Professor Walker's book *Blackstone's Guide to the Anti-Terrorism Legislation*, 3rd ed.

[103] PSNI, *Security Situation Statistics*, 10 November 2017. The figures are from the Accompanying Spreadsheet: *Police Recorded Security Statistics in Northern Ireland: Historic information up to and including October 2017*.

[104] Home Office, Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables, 9 March 2017, table A.02. Historic data from D. Anderson, *The Terrorism Acts in 2015,* December 2016, updated by Home Office Statistics.

means that those arrested on suspicion of terrorism-related activity pursuant to section 41 of the Terrorism Act 2000 can be lawfully detained for up to 14 days. However, Parliament has recognised the possibility of an extension up to 28 days, but only in very particular circumstances. I shall explain below. First though, it is to be remembered that the maximum period of detention stood at 7 days, in fact throughout the period from 1974 until the passing of the Criminal Justice Act 2003, when it was doubled to 14 days. A further doubling to 28 days was permitted by section 23 of the Terrorism Act 2006. This was the state of the law until 25th January 2011, when the maximum period reduced to 14 days.[105]

6.13. Those under section 41 arrest can therefore be lawfully detained by the police for up to the first 48 hours. (section 41(3)). Thereafter, detention can be extended only by a judge, who may issue a warrant of further detention up to 14 days from arrest (Schedule 8, section 41(5) and (6)). The 14 day maximum can theoretically be extended, only by a High Court Judge (section 23 TA 2006), to 28 days.

6.14. 28-day detention, the longest technically permissible by law, is currently dependent upon an order-making power vested in the Home Secretary which when used permits longer detention in any terrorism detention case, but the power is subject to cases within a maximum period of three months. The power lies in a Draft Detention of Terrorist Suspects (Temporary Extension) Bill, which is the current receptacle for the extra detention power enabled by the TA 2006 since.[106] The Home Secretary has not to date invoked the Draft Bill. Were that ever to happen, we would find ourselves in what the former Home Secretary, now the Prime Minister, described as 'exceptional circumstances' (Hansard (HC) vol 254 col 210 (1/3/11)) in which the ordinary maximum period of 14 days is said to be inadequate.

6.15. The maximum period of detention under TA 2000 stood at seven days until January 2004, 14 days until July 2006 and 28 days until 25 January 2011.[107] Attempts by the last Government in 2005 and 2008 to extend pre-charge detention limits further, first to

[105] Protection of Freedoms Act 2012, s 57, Sch 10, Pt 4.
[106] Home Office, Draft Detention of Terrorist Suspects (Temporary Extension) Bills (Cm 8018, London, 2011).
[107] D. Anderson, *The Terrorism Acts in 2011*, June 2012.

90 days and then to 42 days, were withdrawn after defeats in Parliament. Since 25 January 2011, the maximum period of detention has stood at 14 days. This compares to a maximum detention period of 96 hours under other legislation in England, Wales and Northern Ireland. In contrast to the position under PACE, there is no power to release on police bail.

6.16. I make no recommendation for a pre-charge detention regime in terrorism cases longer than 14 days. It is worth remembering that at the time of the passage of the 2011 Bill, the Government mentioned extension beyond 14 days only in the case of 'multiple complex and simultaneous investigations'.[108]

6.17. Separately to all of the above, it is to be noted that there are circumstances where it is reasonable and necessary to pause the detention clock, namely when detainees are admitted to hospital, with the obvious consequence that aspects of pre-charge activity temporarily cease (including, importantly, the availability of the detainee for police interview). As noted above, the Home Secretary has announced her intention to accept a recommendation by my predecessor to this effect.[109]

6.18. In **Northern Ireland**, of the 149 persons arrested in 2015/16, only 8 were detained for more than 48 hours. Persons detained were detained for a minimum of 4-8 hours and a maximum of 5-6 days. No-one was held for more than a week.[110] Once again, therefore: the TA 2000 section 41 arrest power was used with far greater frequency in Northern Ireland than in Great Britain; but detention beyond 48 hours, common in Great Britain, is still rare in Northern Ireland.

[108] Government Response (Cm 8220, London, 2011) p 6

[109] *The Government Response to the Annual Report 2015,* July 2017, page 7. See also para 1.10(g) above.

[110] Northern Ireland Office, *Northern Ireland Terrorism Legislation: Annual Statistics 2015/16*, 1 November 2016, Table 5. Updated tables for 2016/17 have not yet been released at the time of writing (November 2017).

Numbers charged in 2016

6.19. In **Great Britain**, 27 (73%) out of the 37 people arrested under TA 2000 s41 were charged and 9 were released.[111]

6.20. Of the 260 people arrested for terrorism-related offences in 2016, 79 (30%) were charged with terrorism-related offences.[112] The charging rate for those subject to 'terrorism-related arrests' between 2001 and 2015 was an average of 89 charges per year. In total, 39% of those arrested for terrorism-related offences were charged (1,342 out of 3,427).[113]

6.21. Of the 79 charged with terrorism-related offences in 2016, 59 were charged under the Terrorism Acts, five under Schedule 7 of the TA 2000 for failure to comply with border controls, and 15 under other legislation (down from 36).[114] Principal offences for which persons were charged under the Terrorism Acts included membership offences (2 persons), fundraising offences (9 persons), collection of information useful for an act of terrorism (8 persons), encouragement of terrorism (3 persons), dissemination of terrorist publications (10 persons) and preparation for terrorist acts (21 persons).[115]

6.22. In **Northern Ireland**, only 18 (15%) out of the 123 people arrested under TA 2000 s41 were charged in 2016. This has been consistently low in recent years with 12% of those arrested in 2015 and 18% of those arrested in 2014 being charged.[116]

6.23. In addition, amongst the small proportion of persons arrested under section 41 in Northern Ireland who are subsequently charged, even fewer are charged with an offence under the Terrorism Act 2000. In 2015/2016, we know that of 149 persons

[111] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables,* 9 March 2017, table A.02.
[112] *Ibid.*, table A.03. As a number of cases were still incomplete at time the statistics were calculated (16 January 2017), these proportions are likely to have changed as cases progressed.
[113] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table A.03.
[114] *Ibid.*
[115] *Ibid.*, table A.05a.
[116] PSNI, *Security Situation Statistics*, 10 November 2017. The figures are from the Accompanying Spreadsheet: *Police Recorded Security Statistics in Northern Ireland: Historic information up to and including October 2017*.

detained under section 41, 18 (12%) were charged. Those 18 people were charged with 36 offences including 3 offences of attempted murder, eight explosives offences and six firearms offences. Of those charged, 8 (44%) were charged with 11 offences under the TA 2000, including 5 offences of membership, and 3 (17%) were charged with 3 offences under the Terrorism Act 2006 including 2 offences of preparation of terrorist acts and 1 offence related to the encouragement of terrorism.[117] In the relevant period, there were 4 people convicted under TA 2000, TA 2006 or the Counter-Terrorism Act (CTA) 2008 however, as of 29 June 2016, none of the 18 persons detained under section 41 and subsequently *charged* in 2015/16 had been convicted of terrorist related offences.[118]

6.24. David Anderson QC, in his final report as the Independent Reviewer of Terrorism Legislation, published in December 2016, commented, 'The very low charge rate in Northern Ireland is disappointing. I have previously and repeatedly emphasised the need for reasonable suspicion in relation to each person arrested under s41, and suggested that the low charge rate may be an indicator that the arrest power is overused in Northern Ireland.'[119] He welcomed the review carried out by PSNI further to the recommendation in the Northern Ireland Policing Board's Human Rights Annual Report and noted that in the cases reviewed, while the officers did anticipate charging under TA 2000 at the time of arrest, the intelligence indicating the TACT charge was often not converted into evidence sufficient to charge. He commented 'the conversion of intelligence into evidence is a challenge in many terrorism-related investigations but appears to be particularly difficult in Northern Ireland. Factors are sometimes said to include suspects who can operate locally, leaving little online trace; the need to protect sources of intelligence; and fear of retaliation on the part of witnesses (a feature of small tight-knit communities). Those factors may also explain some failures to proceed post charge.'[120]

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[117] *Northern Ireland Terrorism Legislation: Annual Statistics 2015/16*, Northern Ireland Office, November 2016, Table 9.
[118] *Ibid.*, tables 10 and 15.
[119] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 8.16.
[120] *Ibid*. para. 8.20.

6.25. I understand that the PSNI has been actively exploring this issue recently, and I therefore hope to return to it in my next annual report.

Gender, age, ethnicity and nationality

6.26. These data are only available in Great Britain.

(a) Women comprised 10% of those arrested for terrorism-related offences in 2016, 10% of those charged and 4% of those convicted. In 2015, 16% of those arrested, 15% of those charged and 16% of those convicted were women.[121]

(b) Of those arrested, charged and convicted of terrorism-related offences in 2016, 15% were aged under 20.[122]

2016	Under 18	18-20	21-24	25-29	30 and over
% terrorism-related arrests	5%	10%	16%	16%	54%
% terrorism-related charges	5%	10%	20%	19%	46%
% terrorism-related convictions	4%	11%	25%	25%	36%

6.27. The ethnic appearance (based on officer-defined data) of those arrested, charged and convicted of terrorism-related offences in 2016 is as follows:[123]

2016	White	Black	Asian	Other	N/K
% terrorism-related arrests	35%	10%	48%	7%	0%
% terrorism-related charges	27%	15%	56%	3%	0%
% terrorism-related convictions	29%	14%	54%	4%	0%

[121] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table A.09.
[122] *Ibid.*, table A.10.
[123] *Ibid.*, table A.11

6.28. These figures correspond reasonably closely to figures presented by my predecessor for the period 2005-2012, also based on police perceptions:[124]

2005-2012	White	Black	Asian	Other	N/K
% terrorism-related arrests	25%	14%	44%	16%	2%
% terrorism-related charges	24%	17%	46%	11%	2%
% terrorism-related convictions	26%	16%	47%	8%	3%

6.29. As to self-defined nationality, British citizens comprised 74% of those arrested for terrorism-related offences, 77% of those charged with and 75% of those convicted of such offences in 2016. These are comparable to the figures in 2015 but are well in excess of the equivalent figures for the period September 2001 – December 2015, which are 56%, 69% and 68%.[125]

6.30. Of the 628 persons convicted of terrorism-related offences in Great Britain between September 2001 – December 2016, the largest numbers of foreign nationals have come from Algeria (28), Albania (17), Pakistan (15) and Somalia (14).[126]

Conditions of detention

6.31. Since March, I have engaged with many who supply important services in this area. they include the Independent Custody Visitors Association (ICVA), the National Preventive Mechanism (NPM), Force Medical Examiners (FMEs, qualified doctors who attend upon detained persons in police custody suites), and the National Appropriate Adult Network (NAAN).

6.32. Since January this year, the IRTL became a member of the National Preventive Mechanism, a group of some 20 plus entities including the Chief Inspectors of Prisons

[124] D. Anderson, *The Terrorism Acts in 2015,* December 2016, para 8.25.
[125] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table A.12a-c. Historic data from D. Anderson, *The Terrorism Acts in 2015,* December 2016, para 8.26, updated by Home Office Statistics.
[126] *Ibid.,* table A.12c.

and Police, charged to keep the conditions in which detained persons are held under close scrutiny as required by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[127] What that means to me is that I see the pre-charge terrorism custody environment in all its aspects. As noted above, unlike ordinary police detention under PACE, the Terrorism Act regime entails holding individuals in bespoke facilities, entirely separate from normal custody suites and in conditions of solitary confinement for up to 14 days.

6.33. I was very relieved to discover that there is an Independent Custody Visitors Association, the ICVA. They train and run hundreds of volunteers throughout the UK, who conduct daily visits to Police custody suites; and they run a cadre of specially trained Terrorism Act volunteers who hold security clearance and who go to see Terrorism Act detainees every day. This is an excellent resource, and I have come to rely upon it. Since the end of March, I receive daily updates and report forms from each of the terrorism custody suites which happen to be open, and I also receive notifications of every Terrorism Act arrest, Warrant of Further Detention and/or charging decision or release without charge; remembering that the Terrorism Act custody powers do not include bail before charge, in contrast to the PACE regime.[128]

6.34. In amongst all of those cases, what happens within Terrorism Act custody suites can be pivotal to the case in hand. One example from my own experience is the case of Ibrahim and others, recently before the ECtHR, but previously in the Court of Appeal and of course a six-month trial in London, because Ibrahim was the leader of the so-called 21/7 plot to detonate bombs on public transport in central London two weeks after 7/7.[129] Urgent public safety interviews were conducted with Ibrahim and two of his co-accused, at Paddington Green police station during the early hours of their TACT detention there.[130] And, as permitted by the provisions of the current legislation, the

[127] See http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx. Ratified by the UK in March 2009.
[128] Max Hill QC, Lecture to the Criminal Bar Association, 19th September 2017. Available at: https://terrorismlegislationreviewer.independent.gov.uk/lecture-to-the-criminal-bar-association-19th-september-2017/
[129] Ibrahim v United Kingdom, App no.50541/08, 13 September 2016.
[130] The power to conduct urgent public safety interviews are found in Schedule 8 TA 2000 and PACE Code H, paragraphs 6.7 and 11.2.

answers given by Ibrahim and the others in those public safety interviews were capable of being used in court, which is why the interviews were conducted under formal caution. So those early hours in a TACT suite can and do involve important procedures, the product of which can end up in court.

6.35. I am pleased to say that the picture from all of the custody visit reports I have received since March 2017 has been generally positive, in the sense that, so far, I have seen very little if any complaint from detainees about the conditions in which they are held. On the contrary, I see what appear to be flexible and dedicated efforts to provide personal essentials to detainees, including clothing, literature and other items designed to make their time in custody as comfortable and bearable as possible.[131]

6.36. It should be noted however, notwithstanding the general picture, there are examples of cases where there is room for improvement within the TACT custody regime, taking my lead from the content of some of the ICVA reports I have received. 'mental health team took too long', 'use of CCTV in cells makes them uncomfortable', 'low mood' (to be expected perhaps).

6.37. I also note that there appears to be a reluctance by detainees to give consent to ICVA visits within the TACT custody facility in Northern Ireland. This appears to be a local problem. I am unclear of the reason for the low rate of consent but will explore this further in my next report. Meanwhile, I **recommend** that greater efforts are made to ensure that TACT detainees in Northern Ireland are encouraged to the view that ICVA volunteers are entirely independent of the police and should be seen as promoting the welfare of all detained persons.

6.38. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) conducted a country visit to England, which culminated in a full Report (the visit was conducted from 30 March to 12 April 2016).[132] The CPT report includes the following:

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[131] Max Hill QC, *ICVA TACT Conference Speech*, 21 August 2017.

[132] *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, Strasbourg, 19 April 2017.

In general, persons deprived of their liberty by the police were afforded the safeguards laid down in PACE Code C. However, several deficiencies were observed such as a protection vacuum when arrested persons had to wait for up to two hours in holding rooms before their detention was formally authorised and before they were informed of their rights by custody sergeants. The CPT recommends that all detained persons should be fully informed of their rights as from the very outset of their deprivation of liberty (and thereafter of any authorised delay) and current deficiencies impeding the complete recording of the fact of a person's detention should be rectified. Access to a lawyer and a doctor or nurse was generally being facilitated promptly in all police establishments visited. However, there was a lack of respect for lawyer-client confidentiality during consultation by telephone at Southwark and Doncaster Police Stations. As regards custody records, the CPT recommends that whenever a person is deprived of their liberty this fact is formally and accurately recorded without delay and without misrepresentation as to the location of custody, which was not the case at the TACT suite at Paddington Green Police Station.

The material conditions of the custody cells in the police establishments visited were generally of a good standard. There was, however, a lack of access to natural light in many cells and most establishments visited were not equipped with proper exercise yards. The conditions at Paddington Green 'TACT' Suite, in particular, were inadequate and needed upgrading.

6.39. There is much to consider. At the outset, it is important to record the fact that Paddington Green in London is no longer being used as a TACT detention suite. All of that business has now been transferred to a dedicated TACT suite elsewhere in London, and I understand that a new-build London TACT suite is expected to become available within the next two years. Therefore we should treat the CPT criticism of Paddington Green with some caution.

6.40. But the CPT report raises several issues which are all worth emphasising, given the special nature of the solitary confinement in TACT custody suites: I note and **recommend** all of the following:

(i) Universal and early reminder of rights once detained, no more 'protection vacuums' whilst detainees are in a holding room.

(ii) Complete recording of the fact of a person's detention

(iii) Respect for lawyer-client confidentiality, also known as legal professional privilege which is fundamental to the confidence any detainee should have in the custody system, and the criminal justice system in general.

(iv) Access to natural light, and provision for exercise.

6.41. The issue of isolation, or solitary confinement, is directly engaged in every terrorism detention case. The NPM to which I belong has published a useful paper on the topic in January this year.[133]

6.42. I became aware of a particular concern within the Scottish custody environment, deriving from Operation HAIRSPLITTER (2013) in which Police Scotland had five detainees at the Scotland Terrorism Detention Centre (STDC) for a period of seven days.

Anyone detained at the STDC is subject to the Police Scotland, Care and Welfare of Persons in Police Custody Standard Operating Procedure.[134] It became apparent that after the initial 2 days, the detainee(s) were tired as they were being roused every hour.

Current operating procedures state that:

Section 15 Police Scotland Care and Welfare of Persons in Police Custody (Standard Operating Procedure):

*15.1.2 All custodies detained in cells are to be visited **at least** once per hour.*

*15.1.3 At each visit, all custodies **must** be roused and spoken to and are to give a distinctive verbal response which must be noted on the Prisoner Contact Record. The only exception will be when a HCP has given a direction that continued hourly rousing will have a detrimental effect on a custody due to a specific medical condition. In such circumstances a full rationale including medical opinion must be recorded on the relevant custody record.*

[133] National Preventative Mechanism, *Guidance: Isolation in detention*, January 2017.

