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Controlling civil liberties while confronting terrorism: the case of Terrorism Prevention and Investigation Measures.

Emmanouela Mylonaki and Tim Burton

London South Bank University
mylonake@lsbu.ac.uk

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Summary

The recent governmental announcement that control orders are to be replaced by 'Terrorism Prevention and Investigative Measures' (Statement of Secretary of State for the Home Department, Hansard 'Counter-terrorism Review' Column 308 House of Commons 26 January 2011) received mixed reactions. Although the new proposed regime is evidence of an attempt to replace control orders with a new more flexible scheme, it still provides for the restriction of terrorist suspects' civil liberties in the name of public safety and national security. Moving beyond a discussion of the pros and cons of control orders, the present article aims at addressing the critical issue of the ability of the new scheme to engage holistically with the prevention and prosecution of terrorist activity. The article contributes to the debate on how to *control* particular individuals suspected of terrorism (and terrorism) related activity while confronting terrorism by prosecuting those responsible for it. To this end, it might be of relevant to those interested in the use of executive measures as a counter-terrorism tool.

Protecting the public from individuals who neither can be prosecuted nor deported and are suspected to be involved in terrorism, continues to be a contentious issue. The change from detention without trial under Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) to restrictions imposed by control orders under the Prevention of Terrorism Act 2005 (PTA 2005) followed the House of Lords declaration of incompatibility of Part IV and section 23 of ATCSA 2001 in *A and Others* [2004] UKHL 56, [2005] 2 AC 68. Whilst *A and Others* precipitated the PTA 2005 replacement of detention without trial with control orders, (Walker, 2011, 301,

para 7.09) the problem is that restrictions imposed on individuals can, by their cumulative effect, amount to a detention without trial.

The nature of the terrorist threat is continually evolving. Thus, the issue is not only how to control individuals but who to control and the extent of any control. The process of controlling individuals suspected of terrorist activity began with Part IV of ACTSA 2001 as a response to 9/11 and what was then seen to be a threat posed by foreigners, and was reinforced by the decision in *A and Others* criticizing the provisions in ACTSA 2001 for only targeting foreign aliens. Such criticism led to a new type of executive order with the PTA 2005 (in force since 11 March 2005), rapidly followed by home grown terrorism manifesting itself in the 7 July 2005 London bombings (Walker, 2006, 1139-1140). Under the control orders scheme, the Home Secretary was given authority to impose severe restrictions on the civil liberties of suspected terrorists such as house arrest, restrictions on movement and access to communication without arresting or charging those subjected to control orders. The rigid and strict nature of control orders in conjunction with their judicial scrutiny in the last years has resulted in their recent replacement with Terrorism Prevention and Investigative Measures. It remains to be seen how the Terrorism Prevention and Investigative Measures Bill, which is expected to receive the Royal Assent and become law by the end of December 2011, will provide an appropriate forum for preventing and investigating terrorist activity while continue to *control* the civil liberties of suspected terrorists. The present article is moving beyond the arguments for and against the abolition of control orders (and their replacement system) to a more critical discussion of the issues raised by the Terrorism and Prevention Measures in terms of combining investigative and preventive aims when seeking to control individuals suspected or believed to be engaged in terrorist-related activity. The article reviews the proposed form TPIMs' will take in order to consider whether there is a change in approach before moving to a more critical evaluation of the extent to which the new regime might contribute to effective prosecution of terrorist activity.

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Terrorism Prevention and Investigation Measures Bill: A new name for old restrictions

