Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1)

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Introduction

1. This Note considers the proposal in the Counter-Terrorism and Sentencing Bill[1] to amend the standard of proof for Terrorism Prevention and Investigation Measures (TPIMs)[2].

2. Under clause 37 of the Bill the standard of proof is to be lowered. The Secretary of State will no longer be required, as she currently is under section 3 TPIM Act 2011, to be "satisfied, on the balance of probabilities" that the individual was, or had been, involved in terrorism-related activity before making a TPIM.

3. Instead it will be sufficient that the Secretary of State has "reasonable grounds for suspecting" that the individual was or had been so involved. The courts have interpreted the standard of suspicion as a belief not that the person *is* a terrorist, only that they *may be* a terrorist[3].

Background

4. A TPIM is an exceptional administrative measure, enabling restrictions to be placed on individuals outside the criminal process on the basis of risk to national security. In its modern form, this type of measure dates back to 2005, when Control Orders were introduced in response to a ruling that detention of foreign nationals without trial following 9/11 was discriminatory and unlawful[4]. The Prevention of Terrorism Act 2005 came into force in March 2005, several months before the 7/7 attacks in London.

5. Under the Prevention of Terrorism Act 2005 the Secretary of State required "reasonable grounds for suspecting" that the individual was or had been involved in terrorism-related activity before making a Control Order.

6. Control Orders were replaced by TPIMs in 2011. Under the TPIM Act 2011 the required standard of proof was raised, and the Secretary of State could only impose a TPIM if she reasonably believed that the individual was or had been involved in terrorism-related activity. TPIMs did not include the severest measures that were available under Control Orders, such as relocation.

7. The standard of proof was raised again by the Counter-Terrorism and Security Act 2015 to its present standard, whereby the Secretary of State has to be satisfied on the balance of probabilities. This occurred at the same time that Parliament reintroduced the power of relocation. In changing the standard of proof, the government expressly accepted[5] the recommendation of the Independent Reviewer of Terrorism Legislation (Lord Anderson QC) who had concluded that the standard of proof could and should be higher[6].

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[1] https://publications.parliament.uk/pa/bills/cbill/58-01/0129/20129.pdf.
[2] I will publish further notes on other aspects of the TPIM reforms.
[3] See for example, *HM Treasury v Ahmed* [2010] UKSC 2, per Lord Brown at para 199.
[4] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[5] Home Secretary, 2 December 2014, House of Commons, Second Reading, vol 589.
[6] TPIMs in 2012 Report, https://www.legislationline.org/download/id/4605/file/terrorism%20prevention%20and%20investigation%20measures%20in%202012_independent%20reviewer_2013.pdf at 11.47 - 11.52.

8. The standard of proof has remained unchanged since then, notwithstanding the very real prospect of needing to deploy TPIMs in the context of terrorism fighters returning from Syria and Iraq[7], and despite the Manchester and London attacks of 2017.

9. I considered the operation of TPIMs in my Terrorism Acts in 2018 Report which was published in March 2020[8]. I did not report on, nor did I detect in the course of my work, any proposal to lower the standard of proof.

Analysis

10. It does not of course follow from this proposed change that the Secretary of State will be seeking to impose TPIMs on individuals who would not have been candidates under the higher standard of proof. TPIMs are resource-heavy and the authorities are unlikely to seek measures for individuals whom they do not consider to be a serious threat.

11. This begs the question of why this reform is proposed. It would enable the Secretary of State to impose TPIMs on a broader category of individuals, namely those she believed might, but might not be, a terrorist. Intelligence is often fragmentary and may be ambiguous. A reasonable grounds to suspect threshold is lawful[9] but carries with it a stronger possibility, as with an arrest, that the individual may be innocent.

12. Despite 7/7, the 2017 attacks and the prospect of returning terrorist fighters the trajectory has been towards maintaining the fullest range of measures (thus, reintroducing the power to relocate) whilst accepting a certain standard of proof which, it appears, has not proven impractical. Although it was suggested in 2014 that TPIMs were "withering on the vine"[10], TPIMs have continued to be made and maintained. The most recent published data shows that at the end of November 2019 there were 5 TPIMs in force[11].

13. The most significant recent events have been the attacks at Fishmonger's Hall in November 2019 and Streatham in February 2020, carried out by released terrorists on licence. When emergency legislation was introduced to prevent the early release of current serving terrorist prisoners[12], it was suggested that TPIMs could be used to ensure that post-sentence measures were in place for this cohort (to deal with the so-called 'cliff-edge' problems of the 50 or so offenders who might be released without licence)[13].

14. However, if it was intended to impose TPIMs on this cohort, there would be no need to lower the standard of proof: their involvement in terrorist activity has already been established beyond reasonable doubt in the criminal courts. So far as other terrorist offenders are concerned, they will be released on licences administered by specialist police and probation officers, whose conditions largely replicate the measures available under TPIMs. Again, if a TPIM was thought necessary in their cases, their involvement in terrorist activity is not in doubt.

15. It may be said that the change is designed to ease the administrative and litigation burden on the authorities in terms of the evidence that must be presented before a TPIM can be made, or on the disclosure obligations where a TPIM is reviewed by the court.

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[7] Max Hill QC, Terrorism Acts in 2016 Report at 3.9.
[8] https://terrorismlegislationreviewer.independent.gov.uk/terrorism-acts-in-2018-report/ at 8.3 to 8.32.
[9] Control Orders in 2011, https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf at 5.14.
[10] https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/113/113.pdf at page 5.
[11] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-01-27/HCWS65/.
[12] Terrorist Offenders (Restriction of Early Release) Act 2020.
[13] https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists.

16. I reported on the resource issue in my Terrorism Acts in 2018 Report, and in particular the use of "New variant TPIMs"[14] which are a means of using the existing law to reduce the administrative and litigation burden on the authorities. In short, where fewer measures are imposed on individuals it may not be necessary to establish in evidence every chapter and verse of an individual's terrorist-related activity before a TPIM can be imposed. At the time of writing my Report, this approach was being used by the authorities to reduce the administrative burden but had yet to be tested in the courts.

17. In these circumstances it is not clear why there is any need to change the law in the manner proposed. Steps to reduce the resource burden of obtaining TPIMs are already in hand. The courts have not found that the current approach is wrong.

18. This only leaves cases in which the new variant TPIM approach would not be available: for example, those in which the severest measures such as relocation were to be used. But where harsher measures are to be imposed, safeguards should be encouraged, not jettisoned. Moreover in these cases the current standard of proof does not make TPIMs impractical, as is shown by the fact that in November 2019 out of 5 TPIMs in force, 3 subjects were relocated[15].

19. In summary, even administrative convenience does not appear to provide a basis for reversing the safeguard of a higher standard of proof.

20. Even though the authorities can be assumed to act rationally when selecting TPIM subjects, it is inevitable from the nature of intelligence that mistakes may be made. The significance of an individual's actions may potentially be misinterpreted; their adherence to a cause overstated; their intentions misunderstood, if only partially.

21. A safeguard that requires the Secretary of State to consider the intelligence presented to her by officials, and decide whether the individual has actually been involved in the terrorist-related activity that is alleged against them, and which allows a court to review that decision in the light of all information presented to it, is not an impediment to safeguarding national security.

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[14] At 8.23 to 8.32.
[15] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-01-27/HCWS65/.