[134] Police Scotland, *Care and Welfare of Persons in Police Custody*, 10 November 2017.

This led to discussion between Police Scotland and relevant Medical Practitioners, with the result that after the initial 48 hours, the detainee rousing time could be delayed to every 3-4 hours. The detainees were still checked upon every hour, however, not spoken to or roused.

PACE Code H states that:

"Detainees should be visited at least every hour. If no reasonably foreseeable risk was identified in a risk assessment, there is no need to wake a sleeping detainee."[135]

It seems that there has been a difference between Scotland and the rest of the UK in that the standard practice in Scotland was always to get a verbal response from a sleeping detainee.

6.43. I **recommend** that this be explored again, with a view to uniformity where possible, and in the interests of the welfare of all detainees.

Right not to be held incommunicado and to access a solicitor

6.44. In Northern Ireland, all 30 requests to have someone informed of detention under section 41 (Schedule 8, paragraph 6) of the Terrorism Act 2000 in 2015/16 were granted immediately. All 147 requests by persons detained in Northern Ireland for access to a solicitor under section 41 (Schedule 8, paragraph 7) of the Terrorism Act 2000 were allowed immediately.[136]

6.45. I was not in post during 2016, and there are no published statistics on the question of whom amongst TACT detainees in Great Britain during 2016 may have been held temporarily incommunicado, in other words where access to a solicitor was delayed. In future Reports, I shall focus on this issue wherever I have information from individual cases.

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[135] PACE Code H, para 9.4.

[136] Northern Ireland Office, Northern Ireland Terrorism Legislation: Annual Statistics 2015/16, 1 November 2016, Tables 7-8.

7. CRIMINAL PROCEEDINGS

Statistics – Great Britain

Trials in 2016

7.1. 62 trials for terrorism-related offences were completed in 2016. Of these, 54 persons (87%) were convicted and 8 acquitted.[137] Of the 54 persons convicted of terrorism-related offences in 2016, 48 persons (89%) were convicted of TACT offences (most common one being preparation for terrorist acts, contrary to section 5 of the Terrorism Act 2006) and 6 persons were convicted of non-TACT offences.[138]

Sentences in 2016

7.2. Of the 54 persons convicted of terrorism-related offences in 2016:[139]

(a) 6 received life sentences.
(b) 1 received a sentence of between 20 years and 30 years.
(c) 3 received sentences of between 10 and 20 years.
(d) 19 received sentences of between 4 and 10 years.
(e) 19 received sentences of between 1 and 4 years.
(f) 2 received sentences of less than a year.
(g) 3 received non-custodial sentences.
(h) 1 received a hospital order.

Prison in 2016

7.3. At the end of 2016, 183 persons were in custody for terrorism-related offences (up from 143 in December 2015 and 127 in December 2014).[140] Of these:

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[137] Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2016: data tables*, 9 March 2017, table C.01.
[138] *Ibid.*, table C.03.
[139] *Ibid.*, table C.04.
[140] *Ibid.*, table P.01.

(a) 163 declared themselves to be Muslim, 11 Christian, 4 No religion, 2 Other, 1 Buddhist, 1 Jewish and 1 Sikh.[141]

(b) 103 defined their ethnicity as Asian or Asian British, 36 as White, 27 as Black or Black British, 7 as Mixed and 4 as Other ethnic group. 6 persons were unrecorded.[142]

Subject matter of prosecutions

7.4. The Counter Terrorism Division of the Crown Prosecution Service (CTD-CPS) recorded 24 cases that were concluded in 2016.[143] A brief summary of each case is attempted below.

(a) Commission or preparation of terrorist acts:

R v Thomas Mair

Thomas Mair was convicted of the murder of Jo Cox MP. Jo Cox was shot three times and suffered multiple stab wounds. Bernard Carter Kenny was also stabbed by Mair as he intervened to help Jo Cox. The Honourable Mr Justice Wilkie concluded in sentencing Mair to Life Imprisonment; "there is no doubt that this murder was done for the purpose of advancing a political, racial and ideological cause namely that of violent white supremacism and exclusive nationalism most associated with Nazism and its modern forms".

R v Tarrik Hassane, Suheib Majeed, Nyall Hamlett and Nathan Cuffy

Tarik Hassane and Suheib Majeed were convicted of conspiracy to murder and preparation of terrorist acts for plotting to carry out one or more murders in London using a silenced firearm. Both were given life sentences.

Nyall Hamlett and Nathan Cuffy were convicted of possessing or supplying the firearm and ammunition that was to be used in the plot. Cuffy was also convicted of possessing other firearms. Hamlett and Cuffy received terms of imprisonment totalling 6 years and six months and 11 years respectively.

[141] *Ibid.*, table P.04.
[142] *Ibid.*, table P.02.
[143] See https://www.cps.gov.uk/publications/prosecution/ctd_2016.html#header.

R v Nadir Sayed

Nadir Syed was convicted of preparation of terrorist acts for his involvement in a plot to behead a member or members of the public in the days around Remembrance Sunday in 2014. Syed was sentenced to Life Imprisonment with a minimum term of 15 years.

The case involved two others, one of whom was acquitted and the jury were unable to reach a verdict in respect of the other. I was the leading prosecution counsel in this case (instructed by the CPS), which concluded before my appointment as Independent Reviewer.

(b) Travelling to Syria or attempting to do so:

R v Tareena Shakil

Tareena Shakil travelled to Syria with her two year old son where she joined Daesh. She later left Raqqa with her son and was arrested at the Turkish border, where she explained in police interviews that she had travelled to Turkey for a holiday before being kidnapped by Daesh, and that all the messaging she sent to her family was done by Daesh for publicity. Shakil was convicted of membership of a proscribed organisation and encouragement of terrorism and received 4 years' imprisonment and 2 years' imprisonment for each offence respectively, to be served consecutively.

R v Ayman Shaukat, Alex Nash, Kerry Thomason and Lorna Moore

Ayman Shaukat was convicted of preparation of terrorist acts in relation to the assistance he gave to others in their travel to Syria. He was sentenced to ten years' imprisonment with an extended licence term of five years.

Alex Nash admitted that he was travelling to join the conflict in Syria and was sentenced to five years' imprisonment, taking into account a related sentence he had already served.

Kerry Thomason was sentenced to two years' imprisonment, suspended for two years, for her role in helping her husband travel to Syria (the Judge found that she had been a victim of a violent and dangerous relationship).

Lorna Moore was sentenced to 30 months' imprisonment for failing to notify the police as to her husband's terrorist activity.

Moore and Shaukat's sentences were subsequently considered by the Court of Appeal.[144] Before my appointment as Independent Reviewer, I was leading counsel acting for the Respondent (CPS) during these appeals.

R v Junead Khan and Shazib Khan

Junead Khan and Shazib Khan (uncle and nephew, although of similar age) were convicted of preparation of terrorist acts in relation to their plans to join Daesh. J Khan was also convicted of preparation of terrorist acts in relation to his plan to attack military personnel in Norfolk. S Khan was sentenced to 7 years' imprisonment with an extended licence period of 5 years. J Khan was sentenced to 7 years' imprisonment for the first offence but it was concurrent to the sentence for his second offence for which a life sentence was imposed with a minimum term of imprisonment to be served of 12 years. I was the leading prosecution counsel in this case, which concluded before my appointment as Independent Reviewer.

These sentences were subsequently considered by the Court of Appeal.[145]

R v Naseer Taj

Naseer Taj was arrested two days before he was to travel to Syria to join Daesh. A search of his property recovered a publication called 'Inspire Four - Winter 1431/2010' and contained articles which seek to encourage its readers to join in 'global jihad'. He was also found to be the user of a Twitter account in the name of Abu Bakr Al Kashmiri. He was charged with an offence of preparation of terrorist acts, possessing a document containing information of a kind likely to be of use to a person preparing or committing an act of terrorism and possession of false identity documents. Taj was convicted after trial and sentenced to a total of eight years' and three months 'imprisonment with a 15 year notification period.

R v Abdalla and Rasmus

Abdalla and Rasmus were convicted of preparation of terrorist acts for attempting to leave the UK in the back of a lorry. Rasmus was sentenced to 4 years and 3 months' imprisonment and Abdalla was sentenced to 5 years' imprisonment.

[144] Attorney General's Reference (No 323/2016); R v Abdallah and another; R v Khan and another; R v Shaukat and another [2016] EWCA Crim 1868.
[145] *Ibid.*

These sentences were subsequently considered by the Court of Appeal.[146]

R v Forhad Rahman, Kaleem Kristen Brekke and Adeel Ulhaq

All three males were charged with an offence of preparation for terrorist acts for assisting a male to leave the UK to participate in the ongoing conflict in Syria. Adeel Ulhaq was also charged with an offence of funding terrorism for sending money to a social media user he believed was participating in the conflict. Forhad Rahman was sentenced to five years' imprisonment. Kaleen Kristen Brekke was sentenced to four years' and six months' imprisonment. Ulhaq was sentenced to five years' imprisonment for assisting the male, and one year's imprisonment, to run concurrently, for sending money to a social media user. Rahman and Ulhaq were made subject to notification requirements for 15 years and Brekke for 10 years.

Ulhaq's sentence was subsequently considered by the Court of Appeal.[147]

R v Aras Mohammed Hamid, Shivan Hayder Azeez Zangana and Ahmed Ismail

Aras Hamid was charged with the following offences for making arrangements to travel to Syria: assisting another in the preparation of terrorist acts, possession of an identity document with improper intention and preparation of terrorist acts. Azeez Zangana was charged with an offence of preparation of terrorist acts for also making arrangements to travel to Syria. Ahmed Ismail had planned to travel too but changed his mind and was charged with an offence of failing to disclose information about acts of terrorism.

All three were convicted after trial. Hamid was sentenced to a total of 8 years' imprisonment with Terrorism Notification Requirements for 15 years. Zangana was sentenced to a total of 4 years' imprisonment with Terrorism Notification Requirements for 10 years. Ismail was sentenced to a total of 18 months' imprisonment with Terrorism Notification Requirements for 10 years.

(c) Possessing information likely to be of use to a person preparing or committing an act of terrorism:[148]

[146] *Ibid.*
[147] R v Ulhaq (Adeel) [2016] EWCA Crim 2209.
[148] Section 58 of the Terrorism Act 2000.

R v Abubakar Abubakar

Abubakar Abubakar was convicted of possessing a document containing information of a kind likely to be of use to a person preparing or committing an act of terrorism. The document in question was a magazine called 'Smashing Borders - Black Flags from Syria' and contained an article which provides advice on how to avoid detection and attacks by drones. Abubakar was sentenced to 15 months' imprisonment suspended for 24 months and was made the subject of a 24 month supervision order and a 10 year notification requirement.

R v Rebecca Poole

Ms Poole was charged with an offence of collecting information likely to be useful to a person committing or preparing an act of terrorism. She was found not fit to plead but to have been in possession of the material. The court sentenced Ms Poole to a Hospital Order with restrictions.

(d) Terrorist funding:[149]

R v Golamaully and Golamaully

Mr and Mrs Golamaully were convicted of funding terrorism for sending money to their nephew who had travelled from Mauritius to Syria to fight for ISIS. Mr Golamaully was sentenced to 2 years 3 months' imprisonment. Mrs Golamaully was sentenced to 1 year 10 months' imprisonment. Both are subject to a terrorism notification order for 10 years.

R v Hoque and Miah

Hoque and Miah were convicted of funding terrorism for the provision of funds and equipment via aid convoys to Mr Hoque's nephew, who was in Syria fighting for the proscribed organisation known as Jabhat al Nursra. Hoque was sentenced to 5 years' imprisonment and Miah was sentenced to 2.5 years' imprisonment. The terrorism notification period for both is 10 years.

[149] Sections 15-19 of the Terrorism Act 2000.

(e) Failing to comply with Schedule 7:[150]

R v Blaise Tchoula Thcouamo

Blaise Tchoula Thcouamo was convicted of wilfully failing to comply with a duty imposed by Schedule 7 of the Terrorism Act 2000. He was fined £300 and ordered to pay costs in the sum of £350 and the Victim Surcharge.

R v Adam Barik

Adam Barik was convicted of wilfully failing to comply with a duty imposed by Schedule 7 of the Terrorism Act 2000. He was fined £350, and ordered to pay costs of £250 and Victim Surcharge of £45.

R v Steven Singh Narwain

Steven Singh Narwain was convicted of wilfully obstructing, or seeking to frustrate, a search or examination under Schedule 7 for refusing to hand over his mobile phone and wasting police time. In mitigation, Narwain's solicitor stated he had been tired and frustrated, on medication for his broken hand and had been drinking on his flight from India. He was sentenced to 7 days' imprisonment and a one year Supervision Order.

(f) Disseminating information:[151]

R v Zafreen Khadam

Zafreen Khadam was convicted of dissemination of terrorist publications for posting propaganda online encouraging others to join Daesh. She also exchanged messages with a man who purported to be a fighter in Syria, indicating that she intended to marry him and move to Syria. Khadam received a sentence of 4 years' and 6 months' imprisonment.

R v Mohammed Shaheryar Alam

Mohammed Shaheryar Alam was convicted of disseminating a terrorist publication for sending a link to a video entitled "Hadiths referring to ISIS" to two people, on the basis

[150] Paragraph 18 (c) of Schedule 7.
[151] Section 2 of the Terrorism Act 2006.

that he was reckless as to whether it would encourage the commission or preparation of a terrorist act. The judge noted he was of good character and his diagnosed mental health problems may have contributed to his poor judgment. Alam was sentenced to two and a half years' imprisonment and was made subject to notification requirements for a period of 10 years.

R v Mohammed Moshin Ameen

Mohammed Mohsin Ameen was charged with offences of encouraging a terrorist act, disseminating a terrorist publication and inviting support for a proscribed organisation. He was sentenced to five years' imprisonment and was made subject to notification requirements for a period of 15 years. The judge noted that the offending was aggravated by the explicit and intentional nature of the encouragement and by the persistence with which it was pursued.

R v Mohammed Uddin

Mohammed Uddin was convicted of preparation of terrorist acts for spending a little over five weeks in Syria. Some of his messages since his return to the UK indicated an intention to return at some future point to Syria. Uddin was sentenced to seven years' imprisonment with an extended licence period of one year. He was also made subject to the notification provisions for a period of 15 years. Uddin sought leave to appeal his sentence, submitting that it was manifestly excessive, but leave was refused.

R v Abdul Hamid

Abdul Hamid was convicted of dissemination of a terrorism publication for posting a Daesh propaganda video on his Facebook page. He was sentenced to two years' Imprisonment with 10 years' Terrorism Notification Order.

(g) Inviting support for a proscribed organisation:[152]

R v Ibrahim Anderson and Shah Jahan Khan

Ibrahim Anderson and Shah Jahan Khan were convicted of inviting support for a proscribed organisation for distributing leaflets on Oxford Street inviting support for

[152] Section 12 of the Terrorism Act 2000

Daesh. Each received a sentence of 2 years' imprisonment. Anderson was also convicted of possessing information of a kind likely to be of use to someone intending to carry out an act or acts of terrorism after a search of his home found a guide on how to travel to Syria to join Daesh. He was sentenced to 12 months' imprisonment for this offence which was ordered to be served consecutively.

R v Choudary and Rahman[153]

Both were convicted of inviting support for a proscribed organisation for becoming signatories to an oath of allegiance document posted on the internet in 2014 as well as for things they said in specific lectures given in 2014. Mr Justice Holroyde said in his sentencing remarks that both had 'crossed the line between the legitimate expression of your own views and the criminal act of inviting support for an organisation which was at the time engaged in appalling acts of terrorism.' Each was sentenced to 5 years 6 months' imprisonment and made subject to notification requirements for a period of 15 years. There was no evidence that anyone was inspired by their words to do any particular act which Mr Justice Holroyde cited as an important factor in limiting the sentences which they received.

I have underlined the words of Mr Justice Holroyde, above, because they draw the very important distinction between the legitimate (i.e. lawful) expression of a view, and unlawfully inviting support for a proscribed organisation. Thus, so-called 'hate preachers' can and should be prosecuted when they cross the line, as happened in this case.

(h) Breaching a notification order

R v Hana Gul Khan

Hana Gul Khan was previously convicted for funding terrorism. In this instance, she had breached a notification order by changing her name and obtaining a new driving licence. She was sentenced to a total of 180 hours Community Order (100 hours for breach of the notification order and 80 hours for the original suspended offence).

[153] Not included in list of concluded cases in 2016 on the CTD-CPS website. See sentencing remarks here https://www.judiciary.gov.uk/wp-content/uploads/2016/09/r-v-choudary-sentencing.pdf.

7.5. This brief reminder of cases concluded during 2016 perhaps serves to illustrate two principles: first, existing terrorism offences are used whenever commensurate with the criminal activity in a particular case, but second, there are existing terrorism offences which have fallen close to disuse, and there are non-terrorism statutory and common law offences which often describe the crime best and therefore should be used by prosecutors.

7.6. I have written about both of these principles during my time in post this year.[154] I am not the first so to do. My predecessor included within the Conclusion of his final annual report a section entitled 'The justification for special laws'.[155] In turn, this refers back to his 2012 report, in which he expressed the need 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'.* That said, he went on to conclude '*Despite the specific reservations I continue to express about the formulation and operation of the Terrorism Acts, the overall picture seems to me to be one of appropriately strong laws, responsibly implemented and keenly scrutinised by Parliament and by the courts'.*[156]

7.7. I agree with these observations. This report comes too early, both in scope and time, to address the ongoing Government review of counter-terrorism strategy. I hope and expect to be able to write about any outcomes of that review early in 2018. It would be both unnecessary and wrong of me to second-guess that process.