The Terrorism Prevention and Investigation Measures Bill intends to abolish PTA 2005 control orders and replace them with provisions for the imposition of prevention and investigation measures which compared to control orders are reduced in number and in scope (Terrorism Prevention and Investigation Measures Bill (HL Bill 91) clause 1 and 2 and Schedule 1). Currently there are 25 types of measures available intended to both disrupt and prevent terrorist activity in the interests of public safety (Carlisle, 2010a, paras 19-20 and Annex 2). TPIMs' are presented as a modified system of less intrusive, less onerous, and arguably fewer measures, where the preventative aims of an order are short-term, to last for a maximum of 2-years (Terrorism Prevention and Investigation Measures Bill Clause 5) and where investigation is the imperative (Review, 2011, para 23-24). The key changes are to replace curfews with overnight residence monitored by electronic tag and to reduce the restrictions on association, movement, and communication (Review, 2011 para 26 v, 26 vi, 26 vii; Terrorism Prevention and Investigation Measures Bill (HL Bill 91) Schedule 1) . The TPIMs' proposals of overnight residence, exclusion from particular places, prevention of travel overseas, and reporting to the police (Review, 2011, 42 – 43; Terrorism Prevention and Investigation Measures Bill (Schedule 1) , are not by themselves objectionable, as these are typical bail conditions routinely applied by courts in criminal proceedings (Ferguson, 2011). However, the restrictions are still imposed outside the criminal proceedings and the cumulative effect, once incorporated into an order, is very different to granting a person bail in criminal proceedings.

Moreover, the mere fact that a restriction appears to be justified and proportionate does not guarantee that the overall effect of a package of measures is proportionate. This is better understood by reference to the *Secretary of State for the Home Department v AP* [2010] UKSC 24; [2011] 2 AC 1 where the court, in considering the question of whether the overall effect of curfew and social isolation amounted to deprivation of liberty, found that conditions in a control order, which are proportionate restrictions upon the ECHR Art. 8 rights to private and family life, could be decisive to the overall effect amounting to deprivation of liberty contrary to ECHR Art. 5 (*Secretary of State for the Home Department v AP* [2010] UKSC 24; [2011] 2 AC 1 per Lord Brown at para 4 -12). Proportionality is therefore more than a question of simply making conditions more targeted and precise. One can only conclude at this stage that the removal of those particularly restrictive measures, common to control orders in the past (for example curfews) (Review, 2011, para 27-28), is an important step in the direction of seeking to apply the minimum number of obligations commensurate with risk to individuals believed to be involved in terrorism-related activity.

However, simply reducing the number of restrictions will not automatically imply that control orders will be on the right side of the line between a deprivation of liberty in breach of ECHR Art.5 and restriction upon liberty. As Lord Bingham in *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45, [2008] 1 AC 385 states, there is no 'bright line separating the two' (para 17). The issue of when restrictions upon liberty will amount to deprivation of liberty was explored in *JJ and Others*. Lord Bingham pointed out in *JJ* that ECHR Art. 5 is central to control orders

having been expressly referred to in the PTA 2005 and as evidenced by the clear distinction the Act makes between “derogating” and “non-derogating” orders (para 5-7). As Lord Bingham observed in *JJ* when examining Strasbourg decisions, the deprivation of liberty is not just the ‘classic detention’ of prison custody or house arrest but requires the court to examine the whole impact of the restrictive measures on the individual (para 12-15). It is the question of the impact on the individual that led Lord Bingham in *JJ* and *Others* to find that the 18-hour curfew combined with social exclusion and measures intended to regulate the lives of the controlees amount to a detention in breach of ECHR Art. 5 (para 24). The question of when the ‘dividing line’ is crossed led Lord Brown in *JJ and Others* to question the logic of fixing a maximum period of time for curfews. Nonetheless he proposed as a guide for the Secretary of State a limit of 16-hours compared with 18-hours, beyond which there will be a deprivation of liberty (para 104-105).

JJ and Others indicates that a turning point has been reached (much in the same way as *A and Others* had been the turning point leading to the control order system in the first place) with ECHR Art. 5 fundamental to the issue of what restrictive measures can be applied before derogation is required. Rather the correct approach (as per *JJ and Others*) is to consider the impact of the measures on an individual. Therefore TPIM’s as a proposal to reduce the number of measures and apply measures proportionate to both the risk of terrorism and the individual made subject to the measures is a step in the right direction of reforming the control order system.