7.8. For the purposes of this report into the operation of our terrorism legislation as it stood during 2016, I merely point to the fact that a review of the charging decisions and prosecutions throughout the year demonstrates that, in the most serious cases, terrorism legislation does not always provide the right answer.[157] The terrorist killing of

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[154] See e.g. Max Hill QC, *Lecture to the Criminal Bar Association*, 19th September 2017 https://terrorismlegislationreviewer.independent.gov.uk/lecture-to-the-criminal-bar-association-19th-september-2017/ and Max Hill QC, *Tom Sargant Memorial Lecture for JUSTICE*, 24th October 2017 https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/.

[155] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 11.4 and following.

[156] *Ibid.*, para 11.10.

[157] http://icsr.info/wp-content/uploads/2016/10/Criminal-Pasts-Terrorist-Futures.pdf

Jo Cox MP, see above, was charged and prosecuted under the common law as Murder. Nobody should be in any doubt that this was a terrorist offence, but Murder encapsulated the crime and was unquestionably the correct charge. The same is true in many of the most serious terrorist offences of recent years, including the terrorist killing of Fusilier Lee Rigby on the streets of Woolwich in 2011. Incidentally, may I point out, the fact that a Muslim terrorist (Adebolajo) and a white terrorist (Mair) were both charged in the same way, and the fact that neither of them were charged using our terrorism legislation, surely makes the point that our laws - whether in statute or common law - are fit for purpose in respect of each and every offender, whatever his/her ethnicity or religion.

7.9. A glance at the list of concluded cases, above, shows that amongst our terrorism legislation there are offences of great utility. The obvious examples are:

i. section 5, Terrorism Act 2006, preparation for terrorism. An offence carrying extra-territorial jurisdiction since 2015,[158] and punishable with a discretionary maximum of Life Imprisonment

ii. section 2, Terrorism Act 2006, the dissemination of terrorist publications. An offence which can be committed online as well as offline, with the obvious importance this conveys in a world of modern communications

iii. section 12, Terrorism Act 2000, inviting support for a proscribed organisation. The so-called hate preacher offence, used to effect in the prosecution of Choudary and Rahman (see para 7.4(g) above). Contrary to some recent media reporting,[159] I recognise the continuing need for this offence. Indeed, I expect it to feature in the Government review, ongoing, and therefore to be able to comment at greater length in my next reports. My predecessor referred to the prosecution of Choudary and its consequences for the section 12 offence in his last report.[160] I agree with

[158] 2015 statutory extension by the Serious Crime Act 2015.
[159] See e.g. https://www.standard.co.uk/news/uk/uks-terror-czar-says-dont-jail-hate-preachers-a3666496.html.
[160] D. Anderson, *The Terrorism Acts in 2015*, December 2016, para 9.43-9.51.

his observations, and shall revisit them when given the opportunity to comment upon any relevant outcomes from the Government review.

iv. sections 15-19, Terrorism Act 2000, the terrorism funding arrangement offences

v. section 58, Terrorism Act 2000, the collection of information of a kind likely to be useful to a person committing or preparing an actor of terrorism.

7.10. The corollary to the above short list is that there are further offences within the existing terrorism legislation which are now being used rarely if at all, in some circumstances because the criminal activity in question is more appropriately prosecuted without utilising the terrorism legislation. For the reason given above, I decline to make firm recommendations within this report, but I suggest that careful consideration should be given in the near future (perhaps when the ongoing Government review is concluded) to the existence of any ongoing need for the following offences:[161]

i. section 56, Terrorism Act 2000, directing terrorist organisations
ii. section 57, Terrorism Act 2000, possession for terrorist purpose[162]
iii. section 59, Terrorism Act 2000, inciting terrorism overseas
iv. sections 6-8, Terrorism Act 2006, training for terrorism[163]

7.11. This is not to appear weak in responding to terrorism. Far from it. As a former prosecutor, I know from many years experience which of the existing offences best encapsulate the criminal activity which comes before our courts, and I know which of those offences have expanded since enactment, encompassing a greater practical range of activity than perhaps Parliament envisaged in 2000 or 2006. By way of illustration, it is interesting that the more serious offence of possession for terrorist purpose under section 57 TA 2000 is very rarely charged, but we still see examples of the less serious offence of possession (or collection of information to be precise) under

[161] These matters call for careful further exploration, including the fact that some of these offences are based on the ratification by the UK of international treaties, e.g. section 59 TA 2000 and section 6-8 TA 2006.
[162] It may be thought that, in combination, the offences of collection of information, section 58 Terrorism Act 2000, and preparation for terrorism, section 5 Terrorism Act 2006, cover the territory formerly occupied by section 57.
[163] Activity likely to be covered by section 5, Terrorism Act 2006.

section 58. Furthermore, we see much greater use of the preparation for terrorism offence under section 5 TA 2006, arguably eclipsing both sections 57 and 58 of the earlier Act.

7.12. I propose to go no further on these matters, in this report. My predecessor rightly indicated that we should question why and to what extent we need bespoke terrorism legislation. I intend to continue that sensible theme, choosing the appropriate time to question whether the legislation we do have can be re-shaped for an ever-changing modern world.

7.13. I have not thus far touched on sentencing, save to note the sentences imposed in my brief digest of concluded cases, above. The Sentencing Council has been formulating new Guidelines for terrorism offences, and the matter is pending an open consultation at the time of preparing this Report.[164] I do not trespass upon the Sentencing Council's work, save to mark my gratitude for the opportunity to read and to comment upon the draft Guidelines. Where I have spoken and written about sentencing, it has been with a view to making two principled points.[165] First, the nature and extent of terrorism changes over time, and therefore sentencing policy and practice should change, in other words Parliament should from time to time review the measures they put in place for marking criminal activity when it is proved in our courts. Increasing the available maximum sentence for some of our existing terrorism offences is nothing more than a reflection of the changing times in which we live. Second however, where any such changes are made, it should be with a view to permitting the experienced and senior judges who try terrorism cases to impose higher sentences at their discretion. In other words, modern terrorism may require higher maximum discretionary sentences, but it does not in my view require the imposition of mandatory minimum sentences, which would stifle rather than promote the discretion which should be left to our judges.

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[164] Sentencing Council, *Terrorism Guideline Consultation,* October 2017.

[165] See e.g. Max Hill QC, *Tom Sargant Memorial Lecture for JUSTICE*, 24th October 2017, https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/ and Max Hill QC, *'Law tightened to target terrorists' use of the internet'*, 3 October 2017, https://terrorismlegislationreviewer.independent.gov.uk/law-tightened-to-target-terrorists-use-of-the-internet/.

8. CONCLUSIONS AND RECOMMENDATIONS

8.1. This is my first annual report. All four pieces of legislation which I review remained in force throughout 2016, although I was not in post for any part of that year. I shall return to scrutiny of the provisions of the legislation in my annual report for 2017, trying to reflect the intense activity following the atrocities commencing with the Westminster Bridge attack in London on 22nd March 2017.

8.2. Having noted the paragraph above, I nonetheless conclude my first report with a summary of the recommendations made in various chapters:

Threat to the UK

(1) In the UK, the national threat level for international terrorism is set and assessed, not by the Government but by JTAC (Joint Terrorism Analysis Centre).[166] For the sake of balance, and because of the prevalence of the threat, I **recommend** that JTAC in future should also consider activity including domestic extremism.

Port and border controls

(2) I **recommend** the adoption of a universal threshold, namely 'reasonable grounds to support' the exercise of Schedule 7 powers by the application of the criteria within the Code of Practice. Adoption of such a test would be a step in the right direction, demonstrating the absence of either ethnicity alone or the exercise of powers in a random fashion.[167]

Arrest and detention

(3) It is not always clear what exactly counts as a terrorist related arrest. Once one moves outside the use of the s41 arrest power and the TACT offences, the categorisation is decided by the National Counter Terrorism Police Operations Centre, which applies its

[166] JTAC do not assess the threat from domestic extremism and do not take this into account when setting the UK threat level. The threat for domestic extremism is assessed by Counter Terrorism and Policing National Operations Centre (CTPNOC) Intelligence on a biannual basis.
[167] I recognise that this proposal carries consequences, stemming from the fact that the Code of Practice is not enshrined in primary legislation, unlike the Sch 7 powers themselves.

own ideas about terrorism and domestic extremism. I **recommend** clarity in this important area, and I intend to look at this further in my next annual report.

(4) I **recommend** that further work is done to analyse and to understand the use of the distinct arrest and detention powers within TACT and PACE respectively.

(5) Given the special nature of the solitary confinement in TACT custody suites: I note and **recommend** all of the following:
   i. Universal and early reminder of rights once detained, no more 'protection vacuums' whilst detainees are in a holding room.
   ii. Complete recording of the fact of a persons detention
   iii. Respect for lawyer-client confidentiality, also known as legal professional privilege which is fundamental to the confidence any detainee should have in the custody system, and the criminal justice system in general.
   iv. Access to natural light, and provision for exercise.

(6) It seems that there has been a difference between Scotland and the rest of the UK in that the standard practice in Scotland was always to get a verbal response from a sleeping detainee. I **recommend** that this be explored again, with a view to uniformity where possible, and in the interests of the welfare of all detainees.

(7) There appears to be a reluctance by detainees to give consent to ICVA visits within the TACT custody facility in Northern Ireland. This appears to be a local problem. I am unclear of the reason for the low rate of consent but will explore this further in my next report. Meanwhile, I **recommend** that greater efforts are made to ensure that TACT detainees in Northern Ireland are encouraged to the view that ICVA volunteers are entirely independent of the police and should be seen as promoting the welfare of all detained persons.

Criminal proceedings

(8) I decline to make firm recommendations within this report, but I **suggest** that careful consideration should be given in the near future (perhaps when the ongoing Government review is concluded) to the existence of any ongoing need for the following offences: [168]

i. section 56, Terrorism Act 2000, directing terrorist organisations

ii. section 57, Terrorism Act 2000, possession for terrorist purpose[169]

iii. section 59, Terrorism Act 2000, inciting terrorism overseas

iv. sections 6-8, Terrorism Act 2006, training for terrorism[170]

[168] These matters call for careful further exploration, including the fact that some of these offences are based on the ratification by the UK of international treaties, e.g. section 59 2000 Act and sections 6-8 2006 Act.

[169] It may be thought that, in combination, the offences of collection of information, section 58 Terrorism Act 2000, and preparation for terrorism, section 5 Terrorism Act 2006, cover the territory formerly occupied by section 57.

[170] Activity likely to be covered by section 5, Terrorism Act 2006.

ANNEX 1: ORGANISATIONS WHO MET THE INDEPENDENT REVIEWER DURING THE COMMUNITY ENGAGEMENT ROUNDTABLES ORGANISED BY FORWARD THINKING[171]

Leicester

Federation Of Muslims Organisation (FMO)

Friends of Al Aqsa (FOA)

Al Khawther Academy

MEND

Bradford

Khidmat Centre

Indian Muslim Welfare Society

Office of the Children's Commissioner for England and Wales

Kumon y'all

Bradford Council

Bradford Council for Mosques

Shia community representatives

Just Yorkshire

Manchester

European representative of the Libyan Muslim Brotherhood

Manchester Islamic High School for Girls

The Libyan Youth Association

Community on Solid Ground

British Muslim Heritage Centre

Khizra Mosque

[171] Forward Thinking, *Community Roundtables: A report on the aftermath of the terrorist attacks in London and Manchester*, July 2017. Available at: http://www.forward-thinking.org/?post_documents=community-roundtables-a-report-on-the-aftermath-of-the-terrorist-attacks-in-london-and-manchester-foreword-by-max-hill-qc-independent-reviewer-of-terrorism-legislation.

London

Muslim Council of Britain (MCB)

Muslim Association of Britain (MAB)

Finsbury Park Mosque

The Cordoba Foundation

London Muslim Centre

East London Mosque

Arab Association of Human Rights

ANNEX 2: GUEST CHAPTER

EXECUTIVE LEGAL MESAURES AND TERRORISM: PROSCRIPTION AND FINANCIAL SANCTIONS

Professor Emeritus Clive Walker Q.C. (Hon)

1 Introduction

1.1 The primacy of criminal prosecution has been assured as a policy aspiration within counter-terrorism ever since the Diplock Report plotted in 1972 a path out of internment without trial and military predominance in Northern Ireland.[172] Yet, the alternative of executive powers applied to individuals or to organisations suspected of terrorist-related activity retains allure because of features such as greater executive direction and input, the ability to deal with anticipatory risk and to disrupt, and the departure from more exacting standards of criminal process.[173]

1.2 Two prominent forms of executive measures are proscription and financial sanctions. The backgrounds to each are explained elsewhere, including in the reports of the Independent Reviewer of Terrorism Legislation.[174] Though each measure is well-entrenched in UK law and, in the case of financial sanctions, has gained international acceptance, these two measures have become issues worthy of contemporary scrutiny and so form the emphasis of this Annex. The reasons for this attention relate to both immediate and underlying factors.

1.3 The immediate reasons for scrutiny relate to current legal developments. In the case of proscription, the factors include: the expansion of proscription orders in practice to include right-wing groups for the first time; renewed pressure in Northern Ireland to suppress paramilitarism; and demands for de-proscription both from groups in Northern Ireland and from international

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[172] Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (Cmnd 5185, London, 1972). See Walker, C., 'Terrorism prosecution in the United Kingdom' in Ni Aoláin, F., and Gross, O. (eds.), *Guantánamo and Beyond* (Cambridge University Press, Cambridge, 2013).

[173] See Walker, C., *Terrorism and the Law* (Oxford University Press, Oxford, 2011)) chap.7; Analytical Support & Sanctions Monitoring Team, *17th Report* (S/2015/441) para.2.

[174] https://terrorismlegislationreviewer.independent.gov.uk/category/reports/reports-former-reviewers/. For commentaries, see Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford University Press, Oxford, 2014) chaps.3 and 8.

groups. In the case of financial sanctions, the driving force for development is Brexit, which means that much of the existing legal regime relating to sanctions (including terrorism listings but not confined to them) has to be recalibrated. As a result, the Sanctions and Anti Money Laundering Bill 2017-19[175] is now before Parliament, and it proposes to replace the Terrorist Asset-Freezing etc. Act (TAFA) 2010, Part I, and various European Union instruments on which financial sanctions currently depend.

1.4 As for underlying factors which warrant inquiry into these executive measures, the following might be mentioned.

- Prevalence: As for proscription, there has been considerable growth in the number of banning orders,[176] but this prevalence is not replicated in de-proscription which totals just two instances. On 19 February 2001, when the Terrorism Act 2000 came into force, there were 14 proscribed groups, all related to Northern Ireland. In addition, the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001,[177] which came into force on the 29 March 2001, listed 21 foreign-based organisations. No non-Irish domestic groups were then listed. By May 2017,[178] the same 14 groups remain listed from Northern Ireland. There is now one domestic, non-Irish group – National Action.[179] In addition, 71 international groups are listed. As for financial sanctions, there are reckoned to be 17 UN sanctions regimes and 37 EU regimes.[180] The issuance of UK autonomous sanctions under the Terrorist Asset-Freezing etc. Act (TAFA) 2010 has been restrained by comparison,[181] but there are some signs of future expansion through the passage of the Criminal Finances Act 2017, section 13, which allows for civil recovery powers under Part V of the Proceeds of Crime Act 2002 for property obtained

[175] HL no.69. Pt.I of the Act is repealed by cl.47. The EU instruments will be repealed as a consequence of the European Union (Withdrawal) Bill 2017-19 (HC 5).
[176] Note the expanded powers in the Terrorism Act 2006, ss.21, 22.
[177] SI 2001/1261.
[178] Home Office, *Proscribed Terrorist Organisations* (London, 2017).
[179] Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/1238. See also the orders against Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action) as alternative names: Proscribed Organisations (Name Change) (No. 2) Order 2017, SI 2017/944.
[180] Happold, M. and Eden, P. (eds.), *Economic Sanctions and International Law* (Hart, Oxford, 2016) p.2. For a survey, see https://www.sanctionsmap.eu/.
[181] See https://www.gov.uk/government/publications/current-list-of-designated-persons-terrorism-and-terrorist-financing: there are 14 individual and 6 organisational UK only listings as at 13 October 2017.

by or in connection with a gross human rights abuse.[182]

- Controversy as to application: As for proscription, controversies arise from the selection of foreign groups primarily 'to support other members of the international community in the global fight against terrorism'.[183] Many bans relate to very obscure bodies with no base or discernible activity in the UK. In addition, the move signalled by the Terrorism Act 2006, section 21, to allow for the banning of a group which 'promotes or encourages' widens the scope of the executive measure from direct to indirect linkage to political violence – a broader canvass which begins to abut upon expressive rights to be offensive or extreme.[184] For instance, the Muslim Brotherhood has been troublesome case of this type.[185] As for financial sanctions, the controversies relate to the standard of evidence for listing, the impacts on not just against the impugned person but also their family, and also the side-effects de-risking by financial institutions which hampers non-Western money transfers from émigré communities (through hawala) and also humanitarian relief in conflict zones.
- Legitimacy: Executive measures do not directly put suspects behind prison bars (though breach of them can have that effect), but they still can grievously impinge on substantive rights relating to property, expression and family.[186] However, these are not absolute rights, and their impacts can be reduced by being targeted and by exemptions. In actual litigation, most challenges have been about the extent of due process accorded to those who seek to challenge the orders. In this respect, due process should be appreciated not only for its value to affected individuals but also as crucial to community acceptability.[187]

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[182] Compare Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (Pub.L. 112–208).

[183] Hansard (House of Lords) vol 613, col 252 16 May 2000.