Despite keeping the restrictions to the minimum necessary, the TPIM Bill does not resolve the controversy associated with the non-disclosure to the controlee of the actual evidence against him. The case of *R (on the application of the Secretary of State for the Home Department) v BC BB* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542 is instructive on the issue of making orders with ‘light’ obligations as envisaged for TPIM’s, and the effect on convention rights. The control orders against BB and BC were made in the wake of the House of Lords decision in *AF (No 3) (Secretary of State for the Home Department v AF and Anor* [2009] UKHL 28, [2010] 2 AC 269) which ruled that a controlee must know the essence of the case against him for the procedure to be fair and to comply with ECHR Article 6 (per Lord Philips at para 63 to para 69). By revoking their orders and replacing them with new orders, reducing the obligations to a minimum, the Home Secretary sought to argue that the requirements of *AF (No 3)* for sufficient disclosure of the case could be avoided and although the controlees would be unable to contest the allegations against them, the special advocate procedure provided all necessary safeguard (*R (on the application of the Secretary of State for the Home Department) v BC BB* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542, para 2-3). The court’s response in the *BB* case to the Secretary of State argument that a different regime applies in the case of light restrictions and in those cases ECHR Art. 6 could be avoided, was rejected on the following grounds. Since the obligations imposed by control order are intended to restrict those subject to them, the issue of rights is not incidental and it would be contrary to the ruling in *AF (No 3)* and to other cases which accept the application of ECHR Art. 6 (para 22). In *BB*’s case other convention rights (ECHR Art. 8 and 11) are also engaged because the obligations imposed interfered with the controlee’s private lives (para 25-26). Because ECHR Art. 6 applies the hearing must be fair (para 41). The alternative argument for the Secretary of State, that if ECHR Art. 6 applies light obligations will lead to a different standard (para 43-44), was addressed as

follows: in each case it still must be asked whether a controlee knows sufficient of the case against him in order to give effective instructions to his representative (para 45). The implications of the *BB* case for the proposed TPIM's is that a 'control lite' approach is no more justifiable or less objectionable than is the case with control orders. Convention rights are automatically engaged by the nature of the obligations (however 'light') and the question continues to be whether the interests of national security will override the qualified rights to private life, freedom of association etc. Perhaps one of the distinct features of the new regime is the additional emphasis on court oversight. There are currently three requirements in place for the imposition of non-derogating control orders. According to section 2 (1) (a) PTA 2005 there must be reasonable suspicion that an individual has been or is involved in terrorism-related activity. The second requirement under section 2 (1) (b) PTA 2005 is that the Secretary of State must consider the control order is necessary to protect the public from a risk of terrorism. The third requirement under section 1 (3) PTA 2005 is that each obligation under the control order must be necessary for purposes connected with preventing or restricting involvement in terrorism-related activity. It could be argued that together all three requirements provide a robust framework for making a control order and should be a feature of TPIM's. However a strong criticism against the current regime of control orders is the lack of effective court oversight, because it is the Home Secretary and not the court issuing a non-derogating control order (see *N v Secretary of State for the Home Department* [2010] EWCA Civ 869). Despite increasing court involvement by requiring the Home Secretary to obtain judicial approval before imposing a control order, the new TPIM Bill does not increase considerably court oversight of the procedure. However, the fact that court oversight is essential to the legitimacy and regulation of the system still risks compromising the separation of powers doctrine. Court review of an executive order may be perceived to endorse an executive act. Australia has a control orders regime (Anti-Terrorism Act (No 2) 2005 (Cth)) similar to the UK although in Australia the courts are also responsible for making non-derogating orders (Schedule 4). The constitutional challenge to control orders in the Australian case of *Thomas v Mowbray* [2007] HCA 33, 237 ALR 194 raises the subject of authorising judges to manage risk (Meyerson, 2008). According to Meyerson's observation the task of imposing obligations under control orders is different to the normal court business of resolving disputed issues between parties (Myerson, 2008, 216). For Meyerson what moves the task into the domain of political decision-making (ie executive) and potentially compromises judicial impartiality is the issues of public protection and risk. This may be a less suitable task for the judiciary because of the subjective nature of evaluating the risk of a terrorist act (Myerson, 2008, 217-225). We have seen that in the UK the court defers to the Home Secretary on the issue of the necessary measures as the best placed person to consider this. It is recognised that courts are in a difficult position of having to uphold the rule of law and Convention Rights whilst respecting the expertise of the executive on issues of national security, leading towards a bias towards national security (Kavanagh, 2009, 301). This may appear to be an argument for continued separation of functions and therefore a counter-argument against the increased role of the courts. Indeed Meyerson in the case of Australia concludes that risk assessment is outside the capacity of the courts (Myerson, 2008, 229). On the other hand Walker dismisses the idea that judges cannot deal with anticipatory risk on the grounds that they routinely make risk assessments in deciding bail applications and sentencing decisions (Walker, 2007, 1409 and 1420). Therefore, it could be argued that whilst respecting the constitutional independence and competency of the executive,

provision should be made for on-going review of a case by the court at all stages of the police investigation. The purpose of review would be not only to address the continuing necessity for an order and its obligations but to make sure that the system operates transparently and objectively.

Confronting Terrorism Through Prosecution

The TPIMs indicates that the new scheme is characteristic of counter-terrorism measures centred on prevention and not investigation and prosecution (Borgers and van Sliedregt, 2009, 182). Whether cases which merit continued investigation and meet the test for the imposition of conditions will ever result in criminal charges being laid is doubtful. The track record for control orders does not support the idea of purely an interim measure pending prosecution. Of the 48 control cases from March 2005 to December 2010, none resulted in prosecution for terrorism offences (apart from prosecution for breaches of a control order) (Carlile, 2010a, para 15 and Annex 1). The fact that orders are made only in a limited number of cases where there is insufficient evidence to prosecute challenges the idea that the new system will facilitate prosecution. The argument the replacement of control orders will facilitate prosecution only bears scrutiny in terms of seeing the current measures imposed under control orders act as a disincentive to investigate and prosecute cases (Macdonald, 2011, para 11). The Joint Select Committee on Human Rights has emphasised that the overriding priority should be the prosecution of terrorist suspects on the grounds that prosecution through the criminal courts serves both security and liberty by convicting terrorists and at same time ensuring due process before conviction (Joint Select Committee, 2011, para 1.10). The Joint Select Committee firmly rejects the argument that a replacement system, which only seeks to reduce the restrictive measures and continues the current control order regime, is justifiable because of the difficulty with prosecuting terrorism cases (para 1.11) and instead in its Report argues for amendments to ensure investigation and prosecution of cases. Having mentioned the issue of the dividing line between deprivation of and restriction upon liberty and the aim of TPIM's to fall on the right side of the line the question, as raised in the Joint Select Committee Report, is what can be done to bring TPIM's into the criminal justice process (para 1.16-1.23).

There is a potential solution which can be suggested. If the Government is now prepared to relax obligations to the extent that these obligations mirror bail conditions then an alternative is for those investigative TPIM's to become application by the prosecution before a judge similar to pre-charge detention applications for warrants of further detention (Terrorism Act 2000 Sched 8 para 29-37). For example Schedule 8 Paragraph 32 (1) of the Terrorism Act 2000 (TA 2000) provides a

“judicial authority may issue a warrant of further detention only if satisfied a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary and (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.”

The mechanism for judicial scrutiny could likewise provide that the continuation of an order must be necessary with the court also being satisfied that investigation is being conducted both diligently and expeditiously. The aim being that once the case is

certified fit for investigation the court applies pre-charge conditions which are then monitored throughout the investigation. Indeed the Joint Select Committee recommended judicial supervision of the ongoing criminal investigation (para 1.27) and also recommended an additional precondition whereby the Director of Public Prosecutions should be satisfied that a criminal investigation is justified and that the imposition of measures will not impede the investigation (para 1.24).

Walker, drawing an analogy with pre-charge detention, suggests that the imposition of a time limit to the duration of control orders which would turn a control order into a form of pre-charge detention is appropriate (Walker, 2007, 1458). This could uphold the investigative imperative of TPIM's whilst continuing to apply the preventative purpose. The Government objection that judge-made orders can take more time and resources which may not be suitable for urgent cases (Review, 2011, para 21d) can be met by the argument that a) judges are closely involved in making decisions about pre-charge detention in cases where the risks necessitate detention and b) the proposed solution applies to those cases where the risk is less than detention and where the risk is not so great as to apply emergency measures.