[184] Further grounds for proscription have been mooted, but Lord Macdonald rejected as 'strikingly illiberal' and disproportionate any extension to groups which espouse or incite hatred or racism. Lord Macdonald, Review of Counter Terrorism and Security Powers (Cm.8003, London, 2011) p.8. The view was accepted by the Home Office (*The United Kingdom's Strategy for Countering International Terrorism: Annual Report 2011* (Cm.8123, London, 2011) para.4.23.

[185] Cabinet Office, *Muslim Brotherhood Review* (2015-16 HC 679); Hansard (House of Commons) vol.603 col.127w 17 December 2015; House of Commons Foreign Affairs Committee, *'Political Islam', and the Muslim Brotherhood Review* (2016-17 HC 118).

[186] See Happold, M., 'Targeted sanctions and human rights' in Happold, M. and Eden, P. (eds.), Economic Sanctions and International Law (Hart, Oxford, 2016).

[187] For the assessment of due process as a legitimising factor, see Tyler, T.R., *Why People Obey the Law* (Princeton University Press, Princeton, 1990); Huq, A., et al, 'Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom' (2011) 8 *Journal of Empirical Legal Studies* 728; Murphy, K. and Cherney, A. 'Understanding cooperation with police in a diverse society (2012) 52 *British Journal of Criminology* 181; Wolfe, S.E., et al., 'Is the effect of procedural justice on

Thorough scrutiny, whether adversarial or inquisitorial, can also deliver better executive decisions and the allocation of state security resources.

1.5 Such drawbacks have not prevented the burgeoning wider trend of executive based preventive measures in the terrorism field,[188] with a further range of devices promised to deal with 'extremism'.[189] However, in the light of this background, it is intended in this Annex to explore ideas for legislative and practice change so as to highlight how anti-terrorism legislation or related administrative processes might be reformed in relation to proscription/de-proscription and financial sanctions. The evaluative criteria will engage mainly with notions of fairness and clarity. The methodology will primarily involve literature reviews;[190] unlike the previous research on Foreign Terrorist Fighters,[191] comparative fieldwork was not possible within the time and financial resources available.

2 Proscription and de-proscription

2.1 The main issues under this heading will be mechanical processes rather than penalties[192] or the ultimate assessment of the ultimate success or failure of the policy.[193]

2.2 Full descriptions of the mechanical processes, applied under the Terrorism Act 2000, Part II, can be found elsewhere.[194] The mechanisms for proscription involve either legislative

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police legitimacy invariant? Testing the generality of procedural justice and competing antecedents of legitimacy' (2016) 32 *Journal of Quantitative Criminology* 253; Madon, N.S., et al., 'Promoting police legitimacy among disengaged minority groups: Does procedural justice matter more?' (2017) 17 *Criminology & Criminal Justice* 624

[188] See Ashworth, A. and Zedner, L., *Preventive Justice* (Oxford University Press, Oxford, 2014).

[189] *Counter-Extremism Strategy* (Cm.9148, London, 2015). See further Davis, F. and Walker, C., 'Manifestations of extremism' in Lennon, G. and Walker, C. (eds.), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015).

[190] See especially Bonner, D, *Executive Measures, Terrorism and National Security* (Ashgate, Aldershot, 2007).

[191] See *The Terrorism Acts in 2015: Report of the independent reviewer on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 by David Anderson Q.C.* (Home Office, London, 2016) Annex 2.

[192] *R v Anjem Choudary and Mohammed Mizanur Rahman* (Central Criminal Court, https://www.judiciary.gov.uk/wp-content/uploads/2016/09/r-v-choudary-sentencing.pdf, 2016); *Choudary and Rehman v R* [2017] EWCA Crim 1606.

[193] For further reflection, see Walker, C., ''They haven't gone way you know.' The persistence of proscription and the problems of deproscription' *Terrorism and Political Violence* (forthcoming).

listing in Schedule 2 of the Terrorism Act 2000 (in the case of Irish groups, as designated in 2000) or a statutory order under section 3(3) on the basis that the Minister 'believes that it is concerned in terrorism' under section 3(4).

2.3 As for the legal opportunities to challenge an initial proscription, proposed proscription orders (rather than mere name changes) under section 3(3) of the Terrorism Act 2000 require an affirmative resolution under section 123 of the Terrorism Act 2000. As a result, public notice is given to Parliament of the pending proscription order. However, there is no obligation to contact the impugned group or to allow any hearing. Furthermore, once an order has been made, no statutory review or renewal necessarily arises, though the Home Secretary has reassured that 'We do not put their names in a filing cabinet and forget about them'.[195] Proscription orders were kept under an annual review by the Proscription Working Group inside the Home Office,[196] but it has been confirmed by the Home Office in 2017 that this practice ended in 2014, and so it is now even less clear in what sense meaningful review is maintained. The erstwhile executive reviews may have been thorough but lacked transparency and did not afford fairness by giving notice to those affected, by an invitation to make representations, or by the disclosure of evidence. Undoubtedly, proscription decisions will routinely be taken on the basis of sensitive intelligence and other information which it is not in the public interest to disclose to members or to the wider public. At the same time, the experience of equally sensitive hearings around TPIMs and financial sanctions suggests that the sensitivity of some information may not rule out the disclosure of all information (especially after the order has been made) and may not in any event negate the value of an invitation to interested parties to submit their own information to enrich the dossier.

2.4 The rights of those subjected to orders may be helped by two subsequent procedures for challenge within the Terrorism Act 2000. One allows an application to the Secretary of State for the setting aside of an order under section 4(1). The applicant may be either the proscribed organization or any 'person affected' by the proscription order. There had been 11 applications

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[194] See further Walker, C.P., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) chap.8; Da Silva, S.M., and Murphy, C.C., 'Proscription of organisations in UK counter terrorism law' in Cameron, I. (ed.), *Legal Aspects of EU Sanctions* (Intersentia, Cambridge, 2012).
[195] House of Commons Standing Committee D, col 65 (18 January 2000), Charles Clarke.
[196] Anderson, D., *Report on the Operation in 2012 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2013) para.5.8.

for de-proscription up to 2012,[197] rising to 14 by the end of 2016.

2.5 If an application is refused, the second step is an application to the Proscribed Organisations Appeal Commission ('POAC'). As well as contesting an initial order, the POAC may also be used to challenge the ongoing validity of an order. Regulations relating to these proceedings are made under section 4.[198] The POAC is established under section 5 and is modelled on the Special Immigration Appeals Commission (SIAC) Act 1997, including its facility for closed hearings to preserve secrecy. By section 5(3), the POAC shall allow an appeal against a refusal to de-proscribe if the refusal was 'flawed when considered in the light of the principles applicable on an application for judicial review', a phrase which precludes full review of the factual merits. The establishment of the POAC offers some antidote to executive dominance, but weaknesses in terms of procedural fairness are embedded in its constitution. First, it reflects the unwillingness to put sensitive security evidence before the objectors, nor is it afforded a security-cleared case assistant to try to compensate for the absence of this adversarial balance, though a special advocate can be appointed.[199] Second, it will involve considerable courage to mount a challenge as a supporter and so risk being labelled as a sympathizer or even a terrorist, even if section 10 grants a partial immunity from prosecution.[200] Third, legal costs are a further dsinincentive.[201] Fourth, the POAC consideration is confined to the principles of judicial review. Furthermore, under the rules of administrative law, POAC procedures will have to be exhausted before turning to administrative law.[202] Even then, there is a long history of judicial deference to challenges to national security restrictions on organizations.[203] However, the Human Rights Act 1998 has encouraged more assertive

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[197] Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) para.4.25.
[198] See Proscribed Organisations (Applications for Deproscription) Regulations 2006, SI 2006/2299; Proscribed Organisations Appeal Commission (Procedure) Rules 2007, SI 2007/1286, as amended by SI 2007/3377.
[199] Lord Carlile, *Report on the Operation in 2004 of the Terrorism Act 2000* (Home Office, London, 2005) para.47.
[200] Hansard (House of Commons) Standing Committee D, col.111 (25 January 2000), Charles Clarke.
[201] Anderson, D., *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (Home Office, London, 2011) para.4.32.
[202] See *R (Kurdistan Workers' Party and others) v Secretary of State for the Home Department; R (People's Mojahedin Organisation of Iran and others) v Secretary of State for the Home Department; R (Ahmed) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin).
[203] See *McEldowney v Forde* [1971] AC 632; *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696; *Brind and McLaughlin v United Kingdom*, App. no.18714/91, (1994) 77-A DR 42; *Purcell v Ireland*, App. no.15404/89, (1991) 70 DR 262; *Re Williamson* [2000] NI 281.

judicialisation of national security, as has the permanence and endurance of special terrorism laws. This trend is reflected in the two instances of de-proscription to date.

2.6 First, the proscription of the Mujaheddin e Khalq/ People's Mojahedin Organization of Iran (PMOI)[204] was challenged in *Lord Alton of Liverpool & others (In the Matter of The People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* (the *Alton case*).[205] The PMOI claimed to have renounced violence in 2003. The refusal of the Home Secretary to de-proscribe following its applications in 2001, 2003 and 2006 was then challenged before POAC and, on application by the Home Secretary, before the Court of Appeal. Deproscription was ordered by both tribunals, the decision to ban its leader, Maryam Rajavi, from entering the United Kingdom was later upheld as lawful.[206] The Court of Appeal confirmed the need for an 'intense and detailed scrutiny' of proscription orders.[207] On the basis of that review (the open materials alone ran to 15 volumes), the POAC concluded that the Home Secretary's decision had been flawed at the first stage.[208] At the second stage, the Court of Appeal was critical of the minister's performance: '… the decision-making process in this case has signally fallen short of the standards which our public law sets and which those affected by public decisions have come to expect.'[209] Another important legal pronouncement in the *Alton* case concerned the assertion that regular review is a requirement of administrative law.[210] This point has been reinforced by decisions in 2017 of the European Court of Justice regarding the economic sanctions orders against the LTTE and Hamas when it emphasised that listing must be based upon:

> '… an ongoing risk of that person or entity being involved in the terrorist activities …. if, in view of the passage of time and in the light of changes in the circumstances of the case, the mere fact that the national decision that served as the basis for the original listing remains in force no longer supports the conclusion that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, the Council is obliged

[204] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, SI 2001/1261.
[205] PC/02/2006, 30 November 2007, paras.67, 68; *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443, para.22.
[206] *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60.
[207] [2008] EWCA Civ 443, para.43.
[208] *Ibid.*, paras.338, 342.
[209] *Ibid.,* para.57.
[210] PC/02/2006, 30 November 2007, para.73.

to base the retention of that person or entity on the list on an up-to-date assessment of the situation, and to take into account more recent facts which demonstrate that that risk still exists…'[211]

2.7 Rather less can be said about the other instance of de-proscription, relating to the International Sikh Youth Federation, which had been banned in 2001,[212] because its application did not reach the stage of a formal hearing before POAC. Pending that hearing, the Home Office acceded to its application to de-proscribe in 2016.[213] The Minister decided that there was no longer enough information to show involvement in terrorism, especially as no 'overtures' had been received to maintain the ban.[214] This hint again indicates the importance of symbolism directed at foreign allies, but the decision was relatively bold given that the group remains under a ban in India as well as in Canada and the US.[215]

2.8 The fair and effective review of pending or extant proscription orders should be considered desirable for various reasons of principle and policy. First, the rule of law demands that sufficient review is maintained to ensure that proscription does not become so disconnected from reality that a banning order can no longer be justified as lawful. The two instances to date of de-proscription reflect this imperative. A second reason for active consideration of de-proscription is macro-political – to assist in processes of transitional justice by emphasising the advantages flowing from political inclusion and peace. An illustration can be found in the Belfast Agreement 1998, which incorporates the objective of a normalisation of Northern Irish security institutions and laws: 'the development of a peaceful environment on the basis of this agreement can and should mean a normalisation of security arrangements and practices'.[216] De-proscription could play a role, but the indulgence of paramilitary life, as reflected in the 2015 report, *Paramilitary Groups in Northern Ireland*, reduces the pressure for de-proscription. More action was required and, according to the next report, *A Fresh Start – The Stormont Agreement*

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[211] *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, Case C-599/14 P, 26 July 2017, paras.51, 54. Compare *Council of the European Union v Hamas*, Case C 79/15 P, 26 July 2017. The Hamas listing was referred back for further consideration, but the LTTE listing was set aside as there was insufficient factual basis.
[212] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, SI 2001/1261.
[213] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2016, SI 2016/391.
[214] Hansard (House of Commons) vol.607 col.909 15 March 2016.
[215] India: Prevention of Terrorism Act 2002 (on 22 March 2002); Canada: Anti-Terrorism Act 2001 (18 June 2003); US: Executive Order 13224 (27 June 2002).
[216] *Agreement reached in the multi-party negotiations* (Cm.3883, London, 1998) Security para.1.

and Implementation Plan, in November 2015.[217] A Joint Agency Task Force on paramilitary activity was to be established with police, revenue and other representatives from both jurisdictions, and with a Strategic Oversight Group and an Operations Coordination Group.[218] A three person panel appointed by the Northern Ireland Executive is to consider the disbandment of paramilitary groups and to draft an action plan.[219] An intergovernmental body will monitor progress.[220] Following up on these ideas, the Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016, sections 1-5, establishes an Independent Reporting Commission to monitor progress on tackling paramilitary activity. Up to this point, the overall focus of much of this renewed activity has been on curtailing paramilitary action through stronger policing and security action[221] rather than de-proscription. However, as promised by the 2015 Agreement, the Fresh Start Panel's *Report on the Disbandment of Paramilitary Groups in Northern Ireland* appeared in mid-2016 and sought to 'create conditions in which groups would transform, wither away, completely change and lose their significance'.[222] In response, the Panel's proposals range from law enforcement to education.[223] The Panel suggests a programme for young persons at risk of paramilitarism which 'should be a collaboration between government departments and restorative justice partners to combine restorative practices and peer mentoring with targeted support in respect of employment, training, housing, health and social services'.[224] Even more to the point, it recommends a review of the Terrorism Act 2000 to ensure it remains in step with transitioning groups, since most on ceasefire 'are not the organisations they once were.'[225] The Northern Ireland Executive's response, *Tackling Paramilitary Activity, Criminality and Organised Crime: Executive Action Plan*,[226] suggests an initiative led by the Probation Board and focused on young men who have offended (a threshold distinct from the Home Office's Channel Programme)[227] and are at risk of being drawn into

[217] (Northern Ireland Office, Belfast, 2015).
[218] *Ibid.,* p.A3.2.
[219] *Ibid.,* p.A4.1.
[220] *Ibid.,* p.A5.1.
[221] Note also the work of the Organised Crime Task Force which targets racketeering by criminals including paramilitaries: http://www.octf.gov.uk/.
[222] *Ibid.* para.1.5.
[223] (Northern Ireland Office, Belfast, 2016).
[224] *Ibid.* para.4.38.
[225] *Ibid.,* para.4.46.
[226] (Belfast, 2016).
[227] Counter Terrorism and Security Act 2015, s.36. See Home Office, *Channel Duty Guidance* (London, 2015); Blackbourn, J. and Walker, C., 'Interdiction and Indoctrination' (2016) 79 *Modern Law Review* 840; Barrett, D., 'Tackling radicalisation' [2016] *European Human Rights Law Review* 530.

crime and paramilitarism.[228] Clearly, the subject of de-proscription in Northern Ireland warrants deeper consideration and has been given further impetus by the Red Hand Commmando's application for de-proscription in September 2017.[229] The third reason for attention to de-proscription policy is that it might encourage the micro level of disengagement, whereby a restorative justice approach could be fostered by the offer of de-proscription. These arguments seem less applicable to Islamist extremists within 'leaderless jihad'[230] who are often not embedded in any paramilitary structure and so become candidates for individualised treatment, such as counselling under the 'Channel' programme. It follows that the prospects for de-proscription for most groups in this category are even more challenging than for Northern Ireland groups. If they reflect leaderless jihad, then who will champion their cause? They are largely based abroad and often have no discernible presence in the UK, so that the evidence for proscription depends on impacts abroad. Even so, any order will be decided on the basis of advice and assessment prepared by UK officials in the FCO, which will take into account primarily the UK's strategic interests and will assess the veracity and underlying agenda of any communications or information received from other countries. The UK routinely receives diplomatic communications from other countries requesting that the UK should proscribe their domestic groups but will decline to do so if the legal test or discretionary factors are not satisfied. Similarly, intelligence received from foreign liaison agencies will be assessed and its reliability weighted by JTAC, which provides proscription assessments to Ministers; foreign intelligence is not simply considered unfiltered. Though the legal test must always be met, and the need to support international partners in the fight against terrorism is deemed a relevant factor under the UK's proscription scheme, challengers may still face the difficulty that information indirectly derived from foreign sources will be especially sensitive and thereby beyond processes of discovery.[231] It is suggested that this difficulty may have been reduced in some recent cases because the JTAC assessment (the central document to inform consideration of whether the statutory test is met) has relied upon open source and Five Eyes (or UK only) information for its assessment base.

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[228] *Ibid.* p.15.
[229] 'Deproscription application: Red Hand Commando statement in full' (http://www.newsletter.co.uk/news/deproscription-application-red-hand-commando-statement-in-full-1-8145585, 12 September 2017)
[230] Sageman, M., *Leaderless Jihad* (University of Pennsylvania Press, Philadelphia, 2008).
[231] See Murray, C., 'Out of the shadows: the courts and the United Kingdom's malfunctioning international counter-terrorism partnerships' (2013) 18 *Journal of Conflict & Security Law* 193.

2.9 In an effort to make proscription processes fairer, the former Independent Reviewer of Terrorism Legislation (David Anderson QC) undertook several reviews of relevant process which have not been actioned.[232] Stronger oversight of proscription by executive, legislature, and judiciary is now required.

2.10 As for the executive, the main improvement required to satisfy respect for substantive rights and also to ease the procedural barriers is that review should be automatic and repeated rather than awaiting upon the rare eventuality of objections being lodged. Given that 14 listed groups were identified in 2012 as potentially lacking any recent evidence of activity and therefore warranting further scrutiny (albeit after an exercise described as merely 'preliminary'),[233] the need for proactivity has become more palpable over time. To treat proscription as a singular legal event is to risk an affront to the rule of law which also impacts on the fair treatment of those within the proscribed organisation, minorities who share similar affiliations,[234] and humanitarian organisations which wish to engage abroad with affected groups.[235] Whilst prosecutions will concentrate on providing or inviting support, engagement with proscribed organisations is a risky enterprise which may or not be interpreted as a 'genuinely benign' meeting[236] and may or may not excite the attention not only of investigative and regulatory authorities but also of banking providers.[237] Therefore, at the stage of the issuance of a proposed ban (which might enter into force for a provisional period), a formal invitation should be issued to those believed to be affected to join an inquiry process. The

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[232] Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) paras.4.52–54, prefers review by Parliamentarians. The Special Rapporteur on the Protection of human rights and fundamental freedoms while countering terrorism (A/61/267, Geneva, 2006, para.26) advises judicial determinations.
[233] Anderson, D., *Report on the Operation in 2012 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2013) para.5.36.
[234] See Sentas, V., 'Policing the diaspora' (2016) 56 *British Journal of Criminology* 898.
[235] Anderson, D., *Report on the Operation in 2015 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2016) paras.5.13, 5.15. This difficulty is denied by the Home Office: *Operating within Counter Terrorism Legislation* (https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation/for-information-note-operating-within-counter-terrorism-legislation): 'The risk that an individual or a body of persons corporate or unincorporated will be prosecuted for a terrorism offence as a result of their involvement in humanitarian efforts or conflict resolution is low.'
[236] Home Office and OFSI, HM Treasury, *For information note: operating within counter-terrorism legislation* (https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation/for-information-note-operating-within-counter-terrorism-legislation, 2016).
[237] See Walker, C., 'Terrorism Financing and the Policing of Charities: Who pays the price?' in King, C., and Walker, C. (eds), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets (Ashgate, Farnham, 2014).

inquiry should be founded on the factors outlined by Lord Bassam in 2000 (above).[238] The former Independent Reviewer of Terrorism Legislation (David Anderson QC) suggested additional consideration of the 'likely consequences of proscription for members of affected communities both inside and outside the UK' and also shifting the onus (but not the standard) of proof.[239] Consistency with other forms of terrorism executive orders would further require an extra test of necessity for proscription.[240] This fuller dose of transparency and participation could help to counter the secret influence exerted by diplomatic considerations.[241] If a ban is confirmed by the Minister, then full reasons should be given.[242] This more open and participative process of review (which could be staged before POAC) should be repeated periodically (say, every two or three years). Otherwise, orders should lapse unless, perhaps for a further finite period, the Secretary of State certifies proscription as necessary to protect the public.[243] The former Independent Reviewer of Terrorism Legislation has also argued that de-proscription should trigger automatically, without regard for discretionary factors, whenever the statutory test ('is concerned in terrorism') is not met.[244]

2.11 As for proposed reforms affecting the legislature, multiple proscriptions within a single order should be rejected as affording inadequate opportunity for fair scrutiny.[245] Instead, each individualised affirmative order should be debated in the light of a statutory requirement for a Ministerial statement of reasons. Such statements should be considered initially by the

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[238] See the endorsement by Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) paras 4.38, 4.64.
[239] Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) paras.4.34–36, 4.60–61, 4.65–67.
[240] It is rejected as making de-proscription more difficult by Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) para.4.59.
[241] This criticism was raised regarding the prosecution (and acquittal at Woolwich Crown Court on 11 February 2009) of Fariz Baluch and Hyrbyar Marri for activities in connection with the Baluchistan Liberation Army.
[242] Anderson, D., *Report on the Operation in 2015 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2016) para.5.18. It is also recommended that if an application is not defended, then costs should be paid to the applicant: *ibid*.
[243] Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) paras.12.7-12.12 and *Report on the Operation in 2015 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2016) para.5.14.
[244] Anderson, D., *Report on the Operation in 2015 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2016) para.5.18.
[245] See Hansard (House of Commons) vol.462 col.1369 10 July 2007, Tony McNulty; Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) paras.4.52, 4.66.

Intelligence and Security Committee (which can handle sensitive materials under Part I of the Justice and Security Act 2013). Subsequently, the affirmative orders should be debated in the chambers of both Houses. Though amendments are not possible under this procedure, the combination of individualised review and individualised statements in support should improve the quality of the largely 'perfunctory' debates.[246] In addition, periodic review debates should be undertaken.

2.12 As for judicial scrutiny, the POAC should intervene as a proactive reviewer of any new order without awaiting any application.[247] The POAC should have the task of confirming (or otherwise) the initial making of an order and any periodical renewal on the basis of a rehearing rather than judicial review. Special coordinating arrangements (such as cross-border committees to produce expert reports) might be considered for the Irish paramilitary groups, given that the IRA and INLA are also banned in the Ireland.[248]

2.13 Many of these proposals for reform have been raised repeatedly but have been serially rebuffed by the Home Office. In 2012, several ideas proffered by the House of Commons Home Affairs Committee report, *The Roots of Violent Radicalisation*, were rejected.[249] In 2013, the Minister of State indicated that the detailed submissions of the then Independent Reviewer of Terrorism Legislation would not be followed.[250] In 2016, the Minister recognised a 'continuing argument' about periodic review but expressed no sympathy.[251] It remained 'appropriate to continue to take a cautious approach when considering removing groups from the list of proscribed organisations.'[252] That 'cautious approach' was reiterated in 2017.[253]

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[246] Anderson, D., *Report on the Operation in 2015 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2016) para.5.2.
[247] Annual review was suggested by Lord Lloyd and Sir John Kerr, *Inquiry into Legislation against Terrorism* (Cm.3420, London, 1996) para.13.32.
[248] Offences against the State Act 1939, Pt.III. See Unlawful Organisation (Suppression) Orders, 1939 (SI 162/1939) and 1983 (SI 7/1983).
[249] (2010-12 HC 1446) para. 87 and *Reply* (Cm.8368, London, 2012) para.75.
[250] Hansard (House of Commons) vol.572 col.206 (10 December 2013), James Brokenshire. Compare Letter from the Home Secretary to the Independent Reviewer, 12 March 2013.
[251] Hansard (House of Commons) vol.607 col.909 15 March 2016 col.911, John Hayes.
[252] *Government's Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation* (Cm 9357, London, 2016) p.3.
[253] *Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation* (Cm 9489, London, 2017) p.3.

2.14 Several of these proposals are reflected in the kindred jurisdictions of Australia and Canada.[254] In Australia, the Security Legislation Amendment (Terrorism) Act 2002 (amended by the Criminal Code Amendment (Terrorist Organisations) Act 2004), allows for proscription under the Criminal Code 1995 (Division 102).[255] However, orders expire after two years and are reviewed by the Parliamentary Joint Committee on Intelligence and Security.[256] There are currently 23 listed organizations.[257] This more stringent Australian review process does not achieve any dramatic outcome, and no de-proscription has occurred, though the listing of the Armed Islamic Group (GIA), was not renewed when it expired in 2008. However, the Australian system may curtail listing in the first place, as with the LTTE whereby diplomatic pressures were resisted in 2008.[258]

2.15 In the case of Canada, section 83.05 of the Canadian Criminal Code (inserted by the Anti-Terrorism Act 2001) has been applied to 53 groups.[259] The order is subjected to judicial review within 60 days. Any listing must be re-confirmed by the Minister every two years under sections 83.05(9) and 83.05(10). Canada has a much longer list of bans than Australia but still no de-proscriptions.

2.16 Based on these comparative law indications, a more pro-active review system will not deliver mass de-proscriptions. But it would emphasise the exceptional nature of proscription and that groups must be targeted proportionality and for reasons which are overtly explicable to impugned individuals and interrelated communities and which take due account of human rights

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[254] See further Walker, C.P., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) para.8.50 et seq. The proscription of 'unlawful organisations' in the Ireland's Offences against the State Act 1939, Part III, also awaits reform: (Hederman) *Report of the Committee to Review the Offences against the State Acts 1939–1998* (Dublin, 2002) chap.6.

[255] https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/ProtocolForListingTerroristOrganisations.aspx

[256] See (Sheller) *Report of the Security Legislation Review Committee* (Canberra, 2006); Attorney General, *National Security Legislation Discussion Paper* (Canberra, 2009); Law Council of Australia, *Anti-Terrorism Reform Project* (Canberra, 2009); Hogg, R., 'Executive proscription of terrorist organizations in Australia ' in Gani, M. and Mathew, P. (Eds.), *Fresh perspectives on the 'War on Terror'* (ANU E Press, Canberra, 2008); Lynch, A et al, 'The proscription of terrorist organisations in Australia' (2009) 37 *Federal Law Review* 1.

[257] https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx.

[258] http://www.tamilsydney.com/content/view/1488/37/.

[259] https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx. See Roach, K, 'The new terrorism offences and the criminal law' in Daniels, R.J., Macklem, P., and Roach, K., *The Security of Freedom* (University of Toronto Press, Toronto, 2001).

to association[260] and due process. De-proscription will often entail a politically fraught option for the government which will probably prefer to err on the side of security.[261] However, decisions which affect the working of democracies and human rights should not be ultimately based on political calculations.

3 Financial sanctions

3.1 So far as the United Kingdom law is concerned, it has become almost an article of faith that 'money is a crucial factor in the continuance of terrorism'.[262] Legislation against the funding of Irish and international terrorism has burgeoned over the past two decades, with attention to *jihadi* terrorism reinforcing well-established tactics. At the same time, rights remain at stake in the operation of financial sanctions – arguably, even more so than for the more diffused, group impact of proscription. That concern has been expressed by the courts. For instance, in *Her Majesty's Treasury v Ahmed*, Lord Hope expressed the view that, 'designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.'[263] In the words of Lord Brown, financial sanctions 'are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing.'[264] Similar views were expressed in *Bank Mellat v Her Majesty's Treasury*[265] and in *Mastafa v HM*

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[260] See *R v Hundal; R v Dhaliwal* [2004] EWCA Crim 389, para 14; *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 4, para 54.

[261] For an insight into the particularly delicate deliberation in 1974 to deporscribe Sinn Fein and the UVF, see Northern Ireland Office, Deproscription of unlawful organisations (CJ4 643, Belfast, 1974, available at http://www.patfinucanecentre.org/sites/default/files/2017-08/CJ4%20643%20De-proscription%20of%20unlawful%20organisations%20-%20Copy.pdf)

[262] For overviews, see Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford University Press, Oxford, 2014) chaps.3; King, C., and Walker, C., 'Counter terrorism financing: a redundant fragmentation?' (2015) 6 *New Journal of European Criminal Law* 372-395); Ryder, N., Thomas, R., and Webb, G., 'The financial war on terrorism: a critical review of the UK's counter terrorist financing strategies' in King, C., Walker, C., and Gurulé, J. (eds.), *Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, London, 2018).

[263] [2010] UKSC 2, para.60.

[264] *Ibid.* para.192. But in *Khaled v Security Service* [2016] EWHC 1727 (QB), in an application of the Justice and Security Act 2013 to the withholding of material in K's action for misfeasance arising from the imposition of financial sanctions and his removal from a charity, the degree of disclosure was not required at the level of a control order under *Secretary of State for the Home Department v AF (no.3)* [2009] UKHL 28 or of a financial order under *Bank Mellatt v Her Majesty's Treasury* [2013] UKSC 38.

[265] [2013] UKSC 38, paras.5, 6.

Treasury.[266] The detriments may also be more collective than first appears, since financial sanctions can trigger problems of de-risking by banks and the consequent hampering of humanitarian work[267] and also problems of increased costs to poor communities by the stricter regulation of informal money exchange systems such as hawala.[268] Otherwise, many of the issues to be considered in this section of the Annex relating to measures to test financial sanctions – the reasons and the responsive reviews –correspond to those for proscription and de-proscription.

3.2 Despite the limited reviews and the problems of mounting challenges, which will again often entail non-disclosure of sensitive information from security agencies from home and abroad, many more challenges have been made to financial listings than to proscription orders. The explanation may relate not only to the keenness of the intrusion of sanctions imposed on individuals rather than groups, but also to the more varied possibilities for challenge. That opportunity depends on the legal source of the sanctions and whether it derives from the United Nations, European Union, or autonomously from the UK Government. The possibilities will now be examined in relation to those financial sanctions regimes which primarily apply to terrorism related activity, in other words, the Terrorist Asset-Freezing etc. Act 2010 (for autonomous sanctions) and the ISIL (Da'esh) and Al-Qaida (Asset-Freezing) Regulations 2011-16 (for EU and UN sanctions).[269] Left to one side will be related regimes not primarily aimed against terrorism, such as section 4 of the Anti-Terrorism, Crime and Security Act 2001,[270] and Part V of the Counter Terrorism Act 2008,[271] as amended by the Policing and Crime Act 2017, Part VIII. Comparisons for the purpose of policy transfer will also be left to one side in view of the complexity of the arrangements.

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[266] [2012] EWHC 3578 (Admin), para.8.
[267] Ramachandran, V., Collin, M., and Juden, M., 'De-risking: An unintended negative consequences of AML/CTF Regulation' in King, C., Walker, C., and Gurulé, J. (eds.), *Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, London, 2018).
[268] See Cooper, K. and Walker, C., 'Security From terrorism financing: models of delivery applied to informal value transfer systems' (2016) 56 *British Journal of Criminology* 1125.
[269] SI 2011/2742, SI 2016/937.
[270] See Lennon, G., and Walker, C., 'Hot money in a cold climate' [2008] *Public Law* 37; Andrey Lugovoy and Dmitri Kovtun Freezing Order 2016 (SI 2016/67).
[271] See Goldby, M., 'The impact of Schedule 7 of the Counter Terrorism Act 2008 on banks and their customers' (2010) 13 *Journal of Money Laundering Control* 351; Iran (European Union Financial Sanctions) Regulations 2016, SI 2016/36.

3.3 The United Nations financial listing system is most unsatisfactory system of all but is also, unfortunately, the one least susceptible to reform by UK law.[272] The process of sanctioning relevant to terrorism began with the United Nations Security Council Resolution (UNSCR) 1267 of 15 October 1999 against the Taliban. UNSCR 1333 of 19 December 2000 extended that regime to listed individuals and organizations linked to Al-Qa'ida. The Al-Qaida and Taliban Sanctions Committee (the 1267 Committee), supported by its Analytical Support and Sanctions Monitoring Team,[273] can designate or remove persons on the request of governments.[274] UNSCR 1267 was replaced in 2011 by UNSCR 1988 and 1989 of 17 June 2011, one relating to the Taliban, the other to Al Qa'ida.[275] Then UNSCR 2253 of 17 December 2015 widened the regime to the ISIL (Da'esh) and Al-Qaida Sanctions List.

3.4 The difficulties of challenge are daunting. The system of UN sanctions was originally designed with states in mind, and not individuals without direct access to diplomatic channels. To allow for objections to be raised more easily, the Focal Point for De-listing, established pursuant to UNSCR 1730 of 19 December 2006, can receive de-listing petitions and transmit them to the committee. But the Focal Point is not an adjudicator and was not considered as an effective remedy by the European Court of Human Rights.[276] The Office of Ombudsperson was established by UNSCR 1904 of 17 December 2009, Article 20, to assist more actively with the investigation and assessment of de-listing requests in liaison with requesting individuals and entities in relation only to sanctions based on alleged links to Al-Qa'ida or ISIL (Da'esh).[277] Yet, even that office has its limitations from the perspective of due process. The inquiry remains

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[272] See Eden, P., 'UN targeted sanctions, human rights, and the office of the Ombudsperson' in Happold, M., 'Targeted sanctions and human rights' in Happold, M. and Eden, P. (eds.), *Economic Sanctions and International Law* (Hart, Oxford, 2016); Powell, C., 'The United Nations Security Council Sanctions Regime against the Financing of Terrorism' in in King, C., Walker, C., and Gurulé, J. (eds.), *Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, London, 2018).

[273] See https://www.un.org/sc/suborg/en/sanctions/1267.

[274] See 1267 Committee, *Guidelines of the Committee for the Conduct of its Work* (https://www.un.org/sc/suborg/en/sanctions/1267/committee-guidelines, 2016).

[275] See further UNSCR 2082 and 2083 of 17 December 2012.

[276] *Al Dulimi v Switzerland*, App. no.5809/08, 26 November 2013, para.118 (see also the decision of the Grand Chamber, 21 June 2016).

[277] Attempts to expand the role (see Compendium High Level Review of United Nations Sanctions November 2015, Based on United Nations document A/69/941-S/2015/432 (New York, 2015) p.3) have been rebuffed including by the UK: UN Security Council, Debate on Sanctions and the Ombudsperson (7285th meeting, 23 October 2014); UN Security Council, Debate on Sanctions, 11 February 2016 (7620th Meeting).

secretive, executive-dominated, and lacking judicial credentials,[278] though the member states are generally cooperative in terms of the release of information to the Ombudsperson and the recommendations of the Ombudsperson are not in practice overruled.[279] Opinions vary as to whether the system is irredeemable,[280] but, as it stands, it has convinced neither the European Court of Justice[281] nor the European Court of Human Rights[282] of the sufficiency of its due process credentials.