Something more than demonstrating that inquiry is progressing diligently and expeditiously should be required. Otherwise there is a risk that investigation is not actively progressed towards prosecution replacing an order. The arrests and detention between the 8 April 2009 to 22 April 2009 under Operation Pathway reviewed by Lord Carlile shows how in practice judicial scrutiny is applied to the issue of pre-charge detention and the application for warrants of further detention under Schedule 8 of the TA 2000 (Carlile, 2010b). On application to the High Court for further extended warrant Mr Justice Blake affirmed that an evidential test should be applied to extended detention and that there is a "real prospect of evidence" (Carlile, 2010b, para 80-85). Whilst this applies to pre-charge detention, the relevant principle is that unless a point is reached where progress can be shown, it is not enough to assert that the inquiry is being progressed diligently and expeditiously. The relevance is that the test of due diligence and expedition must be subjected to a meaningful review. The longer charges are not forthcoming then the more the progress of the investigation should be scrutinised. To have no mechanism for further review within the 2-year term of TPIM's risks returning to the control order system. With the emphasis on investigative purpose TPIM's do not envisage purely preventative orders. To reimpose orders on purely preventative grounds is against the commitment to prosecute cases.

Conclusion

The rationale of protecting the public from risk and anticipatory risk of terrorism may explain why obligations applied to date have been onerous and intrusive and why it appears so difficult to entirely abolish the system of control orders. The government approach to risk mitigation now is to consider not only necessity but whether there are obligations which are more appropriate in individual cases. The question is whether TPIM's will rebalance civil liberties and national security as asserted by the Home Secretary Theresa May in answering criticism that TPIM's are rebranded control orders (Hansard, H of C, 26 Jan 2011, Column 326). Moreover, the question is the extent to which the new proposals continue to restrict rights of privacy, movement, expression, and association, and whether this is balanced. An assessment of the re-

balancing exercise is at this stage crude because the balance of civil liberties cannot be accurately gauged against national security. Looking to the future we do not know what the risks to national security will be and in each case the identified risks will depend upon the individual and the facts of the case. Assessment is therefore limited to comparing the current proposals against the measures available for control orders and whether this broadly tilts the balance back in favour of civil liberties. The argument that TPIM's are control orders by another name overlooks that they try to redress the balance by removing some of the more objectionable measures such as 16-hour curfews and forced relocation. In mirroring the court approach to proportionality in terms of the minimum measures commensurate to risk, this is a welcome change of approach. TPIM's are at least an attempt to find a more proportional solution. However, the difficult question remains: how to legitimately control individuals believed to be engaged in terrorist activity for whom there is insufficient evidence to prosecute. It is clear it will be unsatisfactory to continue as before without any mechanism to actively review the progress of an investigation. The goal of reform must be to break the deadlock of orders made on a lack of evidence to support criminal charges whose justification for continuing with them relies on continued lack of evidence and ongoing risk. Realistically it is only through increased court oversight and review mechanisms to promote investigation of a case and decision to prosecute made in time that the deadlock could be broken.

Bibliography

Matthias Borgers and Elies van Sliedregt (2009) 'The Meaning Of The Precautionary Principle For The Assessment Of Criminal Measures In The Fight Against Terrorism' 2 (2) *Erasmus Law Review* 171.

Lord Carlile (2010a) *Sixth Report of the Independent Reviewer Pursuant to Section 14 (3) of the Prevention of Terrorism Act 2005* The Stationery Office.

Lord Carlile (2010b) *Operation Pathway Report Following Review* The Stationery Office.

Corinna Ferguson (2011) 'Comment: Rebranding Injustice', *LS Gazette*, 3 Feb 10 (2) 2011.

Joint Select Committee on Human Rights, Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill 16th Report of 2010/11 (HL 180/HL 1432 July 19 2011)

Aileen Kavanagh, 'Judging the Judges Under the Human Rights Act: Deference, Disillusionment And The War on Terror' [2009] *Public Law* 287.

Lord MacDonald (2011) *Review of Counter-Terrorism and Security Powers* Cm 8003 The Stationery Office.

D Meyerson (2008) 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' 36 (2) *Federal Law Review* 209.

Review of Counter-Terrorism and Security Powers Review Findings and Recommendations Cm 8004 (2011) The Stationery Office.

C Walker (2006) 'Clamping Down on Terrorism in the United Kingdom' 4(5) *Journal of International Criminal Justice* 1137.

C Walker (2007) 'Keeping Control of Terrorists Without Losing Control Of Constitutionalism', 59 *Stanford Law Review* 1395.

C Walker, *Terrorism and the Law* (Oxford University Press 2011).