3.5 For its part, the UK government has sought to make the best of these UN procedures, which it cannot unilaterally ignore. Initial reliance was placed on implementation via an order under the United Nations Act 1946, but this basis was declared *ultra vires* in *HM Treasury v Ahmed*,[283] and so orders were instead were issued under the European Communities Act 1972, s.2(2). The Regulations largely reproduce the previous regime. Some of the procedural deficiencies at domestic level were also addressed for both schemes by 'Financial restrictions proceedings' under the Counter Terrorism Act 2008, Part VI. An application to set aside financial restrictions under the United Nations Orders[284] can be made under section 63. Any person affected by the order (which could include family relatives) may apply to the Queen's Bench Division of the High Court (under section 71) or the Court of Session in Scotland which shall apply judicial review principles (sections 65, 67). The proceedings are governed by special rules of court which must under section 66(2) take account of two predominant interests: the need for a proper review of the decision subject to challenge and the need to ensure that

[278] For appraisal, see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Second Annual Report* (A/67/396, New York, 2012), para.59, which called for redesignation as the Office of Independent Designation Adjudication.
[279] See Prost, K., *Ninth Report of the Ombudsperson to the Security Council* (S/2015/80).
[280] See Boon, K.E., *Terminating Security Council Sanctions* (International Peace Institute, New York, 2014); van den Herik, L., 'Peripheral hegemony in the quest to ensure Security Council accountability for its individual UN sanctions regimes' (2014) 19 *Journal of Conflict Law & Security* 427; Cuyvers, A., 'Give me one good reason' (2014) 51 *Common Market Law Review* 1759; Hollenberg, S., 'The Security Council's 1267/1989 targeted sanctions regime and the use of confidential information' (2015) 28 *Leiden Journal of International Law* 49; Happold, M., 'Targeted sanctions and human rights' in Happold, M. and Eden, P. (eds.), *Economic Sanctions and International Law* (Hart, Oxford, 2016); Hovell, D., *The Power of Process* (OUP, Oxford, 2016); van der Herik, L., *Research Handbook on UN Sanctions and International Law* (Edward Elgar, 2017); Prost, K.,' The intersection of AML/SFT and Security Council Sanctions' in King, C., Walker, C., and Gurulé, J. (eds.), *Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, London, 2018).
[281] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, 18 July 2013, para.163.
[282] *Al Dulimi v Switzerland*, App. no.5809/08, 21 June 2016, para.153.
[283] [2010] UKSC 2
[284] The Financial Restrictions Proceedings (UN Terrorism Orders) Order 2009, SI 2009/1911, specified the Terrorism (United Nations Measures) Order 2009 for these purposes.

disclosures are not made contrary to the public interest.[285] The rule-making powers envisage the use of special advocates (explained further in section 68), curtailed disclosure and reasons, and physical exclusion from hearings. As far as the rules of disclosure are concerned, section 67(6) provides that the court is never required to act in a manner inconsistent with Article 6 of the European Convention on Human Rights. Part 79 of the Civil Procedure Rules (or in Scotland, Rules of the Court of Session, chapter 96) offer further details.[286] It should be emphasised that these procedures may be invoked against decisions of HM Treasury but may still not bear any fruit in the United Nations itself.[287]

3.6 The European Union has underwritten these United Nations obligations so as to ensure consistency in application.[288] Under UNSCR 1267, the listings are precisely copied across as a 'mandatory duty'.[289] Thus, Council Common Position 1999/727/CFSP of 15 November 1999 specified that UNSCR 1267 should be applied via EU law,[290] and the details are now specified by Council Regulation (EC) 881/2002 of 27 May 2002. UNSCR 1988 and 1989 (2011) have been implemented by 2011/486/CFSP of 1 August 2011 and Regulations 753/2011 and 754/2011. As for UNSCR 2253, the Council adopted Decision (CFSP) 2016/368 on 14 March 2016, and Regulation 881/2002 was amended by Council Regulation (EU) 2016/363. Next, in view of the foreign terrorist fighter crisis, Council Decision CFSP 2016/1693 and Council Regulation (EU) 2016/1686 of 20 September 2016, concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda, allows for additional autonomous action. In this way, the Council may target a wide range of persons linked to ISIL (Da'esh) and Al-Qaeda without awaiting their UN

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[285] Compare Rees, G., and Moloney, T., 'The latest efforts to interrupt terrorist supply lines' [2010] *Criminal Law Review* 127, p 134.
[286] See Civil Procedure (Amendment No 2) Rules 2008, SI 2008/3085 (amended by SI 2010/3038, SI 2011/1979); Act of Sederunt (Rules of the Court of Session Amendment No 6) (Counter-Terrorism Act 2008) 2008, SSI 2008/401 (amended by SSI 2010/459).
[287] See *R (Youssef) v Secretary of State for the Foreign & Commonwealth Office* [2012] EWHC 2091 (Admin); *Youssef v Secretary of State for the Foreign & Commonwealth Office* [2013] EWCA Civ 1302 and [2016] UKSC 3.
[288] Council, *Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures* (10254/15, 2015). See further Eckes, C., *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, Oxford, 2009); Murphy, C.C., *EU Counter-Terrorism Law* (Hart Publishing, Oxford, 2013); Cameron, I. (ed.), *EU Sanctions* (Intersentia, Cambridge, 2013); van der Herik, L., *Research Handbook on UN Sanctions and International Law* (Edward Elgar, 2017).
[289] Case T-306/01 *R, Aden and others v Council and Commission* [2002] ECR II-2387, para 70.
[290] See also 2001/154/CFSP, 26 February 2001.

listing, nor is it necessary for Member States to base their listing proposals on decisions of 'competent national authorities'.

3.7 The European Union chose to invoke UNSCR 1373 autonomously, beginning with Council Common Position 2001/931/CFSP, which allowed for an auxiliary listing and asset freezing system to address terrorism extending beyond the borders of one member state, leaving national authorities alone to deal with localized terrorism.[291] The listing under Article 1(4) should be based on 'precise information or material in the relevant file which indicates that a decision has been taken by a competent authority', but it is not demanded that the national 'competent authority' shall be a judicial authority.[292] The Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (the CP 931 Working Party) was established in 2007 to provide technical examination of proposals for listings and de-listings.[293] The list is compiled in private on nomination by a state's 'Competent Authority' (such as HM Treasury) or a third state (through the President), the CFSP instrument constituting a prerequisite for adoption. The United Kingdom can nominate based on proscription of an organization or domestic legal action (typically conviction for a terrorist offence).[294] The final decision (which must be unanimous) rests with the Council in secret session, without consulting the European Parliament and without published fact-finding. Requests for delisting can be sent to the Council's General Secretariat. There is also a review every six months, but it relates to the entire list which makes an individual amendment 'unpalatable'.[295] Enforcement by Council Regulation (EC) 2580/2001 of 27 December 2001 is directly binding on member states but requires national criminal law enforcement.[296] To avoid duplication with UNSCR 1267 and to ensure competence under European law, the implementation of the freezing of funds and financial assets in pursuance of UNSCR 1373 targets non-Al Qaida or Daesh related EU-external terrorist groups, or EU members of external

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[291] See also 2001/930/CPSP, 27 December 2001.

[292] See Case T‑256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II‑3019 para 144; Case T-348/07 *Stitching Al-Aqsa v Council*, 9 September 2010, paras 77, 88.

[293] Council Document 10826/07, 21 June 2007. See further Council, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy* (EU11205/12, 2012) and *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy - new elements* (5993/13, 2013)

[294] Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) para 3.12.

[295] Hansard (HL) vol 703, col 1651 (22 July 2008), Lord Malloch-Brown.

[296] See http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

groups which present a threat beyond the borders of one Member State.[297] a range of Greek and Italian leftist revolutionaries, plus international groups such as Hamas-Izz al-Din al-Qassem, Palestinian Islamic Jihad, the PKK, and the Sendero Luminoso.[298] Listings under the Terrorist Asset-Freezing etc. Act 2010 continue to support 14 CP931 listings, and both HMT and FCO will consider future CP931 proposed listings if requested.

3.8 Following the decision in *Ahmed*, the European Communities Act 1972, section 2(2) has provided an alternative basis for listings, but a fairer version was required to provide criminal sanctions to enforce Regulation 881/2002.[299] Consequently, the Al-Qaida and Taliban (Asset Freezing) Regulations 2010[300] replaced the Al-Qaida and Taliban (United Nations Measures) Order 2006. As mentioned previously, the 2010 Regulations largely reproduced the previous regime, though were confined to persons listed pursuant to Regulation 881/2002 and additionally allowed for the procedures in Part VI of the Counter Terrorism Act 2008 to be invoked. After the split in 2011 between UNSCR 1988 and 1989, the Afghanistan (Asset-Freezing) Regulations 2011[301] provide for measures directed against individuals and entities linked to the Taliban. The Al-Qaida (Asset-Freezing) Regulations 2011 handle terrorism listings and revoke the 2010 Regulations.[302] The Counter Terrorism Act 2008, Part VI, is again available for domestic challenges. Despite these Regulations, selection and invocation of the 1267 regime resides at European Union level and ultimately at the UN. Listings under UNSCR 1373, whether through the European Union or HM Treasury, became the province of the Terrorist Asset-Freezing etc. Act 2010, Part I, as described below.

3.9 These European systems have sparked much litigation which has provoked both praise and condemnation for being unduly complex, slow, and secretive.[303] Under UNSCR 1267, a

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[297] See Council decision (CFSP) 2017/1426 of 4 August 2017. A general explanation is given at http://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/.
[298] As noted earlier, the LTTE listing has been set aside as there was insufficient factual basis: *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, Case C‑599/14 P, 26 July 2017.
[299] Hansard (HC) vol 505, col 663 (8 February 2010), Liam Byrne.
[300] SI 2010/1197.
[301] SI 2011/1893.
[302] SI 2011/2742, Art 19.
[303] Compare Murphy, C., 'Counter terrorism and judicial review' in de Londras, F., and Davis, F. (eds.), *Critical Debates on Counter Terrorism Judicial Review* (Cambridge University Press, 2014); Pantaleo, L., 'Sanctions cases in the European Courts' in Happold, M. and Eden, P. (eds.), *Economic Sanctions and International Law* (Hart, Oxford, 2016); Cooper, K. and Walker, C., 'Heroic or Hapless? The Legal Reforms of Counter-Terrorism Financial Sanctions Regimes in the European Union' in Fabbrini, F. and

person can apply to a national authority to ask it to request a 'specific authorisation' to unfreeze. If the national authority rejects the application, there are two possibilities for legal action: challenge under Article 263 of the Lisbon Treaty, provided the regulation or decision can be viewed as of 'direct concern'; or challenge under national law against the state on human rights or administrative law grounds. There have been many challenges under the first procedure. The European Court of Justice recognizes that the Council has broad competence but must not incur manifest errors of fact or disregard fundamental rights of the defence and the right to effective judicial protection. The key decisions arose in the three cases relating to Yasin Kadi.[304] The identified rights had been breached by the Council, because it had had neither communicated sufficient indication of the evidence nor effectively allowed Kadi to be heard. Equally, rights to property had been infringed since the freezing order was a disproportionate interference. The Council is thus placed in a quandary since listing is ultimately a diplomatic rather than judicial process, at the secretive behest of a national government (not necessarily European) and the UN Security Council.[305]

3.10 Due process rights have also been applied to the listings under Regulation 2580/2001 pursuant to UNSCR 1373. The fairness of decisions as to listing and the procedures have also been found wanting, most notably in *People's Mojahedin Organization of Iran v Council of the European Union*.[306] The European Court of Justice has also required a process of verification by national authorities prior to European listing.[307] The Council has formalized its procedures in response to these strictures by providing a statement of reasons to affected parties and inviting representations (but not a hearing).[308] However, these processes have continued to fail to meet

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Jackson, V., *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar, Cheltenham, 2016)..

[304] C-402/05, 415/05, [2008] ECR I-6351; T-85/09, [2010] ECR II – 5177; C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013. See Avbelj, M. et al, *Kadi on Trial* (Routledge, London, 2014).

[305] See further *HM Treasury v Ahmed* [2010] UKSC 2, paras 71, 151.

[306] Case C 27-09 *People's Mojahedin Organization of Iran v Council of the European Union*, 21 December 2011. See further T-228/02, [2006] ECR II-4665; T-157/07, T-256/07, [2008] ECR II-3019; T-284/08, [2008] ECR I-3487.

[307] Case T 348/07 *Stichting Al-Aqsa v Council* [2010] ECR II-4575 (but this point was not sustained in C-539/10 P and C-550/10 P, 15 November 2012).

[308] See Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (15114/05); Update of the EU Best Practices for the effective implementation of restrictive measures (8666/1/08).Full disclosure to the applicant is not required: *Fulamn and Mahmoudian v Council*, Case C280/12P, 28 November 2013. For the UN 1267 system, see the requirement of a statement of reasons under UNSCR 1735 of 22 December 2006 and UNSCR 2161 of 17 June 2014 ('except for the parts a Member State identifies as being confidential to the

judicial expectations that there should be divulged 'actual and specific reasons' with a judicial review on the basis of 'serious and credible evidence' and not just the legality of the decision, while the Council should act on 'precise information or material'.[309]

3.11 Various suggestions for reform of the EU systems were made by the report in 2017 of the House of Lords European Union Committee, *The Legality of EU Sanctions*, including in relation to the standard of proof, closed material procedures, and the use of an Ombudsperson.[310] However, the room for national manoeuvre in this multilateral system is limited, and, with Brexit pending, UK influence is about to diminish considerably. At best, the government could promise that 'Sanctions will continue to be an important tool for the international community in efforts to tackle threats to peace and security and promote the rule of law. The UK will continue to play an active role in those efforts'.[311]

3.12 As well as the systems imposed by the UN and EU, the UK has its own autonomous system of sanctions in the Terrorist Asset-Freezing etc. Act 2010, Part I. The main impact of UNSCR 1373 designation is on terrorists who have been subjected to domestic criminal process,[312] In many ways, these patriated provisions hold out the best prospect for due process since they are less shaped by diplomacy and foreign state interests.[313] The same hope for autonomous action has been voiced by the High Court[314] and by the European Court of Human Rights in *Al Dulimi v Switzerland*:[315]

Committee': para.32) which, if endorsed, should be developed into 'a narrative summary of reasons for listing' (para.36).

[309] Case T-341/07 *Sison v Council of the European Union* [2009] ECR II-3625*,* paras.60, 93.

[310] (2016-17 HL 102).

[311] Reply letter from Baroness Anelay to the House of Lords European Union Committee, 6 April 2017, para.10.

[312] Hansard (HL) vol 718, col 453GC (25 March 2010), Lord Myners.

[313] See Hollenberg, S., 'The Security Council's 1267/1989 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review' (2015) 28 *Leiden Journal of International Law* 49; Compendium High Level Review of United Nations Sanctions November 2015, Based on United Nations document A/69/941-S/2015/432 (New York, 2015) p.3; Cooper, K. and Walker, C., 'Heroic or Hapless? The Legal Reforms of Counter-Terrorism Financial Sanctions Regimes in the European Union' in Fabbrini, F. and Jackson, V., *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar, Cheltenham, 2016).

[314] See *R (Khaled) v Secretary of State for the Foreign & Commonwealth Office* [2010] EWHC 1868 (Admin).

[315] *Al Dulimi v Switzerland*, App. no.5809/08, 26 November 2013, para.118 (see also the decision of the Grand Chamber, 21 June 2016, paras.146, 147.

> '… in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution … does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.
>
> ….the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.'

Therefore, strong indications are here imparted that nation state standards can be, and should be, higher than international standards.

3.13 To some extent, this precept is reflected in the Terrorist Asset-Freezing etc. Act 2010, Part I. It is worth examining the Act in greater depth since such advances it has made in terms of due process are now in jeopardy under replacement legislation in the Sanctions and Anti Money Laundering Bill 2017-19.[316]

3.14 A final designation order can be issued under section 2 of the Terrorist Asset-Freezing etc. Act 2010 where there are reasonable grounds for believing (a) that the person is or has been involved in terrorist activity, and (b) that it is considered 'necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied'. When required, an interim order may be issued under s 6, and only reasonable

[316] HL no.69.

suspicion (rather than the higher standard of belief)[317] of (a) and (b), akin to arrest powers,[318] need then be established (plus necessity). Interim orders will be avoided if there is sufficient evidence to do so.[319] The listing may relate entirely to past activities, and, though the order expires after one year under section 4 (or may be varied or revoked sooner under section 5), it may be then renewed without limit on the number of renewals. Thus, there is no ultimate expiration date, unlike the position applicable to executive orders under the Anti-Terrorism, Crime and Security Act 2001, section 8 and under the Terrorism Prevention and Investigation Measures Act 2011, section 5.[320] However, the criterion of 'Necessity for purposes connected with protecting members of the public' constrains listings based purely on past involvement in terrorism despite the loose formulation which points to an indirect causation.[321] A Designation Policy Statement[322] emphasizes that there can be a wide range of possible factors lying behind listing, including the protection of non-UK publics and the maintenance of good foreign relations. A designation results in prohibitions which are explained in sections 11 to 15, subject to licences granted by HM Treasury under section 17

3.15 As for due process, a designation must be notified after issuance under section 3 (section 7 for an interim order) by written notice to the designated person and must normally be publicized more generally (in practice by web listing and notices to financial institutions), but anonymity can apply to protect individuals under 18 and public interests in national security, justice, or serious crime detection. Failure to notify a pending interim order will probably breach of common law natural justice.[323] By section 4, a designation expires after one year (or may be varied or revoked sooner under s 5) but may be then renewed without limit on the number of renewals. An internal system of review on renewal (or also on special changes of circumstance such as release from prison) has been developed. The subject is invited to make

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[317] See *Ahmed v HM Treasury* [2010] UKSC 2, para.199 per Lord Brown: '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'.
[318] HM Treasury, *Public Consultation: Draft Terrorist Asset-Freezing Bill* (Cm.7852, London, 2010) paras.4.2–4.4.
[319] Hansard (HL) vol.721, col.1057 (25 October 2010), Lord Sassoon.
[320] For details, see Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford University Press, Oxford, 2014) chap.7.
[321] Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) p.22 n.64, para.6.23.
[322] HM Treasury, *Response* (Cm.8287, London, 2012) Annex.
[323] *Bank Mellat v HM Treasury* [2013] UKSC 39. See Hooper, H.J., 'Crossing the rubicon' [2014] *Public Law* 171.

representations (along with security authorities) but not to attend any meeting.[324] Prompted by the Independent Reviewer of Terrorism Legislation,[325] HM Treasury set up a dedicated Asset Freezing Review Sub-Group (AFRG) in 2012 and assures that prosecution as well as other alternatives are considered and that liaison is arranged with Multi-Agency Public Protection Arrangements (MAPPA) agencies.[326] It was reported in October 2016 that 'AFRG meetings continue to be convened ahead of a new designation or the expiry of each designation to consider whether the individual/entity continues to meet the test in TAFA and should have their designation renewed, or whether it should be allowed to lapse.'[327] However, the AFRG has since been discontinued, though all current designations are reviewed every year and any potential new designations have to go through a Home Office-based process under an MoU before they can be considered by HM Treasury, to help decide whether an asset freeze is the most appropriate tool. Because of their lesser evidential standard, interim section 6 orders may only last for 30 days and a second interim order is not allowed on the basis of the same evidence.

3.16 Further challenge to designation is envisaged by section 26, by which any person affected may apply to the High Court or, in Scotland, the Court of Session. The court will conduct a full appeal and not just apply judicial review standards as originally envisaged by the Bill (or as applies under the Counter Terrorism Act 2008, section 63.[328] However, judicial review applies under section 27 to subsidiary complaints, such as the granting of specific licences. The appeal jurisdiction allows wide remedial powers as considered 'appropriate' (section 26(3)), including damages under the HRA 1998, going beyond the quashing power in the original Bill. Otherwise, the provisions of sections 66 to 68 of the Counter Terrorism Act 2008, backed by the Civil Procedure Rules, Part 79, are applied.

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[324] See Anderson, D., *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2013* (Home Office, London, 2011) para 3.13.
[325] Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) paras 11.2–4.
[326] HM Treasury, *Response* (Cm 8287, London, 2012) paras. 1.4–6, (Cm 8812, London, 2014) para 1.2.
[327] HM Treasury, *Post-legislative scrutiny of the Terrorist Asset Freezing etc. Act 2010* (Cm 9316, London, 2016) para.5.8.
[328] But limits on disclosure reduce the differences between appeal and review: *R (Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin), para 4.

3.17 Other checks and balances involve the formalization in section 30 of quarterly HM Treasury reports to Parliament,[329] to which is added under section 31 an annual independent review made to HM Treasury which must lay a copy before Parliament (a function carried out by the Independent Reviewer of Terrorism Legislation).[330] HM Treasury also instituted an internal Asset Freezing Working Group which regularly considered the working of the system and its relationship with other measures.[331] However, since 2016, this group no longer meets due to the low number of current designations and the lack of any new designations for over two years. Instead CT sanctions are discussed as necessary at a regular FCO run meeting with a wider purpose (with membership from FCO, police and UKIC).

3.18 Though the Terrorist Asset-Freezing etc. Act 2010 represents an improved sanctions model compared to the offshore versions, criticisms persist[332] that the regime remains (for those not also serving prison sentences) 'highly inhuman and restrictive'.[333] One problem is that the reform is complex, with no attempt to consolidate even the closely related UNSCR 1267 measures, let alone the several other financial listings powers. As a result, there remain complex and overlapping powers, as well as potential unfairness and uneven scrutiny.[334] The next problem concerns the threshold standard for designation. While this standard was raised during parliamentary passage for final orders to 'reasonable belief',[335] it remains debatable whether this standard is high enough in view of the personal impacts of designation.[336] A third problem concerns the limits to accountability. The levels of transparency and review in individual

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[329] See Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) Annex 1-4.
[330] For standards of scrutiny, see Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) para 1.9.
[331] Anderson, D., *Third Report on the Operation of the Terrorist Asset Freezing etc 2010* (Home Office, London, 2013) para 2.25; HM Treasury, *Post-legislative scrutiny of the Terrorist Asset Freezing etc. Act 2010* (Cm 9316, London, 2016) para.5.8.
[332] Aside from the reports of the Independent Reviewer, see HM Treasury, *Draft Terrorist Asset Freezing Bill: Summary of Responses* (Cm 7888, London, 2010); House of Lords Select Committee on the Constitution, *Terrorist Asset-Freezing etc Bill* (2010–11 HL 25); Joint Committee on Human Rights, *Terrorist Asset-Freezing etc Bill (Preliminary Report)* (2010–12 HL 41/HC 535) and *(Second Report)* (2010–12 HL 53/HC 598).
[333] Anderson, D., *Second Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2012) para 1.1.
[334] *HM Treasury v Ahmed* [2010] UKSC 2, para 223; Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) para 2.3.
[335] For differences between the standards, see *Wills v Bowley* [1983] 1 AC 57, 103; *Johnson v Whitehouse* [1984] RTR 38; *R v Hall (Edward Leonard)* (1985) 81 Cr App R 260; Joint Committee on Human Rights, *Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill* (2010–11 HL 41/HC 535) para 1.16.
[336] *HM Treasury v Ahmed* [2010] UKSC 2, paras 137, 199–200.

cases have changed only to a marginal extent. To emulate the position which applies to TPIMs, there should be the issuance of the final order by the court rather than an optional appeal process. Arguments that only ministers can handle security-based decisions are outdated.[337] As with TPIMs, priority for prosecution should be set as a condition, with a final time limit imposed on the duration of freezing orders. Finally, the appeal system under section 26 (and therefore the review system in the Counter Terrorism Act 2008, Part VI, remain vulnerable to challenge under Article 6 standards.[338] The government has denied the applicability of this standard of disclosure because of the lesser impact of property rights[339] and refused to write into the legislation disclosure based on 'gisting'.[340] Challenges to UNSCR 1267 listings were rejected in *Secretary of State for Foreign & Commonwealth Office v Maftah and Khaled*, though more on the basis of the public law duties of the Foreign Office in securing removal from a list rather than because of the interpretation of any private right.[341] This precedent was applied in *R (Bhutta) v HM Treasury*.[342] However, it was confirmed in *Mustafa v HM Treasury*[343] that Article 6 is applicable to an appeal under section 26 and that the gist of the allegations must be disclosed. The decisions in *Maftah and Khaled* were distinguished as relating more to public law duties rather than the rights of the applicant, while the proximity to processes such as control orders and TPIMs made it hard to justify a significantly different standard here. As well as Article 6, the sweeping and permanent nature of the system may engage rights under Article 8 and Protocol 1, Article 1, where there is 'a dramatic impact on the civil rights of individuals',[344] so that the powers must be exercised proportionately.[345] The claim that 'great strides'[346] have been made towards standards of fairness is fanciful, but at least some steps have been sustained.

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[337] Compare Hansard (HL) vol 721, col 135 (6 October 2010), Lord Sassoon and col 1051 (25 October 2010), Lord Lloyd.
[338] See Hansard (HC) Public Bill Committee on the Counter-Terrorism Bill, *Memorandum from JUSTICE*, para 108.
[339] Joint Committee on Human Rights, *Terrorist Asset-Freezing etc Bill (Second Report)* (2010–12 HL 53/HC 598) para 1.16. In *Ahmed v HM Treasury* [2010] UKSC 10, paras 144, 201, 235, just three judges ventured an opinion (all that there was no breach).
[340] Hansard (HL) vol 721, col 1077 (25 October 2010), Lord Wallace.
[341] [2011] EWCA Civ 350. See also *R (Bredenkamp) v Secretary of State for the Foreign & Commonwealth Office* [2012] EWHC 3297 (Admin).
[342] [2011] EWHC 1789 (Admin), para 25. The default common law standard requires disclosure of the 'general nature' of the case: *Home Office v Tariq* [2011] UKSC 35, para 63. Bhutta was de-listed in 2011 and the case was discontinued.
[343] [2012] EWHC 3578 (Admin).
[344] *Secretary of State for Foreign & Commonwealth Office v Maftah and Khaled* [2011] EWCA Civ 350, para 26.
[345] Anderson, D., *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2011) paras 6.28, 11.3; HM Treasury, *Response* (Cm 8287, London, 2012) para 1.2.

3.19 In view of the promise for greater fairness offered by autonomous systems, set against the limited improvements in the Terrorist Asset-Freezing etc. Act 2010, attention should now be turned towards the details and overall direction of travel represented by the Sanctions and Anti Money Laundering Bill 2017-19, which will replace Part I of the 2010 Act. Regrettably, the Bill portends a largely regressive stance in terms of the delivery of due process.[347] The Bill is needed since the European Union (Withdrawal) Bill will simply freeze the current designations by the EU as at the date of the UK's exit. However, the listings would quickly become out of date, which would leave the UK state and its financial institutions in breach of international regulatory regimes.[348] Furthermore, the mechanisms for challenge under EU law will no longer be available.

3.20 The Bill was presaged by a full consultation process. In the Foreign & Commonwealth Office's paper in April 2017, *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions*,[349] views were sought on the legal framework needed for imposing and implementing sanctions after Brexit. Notable early propositions were that the operative threshold would be 'reasonable grounds to suspect' (chapter 4) and that there should be periodic reviews of individual orders and entire regimes, always subject to closed material procedures in the case of court challenge (chapter 5). More definite plans were set out in the Government Response paper to the consultation process in August 2017.[350] Before taking up selected detailed points which are reflected in the Bill itself, several more general points might be made. One is that the scope of the Bill is limited. All sanctions legislation potentially relating to terrorism is not consolidated, and so the Anti-Terrorism, Crime and Security Act 2001 and the Counter Terrorism Act 2008, Parts V and VI, are untouched.[351] However, despite indications in the *Government Response* that the 2010 Act would continue as a distinct regime,[352] it is now to be replaced by the Bill. Second, the issue of UK nexus will continue to arise. How far will there

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[346] Hansard (HC) Delegated Legislation Committee col 5 (30 March 2010), Sara McCarthy-Fry.
[347] See Newson, N., *Sanctions and Anti-Money Laundering Bill [HL] (HL Bill 69 of 2017–18)* (House of Lords Library, London, 2017)
[348] But with suitable legislation, sanctions against the UK are unthinkable: Brexit: Written question - 7531, 13 September 2017, Robin Walker.
[349] (Cm.9408, London, 2017)
[350] *Public Consultation on the United Kingdom's future legal framework for imposing and implementing sanctions: Government Response* (Cm.9490, London, 2017).
[351] Also note the Export Controls Act 2002.
[352] *Ibid.* para.2.7.

be the shadowing of foreign allies, and should there be promises of close replication of EU decisions, no matter how irrelevant to the UK?[353] According to one Minister, the intention is to 'lift and shift" existing sanctions regimes, to 'remain aligned with the EU — with existing sanctions'.[354] Should there be corresponding coordination with Five Eyes allies? How will the legislation be implemented in a way that the UK is 'a credible and reliable partner for international allies'[355] – which allies and how automatic is the consideration or shadowing? Third, will the processes be fairer than the previous regimes? Opportunities for challenge will be considered below, though it may also be noted that limits are promised on compensation even when a listed body/person has been successful in court. Finally, the proposals betray no sign of learning from experiences in other jurisdictions. The most prominent actor in the field is the US Department of the Treasury which sets the agenda for many other countries to follow (on pain of financial penalties). There are also autonomous systems in Australia (Autonomous Sanctions Act 2011),[356] Canada (Special Economic Measures Act 1992), Netherlands (Sanctions Act 1977) and elsewhere. Thus, some comparative work would have been very profitable. In conclusion, the process of legislative reshaping represents an excellent opportunity for greater clarity and fairness, but instead the official approach is to adopt the negative objective of 'the maximum possible continuity and certainty and is not designed to bring any substantive policy changes'.[357]

3.21 Regarding clarity, some improvements are imparted by the Bill, such as by bringing together the types of sanction available (in clauses 2 to 7), ranging from financial through travel to trade and transport. However, there remains a contrast between the specification of rules where the rights of individuals are restricted and those where they might be furthered. Thus, clarity has been put in place regarding the rules as to the suppression of disclosure through the closed material procedures in the Civil Procedure Rules Part 79 and more generally in the Justice and Security Act 2013. But details about opportunities for challenge, including through

[353] *Ibid.,* para.7.9. See also HMG, *Foreign Policy, Defence and Development* (London, 2017), paras.31, 68.
[354] HC Hansard vol.627, 19 July 2017, col 946, Alan Duncan
[355] Foreign & Commonwealth Office, *Sanctions and Anti Money Laundering Bill: Impact Assessment* (London, 2017) p.1.
[356] See the Independent National Security Legislation Monitor, *Third Annual Report 7th November 2013* (Canberra, 2013).
[357] Foreign & Commonwealth Office, *Sanctions and Anti Money Laundering Bill: Impact Assessment* (FCO1701, London, 2017) p.4. For this reason, the Regulatory Policy Committee, Sanctions Bill (RPC-17-*Foreign & Commonwealth Office*-4135(1), London, 2017) could find no fault.

internal departmental procedures, are less handy. The Office of Financial Sanctions Implementation in HM Treasury has made a start by the issuance of the *Financial Sanctions Guidance*[358] which gives helpful information and practical example. By contrast, the equivalent Office of Foreign Assets Control (OFAC) in the US Department of the Treasury is subject to extensive and detailed legal regulations.[359] Consequently, fuller criteria and guidance are needed, and so it is hoped that clause 36 of the Bill, which requires the issuance of guidance about any prohibitions and requirements imposed by the regulations, will be used comprehensively.

3.22 next, the savings for prerogative powers in clause 43 should also be clarified. Given the existence of the Civil Contingencies Act 2004 (which did not find it necessary to preserve prerogative powers),[360] one wonders what can be left to save. In *Youssef v Secretary of State for Foreign and Commonwealth Affairs*,[361] the view was taken that the statutory scheme (based then on the European Communities Act 1972) supplanted any reliance on the prerogative powers. Prerogative powers to conduct foreign affairs can remain, but the principle stated in *Entick v Carrington*,[362] that interference by the state with individual property rights cannot be justified by the exercise of prerogative powers which are unsupported by specific statutory authority, should not be thrown into any doubt.

3.23 As for the preferment of fairness, the key grounds for designation are delineated in clauses 10-12. For autonomous sanctions (clauses 10(2) and 11(2)), the Minister must have reasonable grounds to suspect involvement in an activity relevant to clause 1(2), in other words, to:

> '(a) further the prevention of terrorism, in the United Kingdom or elsewhere,
> (b) be in the interests of national security,
> (c) be in the interests of international peace and security, or
> (d) further a foreign policy objective of the government of the United Kingdom.'

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[358] https://www.gov.uk/government/publications/financial-sanctions-faqs.
[359] 31 CFR 501.101-901. See Barnes, R., 'United States sanctions' in Happold, M. and Eden, P. (eds.), Economic Sanctions and International Law (Hart, Oxford, 2016).
[360] s.18(2). See Walker, C. and Broderick, J., *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, 2006) chap.2.
[361] [2016] UKSC 3, paras.31-34.
[362] (1765) 19 State Tr 1029.

The Minister must also consider that designation is 'appropriate' for that person. For non-autonomous sanctions under clause 12, the designation is still automatic so long as it can be shown to implement clause 1(3), in other words, 'compliance with a UN obligation, or other international obligation,[363] specified in the regulations'. Since the room for manoeuvre is mainly in cl.10 and 11, they should be scrutinised most carefully.

3.24 The first question is whether the criteria are adequate. Much turns here on the standard of 'reasonable grounds to suspect'. The Foreign & Commonwealth Office explained to the House of Lords European Union Committee inquiry that there is no 'agreed formula' for the standard of proof required for a sanctions listing.[364] The government argues that the standard of proof should be 'reasonable grounds to suspect'[365] because this threshold has been endorsed by both the UK Supreme Court in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*[366] and the EU General Court in *Al-Ghabra v European Commission*.[367] Three important qualifications should be entered to this claim.

3.25 The first qualification is that the standard may have been endorsed (but not exactly required, as shall be raised in the second qualification) for non-autonomous designations, but the 2010 Act adopts a significantly higher standard for autonomous designations. As noted above, the threshold standard for 2010 Act designations was originally set in the Bill at 'reasonable suspicion' but was raised during parliamentary passage for final orders to 'reasonable belief'. Thus, the current Bill now augurs a retrograde return to the lower standard. Furthermore, the lowering of that standard is being glossed over, despite the fact that it was hard won through careful Parliamentary scrutiny. One might compare the autonomous standard in TPIMs, where, under section 3, the key criterion was that the Minister 'reasonably believes that the individual is, or has been, involved in terrorism-related activity'; this standard was raised

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[363] The directions of the Financial Action Task Force are also actioned: Counter Terrorism Act 2008, Pt.V.
[364] *The Legality of EU Sanctions* (2016-17 HL 102) para.32. See also Reply letter from Baroness Anelay to the House of Lords European Union Committee, 6 April 2017, para.10
[365] *Public Consultation on the United Kingdom's Future Legal Framework for Imposing and Implementing Sanctions* (Cm 9408, London, 2017) p.18; *Foreign & Commonwealth Office*, *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions: Government response* (Cm.9490, 2017) para.3.6. This standard was endorsed by the House of Lords European Union Committee, *The Legality of EU Sanctions* (2016-17 HL 102) para.102.
[366] [2016] UKSC 3, para.49, 50.
[367] Case T 248/13,13 December 2016, para.111.

even higher under the Counter-Terrorism and Security Act 2015, section 20, to being 'satisfied, on the balance of probabilities'.

3.26 The second qualification is that the key formulation given by the European Court of Justice in the *Kadi* case promised 'a full and rigorous judicial review' of whether there is 'a sufficiently solid factual basis' for designation.[368] In this way, it might be said that there is no specification of a fixed standard along the lines now being claimed.[369] In practice, the UK Government has adopted a 'reasonable grounds for suspicion test' as its own standard of proof for voting in the European Council on whether to adopt a sanctions listing.[370] True enough, that standard also withstood challenge in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*, contrary to the appellant's argument that the adopted standard of proof was too low, based on the recognition that designation has a 'preventative' purpose.[371] The test also aligns with the approach of the UN Ombudsperson; her test is 'whether there is sufficient information to provide a reasonable and credible basis for the listing'.[372] In conclusion, a reasonable suspicion test will not ruffle international feathers, but states are not precisely obliged to adopt that standard, especially for autonomous systems. International standards tend to offer lowest common denominators. Higher standards could be followed as precepts in the domestic setting of UK executive action and the UK legal system which exalts values such as the rule of law, the separation of powers and judicial independence, and human rights.[373] These values are to be promoted as a priority for the UK and as an example to others. In the words of the Foreign Secretary, 'Promoting the values that Britain holds dear is not an optional extra, still less a vainglorious addition to our diplomacy; it is in keeping with centuries of tradition. This is

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[368] Joined cases C‑584/10, C‑593/10 and C‑595/10: *European Commission and Others v Yassin Abdullah*
Kadi, 18 July 2013, paras.42, 119. The latter is cited as a key test in *Al-Ghabra v European Commission*, Case T 248/13,13 December 2016, para.111 (a challenge to a UK listing) and in HM Government, *Public Consultation on the United Kingdom's Future Legal Framework for Imposing and Implementing Sanctions—Government Response* (Cm 9490, London, 2017) pp.10-11.

[369] See further House of Lords European Union Committee, *The Legality of EU Sanctions* (2016-17 HL 102) para.38, 102.

[370] *Ibid.* para.30.

[371] [2016] UKSC 3, para.50.

[372] *Second Report of the Ombudsperson to the Security Council* (S/2011/447, 22 July 2011) para.22; https://www.un.org/sc/suborg/en/ombudsperson/approach-and-standard. The UN Special Rapporteur on the Protection of human rights and fundamental freedoms while countering terrorism proposed a more stringent 'balance of probability' test: *Second Annual Report* (A/67/396, New York, 2012), para.56. UNSCR 2083 of 17 december 2012 rather enigmatically states that states are 'to apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis"' (para.44).

[373] Human Rights Act 1998; Constitutional Reform Act 2005.

part of who we are.'[374] Correspondence with lower international law standards is arguably less pressing after Brexit (which is the cause of the new legislation), so why make this regressive change? Perhaps the answer resides within the convenience of departments and litigation-proofing rather than seeking to instil ever greater fairness according to British values.

3.27 The third qualification concerns the meaning and impact of other trigger standards. The Bill requires in clauses 10(2) and 11(2) that designations be 'appropriate' as well as sufficiently proven. This overworked word is used in several contexts in the Bill but is nowhere defined. For the purposes of fairness, it would be useful to build on the experience of the 2010 Act and to refer to 'necessity' and 'proportionality'. 'Necessity' is specified in relation to the existing 2010 Act, section 2(1)(b), by which designation must be considered 'necessary for purposes connected with protecting members of the public from terrorism'.[375] A necessity test also applies to TPIMs.[376] 'Proportionality' was recognised as a relevant standard by the UK Supreme Court in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*[377] on the basis that in common law 'there is a measure of support for the use of proportionality as a test in relation to interference with "fundamental" rights', albeit that 'in many cases, perhaps most, application of a proportionality test is unlikely to lead to a different result from traditional grounds of judicial review.' not least because of 'a large margin of judgment … accorded to the executive'.

3.28 Moving on from threshold criteria, the next issue engaged by fairness standards concerns review and expiration. Designation may or not be fair, but it cannot fairly last forever. These arguments have previously been made in the context of control orders and TPIMs, where it was accepted in the Terrorism Prevention and Investigation Measures Act 2011 that an annual review should be held and an absolute limit of two years should apply; at that point, any new order would have to be based on new circumstances.[378] In this aspect, the Bill shows some mediocre progress and ventures further than the 2010 Act or proscription but falls far short of

[374] Foreign & Commonwealth Office, *Human Rights and Democracy* (Cm.9487, London, 2017) p.v.
[375] The importance of the test is underlined by Anderson, D., *Fourth Report on the Terrorist Asset-Freezing etc. Act 2010* (Home Office, London, 2015) para.2.16.
[376] Terrorism Prevention and Investigation Measures Act 2011, ss.3, 11.
[377] [2016] UKSC 3, paras.56, 57.
[378] See Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford University Press, Oxford, 2014) chap.7.

the promised 'robust' review and challenge systems,[379] including the standards set for TPIMs, despite the pronouncements in *Ahmed* and *Bank Mellat* about their impacts on individual rights.

3.29 The following proposed measures should be considered in this context.[380]

- There is a power to revoke at any time under clause 18, and 'If at any time the Minister considers that the required conditions are not met in respect of a relevant designation, the Minister must revoke the designation.' No guidance is given as to the exercise of this power, nor is it linked to any necessary review.
- Under clause 19, there is a right to request variation or revocation, subject to sensible limits on repeat requests which require submission of 'a significant matter' which had not previously been considered by the minister. This measure is a welcome advance on the 2010 Act.
- Even more welcome is clause 20 – a default periodic review so that 'ensure that sanctions regimes remain properly targeted and that there are clear incentives for changes in behaviour by designated individuals and entities'.[381] In this way, listings are 'not maintained in perpetuity by default'.[382] However, the review period is set at three years, so the situation is not as favourable as for TPIMs, even though, as already stated, the courts view financial listing as equally as intrusive.
- Clause 21 also represents a welcome improvement on the 2010 Act, since it allows a UN-designated person to request review. Given that this process cannot unilaterally result in the overturning of the listing – that remains for UN decision-makers –the Bill confines the review to asking whether the Minister should deploy 'best endeavours to secure that the person's name is removed from the relevant UN list' (clause 21(2)). The concession should go further in that there should be notification to the UN Ombudsperson whose views should be sought and it should remain possible to challenge decisions of HM Treasury.

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[379] Foreign & Commonwealth Office, *Sanctions and Anti Money Laundering Bill: Impact Assessment* (FCO1701, London, 2017) p.5.
[380] See *Foreign & Commonwealth Office*, *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions: Government response* (Cm.9490, London, 2017) paras.4.5, para 4.8.
[381] HM Government, *Public Consultation on the United Kingdom's Future Legal Framework for Imposing and Implementing Sanctions—Government Response* (Cm 9490, London, 2017) para.4.4.
[382] Explanatory Notes to Bill (2017) para.88.

- The UN-designated person also seems to benefit from the reviews in clause 20, and there is no reason why they should not do so. There are relatively few UN listed persons known to be located in the UK, so review would not create a major burden of work.[383] However, the ordering of the clauses is odd and might suggest otherwise.

3.30 The formats of the reviews should also be clarified. Annual ministerial review is envisaged under clause 26, but this duty focuses on each sanctioning regime as a whole rather than individuals subjected to it. Thus, it will be 'a high level political review of the overall regime, particularly focused on whether or not it is contributing to its intended purpose, and would not include a review of the evidence underpinning each designation.'[384] In addition, there should be an obligation to hold an annual internal review of each individual case. This form of scrutiny, within the Asset Freezing Review Sub-Group (AFRG), was emphasised as beneficial by David Anderson, QC, in his *Fourth Report on the Terrorist Asset-Freezing etc. Act 2010*: 'the system of annual ministerial review has been effective in focusing minds on whether the statutory tests are still met, and in clearing out dead wood.'[385] As a result, he sought to improve it further by asking for more intelligence information to be provided and also a devil's advocate approach.[386] In reply, HM Treasury,[387] agreed that 'one member of the review group as the 'challenge champion', to put the case against designation, could further increase the level of challenge that takes place during the review group meeting and make those meetings even more rigorous.'[388] However, the official response was negative on information disclosure, revealing mind-set of secrecy even within the confines of the corridors of the state:[389]

> 'The Government agrees that it is beneficial for sufficient material to be provided in order for this function to be carried out. However the Government does not accept that receiving the underlying intelligence underpinning agency assessments would assist this

[383] On **4 October 2017**The **ISIL (Da'esh) & Al-Qaida Sanctions List consisted of** 256 individuals and 80 entities **(https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list). At that time, 13 individuals were listed with UK connections, including one (Sally Jones, QDi.360) reportedly killed in a drone strike.**
[384] Explanatory Notes to Bill (2017) para.97.
[385] (Home Office, London, 2015) para.3.2.
[386] *Ibid.* paras.3.35, 6.7.
[387] *Operation of the Terrorist Asset-Freezing Etc. Act 2010: Response to the Independent Reviewer's Fourth Report* (Cm.9118, London, 2015).
[388] *Ibid.,* para.1.1.
[389] *Ibid.,* para.1.2.

function in most cases. Operational partners are best placed to make assessments of underlying intelligence and explain those assessments to the Treasury. Officials and operational partners will continue to work closely together to ensure that assessments allow for rigorous consideration of both new potential designations and reviews.'

3.31 Regulations are required to be made under clause 27 in connection with a request under section 19 or 21 or a review under section 20 or 26. So these foregoing points about review and expiration should be clarified, as well as statutory provision for annual internal review and a two year limit.

3.32 The next step in oversight concerns potential court review which can be invoked under clause 32 by any person sanctioned or affected regarding a decision as to listing or review. As with proscription, the statutory remedies must be sought in the first instance before resort to the courts.[390] However, in detail, the proposed scheme is regressive in terms of fairness. Under section 26 of the 2010 Act, the court can conduct a full appeal and not just apply judicial review standards (unlike the proposal in the Bill as drafted or as applies under the Counter Terrorism Act 2008, section 63).[391] Judicial review only is specified under section 27 of the 2010 Act for subsidiary complaints, such as the granting of specific licences. By contrast, under clause 32(4) of the proposed Bill, 'In determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review.' For such intrusive orders, this standard of review is inadequate. One should also bear in mind that sensitive evidence will be fully protected by closed material procedures because of the Counter Terrorism Act 2008, sections 66-68, which are applied by clause 34. The invocation of closed material procedures is controversial in itself.[392] For its part, the House of Lords European Union Committee took the view that the system would not satisfy litigants, since it is 'unlikely to provide satisfaction to sanctioned individuals and companies, as they will not have sight of the evidence provided on which judgements are made'.[393] But the standards of protection on offer under the UK version of

[390] See Explanatory Notes (2017) para.105.
[391] Limits on disclosure reduce the differences between appeal and review: *R (Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin), para 4. TPIMs are also subject to their own version of closed material procedure: Terrorism Prevention and Investigation Measures Act 2011, Schedule 4.
[392] See Tomkins, A., 'Justice and Security in the United Kingdom' (2014) 47 *Israel Law Review* 305; Walker, C., 'Living with National Security Disputes in Court Processes in England and Wales' in Martin, G., Greg Martin, Scott Bray, R., and Kumar, M., *Secrecy, Law and Society* (Routledge, Abingdon, 2015); Davis, J., 'Equality of arms' (2016) 21 *Journal of Conflict and Security Law* 69.
[393] *The Legality of EU Sanctions* (2016-17 HL 102) para.107.

closed material procedure are considered to be superior to those than available under the General Court Rules of Procedure 2015 in the European Court of Justice.[394] Those rules have been criticised by UK Ministers since they do not provide for the party providing the sensitive material to be able to withdraw material at any stage of the proceedings, and there is no provision for the security checking of judgments and orders to prevent accidental disclosure of information.[395] Given the forthcoming withdrawal from the jurisdiction of the European Court of Justice, the application of sturdier British standards of protection for official sensitive information should allow for greater fairness than is here on offer in the Bill.

3.33 Moving on to wider mechanisms of oversight, the removal of other forms of oversight is to be regretted. In particular, the legal duty under section 31 of the 2010 Act to provide an annual report on the operation of Part I is dropped from the pending Bill. The oversight function has been fulfilled by the Independent Reviewer of Terrorism Legislation. Reports must be laid before Parliament, but there is no requirement of Parliamentary debate. In addition, HM Treasury provides quarterly reports (largely statistical in nature) on the implementation of the legislation. It is bemusing to reflect upon the recent extension of the remit of the Independent Reviewer of Terrorism Legislation by the Counter Terrorism and Security Act 2015, section 45, only then to find the same official being pushed aside in an allied context. In the consultation on the Bill, some respondents advocated the continuance of independent oversight: 'Several respondents felt that there should be an independent reviewer or Ombudsperson for sanctions. A number of potential areas of focus were put forward for this person: assisting designated persons; assisting the government; and making reports to Parliament.'[396] The official response concentrated on the Ombudsperson model:[397]

> 'As set out above, those subject to UK sanctions would be protected by the ability to request an administrative reassessment of the government's decision, as well as to challenge their designation in the High Court. The government believes this provides sufficient procedural protection for designated persons and is consistent with the

[394] OJ 2015 L105, p.1.
[395] Reply letter from Baroness Anelay to the House of Lords European Union Committee, 6 April 2017, para.5. The points are quoted from House of Commons European Scrutiny Committee, *Twenty-ninth Report of Session 2014–15* (2014-15 HC 219-xxviii) pp.63-64.
[396] HM Government, *Public Consultation on the United Kingdom's Future Legal Framework for Imposing and Implementing Sanctions* (Cm 9408, London, 2017) para.5.12.
[397] *Ibid.,* para.5.13.

approach followed by the EU and by other international partners with autonomous sanctions powers. Therefore we are not proposing to establish an independent reviewer or Ombudsperson focused specifically on UK sanctions. We do see a case for improving the way designations are agreed and reviewed at the UN level, building on the good work of the UN Ombudsperson for the ISIL (Da'esh) and Al-Qaida Sanctions Committee.'

By way of comment, the involvement of the courts, albeit that it is too limited, may indeed offer a sufficient argument to make any new Ombudsperson system largely redundant:[398]

'In the EU context, the Courts already play a substantial role in maintaining standards of due process. The EU courts have made clear in Kadi II that they will expect to see the underlying evidence supporting at least one of the stated reasons for designating an individual or entity. This would mean they would expect to see the evidence that had been provided to the Ombudsperson, essentially nullifying the latter's role. The Government considers that reforms in the EU context should focus more on improving open source evidence gathering capacity and building appropriate safeguards into the close materiel procedure.'

Following the enactment of the Bill, the EU courts will no longer play a role, but the courts UK will then provide a more accessible alternative forum. However, nothing is said here about the mechanisms of independent review or parliamentary review. It is submitted that they should not be sacrificed so quietly and effortlessly.

3.34 The final aspect related to fairness concerns exemptions and licences which, as indicated earlier, have caused difficulties for overseas humanitarian relief.[399] Some progress is indicated here in the Government Response to the consultation by the devising of general licences under clause 14,[400] a very welcome opportunity not afforded under EU law. However, any attempt to instil fairness is again undermined by the lack of clarity as to what the new

[398] See Reply letter from Baroness Anelay to the House of Lords European Union Committee, 6 April 2017, para.9
[399] See Walker, C., 'Terrorism Financing and the Policing of Charities' in King, C., Walker, C., and Gurulé, J. (eds.), *Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, London, 2018).
[400] *Foreign & Commonwealth Office*, *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions: Government response* (Cm.9490, London, 2017) para 6.5.

regime will allow or facilitate. All that is revealed is that the Government intends to set out more detailed grounds and criteria for a licensing regime.[401] A useful starting point for reflection might be the HM Treasury's own report, *National risk assessment of money laundering and terrorist financing 2017*, which reveals that:[402]

> 'Recent work has suggested that the terrorist financing risk to UK charities is concentrated in the subsector comprising the 13,000-16,000 charities operating internationally, particularly in areas such as Syria and Iraq. The ongoing crisis in this region and the threat from Daesh and other terrorist groups mean that these charities are likely to be exposed to the greatest risk. Over 30% of charities in this group have a declared annual income of under £10,000, and therefore may be more vulnerable to such abuse as they are less likely to be able to access professional advice. They may also make honest mistakes and adopt poor practices which make them more vulnerable to abuse. The geographical risk domestically is assessed to be concentrated around charities operating in London, the Midlands and the North-West of England.'

On this basis, it would seem appropriate that general licences should be based on the size (turnover) and expertise of the charity which could be evidenced by certification from the Charity Commission (which might involve a cumulative record based on annual returns and regulatory performance). At the same time, given the complexity of the sector and the influence of extraneous stakeholders such as banks and foreign (especially US) regulators, general licences will not solve all the problems faced by humanitarian organisations. More determined inter-governmental responses will still be required.

4 Conclusions

4.1 This survey of proscription and financial sanctions underlines the importance of executive measures against suspected terrorism. The project here is not to dispense with them but to enhance their clarity and fairness. A bolder approach might seek to devise more consolidated approaches to cover not only all of the financial sanctions regimes but also the other executive measures, such as TPIMs, as well as entry, immigration, and nationality

[401] Explanatory Notes (2017), pp.12-13.
[402] (London, 2017).

controls and the emergence of statutory versions of 'Prevent'. The introduction of an Ombudsperson to investigate and make representations on behalf of individuals has some attractions, but the UK domestic legal system has rightly placed more faith in the courts, and also in independent expert review and parliamentary review. Therefore, the focus should remain on delivering fair and effective court procedures within the circumstances of each measure and bolstering or restoring independent and parliamentary scrutiny.

4.2 The final reflection is that the survey emphasises the need to refight battles over acceptable standards. The point is well-illustrated by the repeated efforts by the Independent Reviewer of Terrorism Legislation to bring about the reform of de-proscription. The battle should now be resumed in the context of the proposed Sanctions and Anti Money Laundering Bill 2017-19 over features such as standards of proof in individual cases and systemic oversight.

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