

COUNTER-TERRORISM AND BORDER SECURITY BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Counter-Terrorism and Border Security Bill. This memorandum has been prepared by the Home Office. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon Sajid Javid MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The Bill has two substantive Parts:
 - Part 1 amends certain terrorism offences to update them for the digital age and to reflect contemporary patterns of radicalisation and to close gaps in their scope. It also strengthens the sentencing framework for terrorism-related offences and the power for managing terrorist offenders following their release from custody, including by increasing the maximum penalty for certain offences, to ensure that the punishment properly reflects the crime and to better prevent re-offending. This Part will also strengthen the powers of the police to prevent terrorism and investigate terrorist offences.
 - Part 2 confers the power on examining officers (that is constables and designated immigration and customs officers) to stop, question, search and detain persons at a port, airport or the border area for the purpose of determining whether they are, or have been, involved in hostile state activity.
3. The Government considers that clauses of and Schedules to this Bill which are not mentioned in this memorandum do not give rise to any human rights issues

Part 1: Counter-terrorism

Expressions of support for a proscribed organisation

4. Groups are proscribed by Parliament as terrorist organisations if they are “concerned in terrorism” within the meaning given by section 3(5) of the Terrorism Act 2000 (“the 2000 Act”). Section 12(1) of the 2000 Act criminalises a person who “invites” others to support a proscribed

organisation. The offence does not criminalise mere expressions of support for, or personal approval of, such an organisation where there is no accompanying invitation to others to support the group¹.

5. Clause 1 of the Bill amends section 12 of the 2000 Act to create a new offence of expressing an opinion or belief that is supportive of a proscribed organisation, where the person expressing the opinion or belief is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.
6. The concept of recklessness in this context bears the interpretation given to it by the Court in *R v G and another*²: only cases where the defendant has some subjective foresight that his conduct will result in the proscribed outcome and nonetheless engages in the conduct in circumstances where a reasonable person would not, are criminalised. This matches the position under section 1(2)(b)(ii) of the Terrorism Act 2006 (“the 2006 Act”) (encouragement of terrorism) which provides that a person commits an offence if, at the time of publishing an encouraging statement that falls within section 1(1), he is reckless (within the *R v G and another* meaning) as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate terrorist acts.
7. A key element of the “concerned in terrorism” definition is that the organisation is involved in, or threatens, actions such as serious violence for a “political, religious, racial or ideological cause”, as defined in section 1 of the 2000 Act. Paragraphs 8 to 19 below discuss the potential Convention issues in relation to this change in legislation.

Article 8

8. A person may be restricted by the new offence in the exercise of his Article 8 rights, particularly if the person to whom the expression would be made is a family member whom the person voicing the opinion wishes to persuade to hold that opinion too, and particularly where the opinion would be expressed in the privacy of the person’s own home.

Article 9

9. A person may also be restricted in the exercise of his Article 9 rights to manifest his religion or belief, in worship, teaching, practice and observance.

Article 10

10. A person may be restricted in the exercise of his Article 10 right to receive and impart information and ideas concerning his religion or political/ideological beliefs.

¹ In *Choudhary* ([2016] EWCA crim 1436), paragraph 42, the Court opined that “it is difficult to see how an invitation could be inadvertent.”

² <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/g-1.htm>

11. The Government considers that these intrusions into ECHR rights are justified as necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others (such as the Article 2 right to life and property rights protected by Article 1 of Protocol 1).
12. Proscribed groups are those Parliament has decided are concerned in activity, or the threat of activity, which involves seriously harmful outcomes, including serious injury, death and property damage. There is a clear public interest in stymieing support for terrorist organisations since the more support they have, the stronger their capacity to engage in terrorism, with the attendant risks listed above³.
13. The public interest in choking off support for terrorist groups is all the more pronounced now, given modern-day terrorist methodologies adopted by members or supporters of such groups (for example, easily perpetrated low-tech attacks such as the Westminster Bridge attack) and the propensity for people to graduate swiftly, through online radicalisation, from a position of posing little threat to committing terrorist atrocities in the name of such groups.
14. The objective of this new offence – to restrict the degree to which proscribed terrorist groups garner more support – is sufficiently important to justify the limitation of the fundamental rights under Articles 8, 9 and 10.
15. The new offence is rationally connected to the objective since it criminalises those who, whilst not deliberately inviting support for a terrorist group, express supportive opinions or beliefs despite having perceived there to be a risk that others will be encouraged to support a proscribed organisation.
16. Criminalisation of such reckless expressions is no more than necessary to accomplish the objective.
17. Consequently, a fair balance has been struck between the rights of the individual and the interests of the community. The gravity of the risk posed by terrorist groups to the public at large is such that it is proper to curtail the Article 8, 9 and 10 rights of persons whose expression of opinions which are supportive of a terrorist group are made reckless as to the consequence of others being encouraged to provide support to the group.
18. As a general point, the European Court of Human Rights (“ECtHR”) has previously concluded that legal restrictions designed to deny representatives of known terrorist organisations and their political supporters the possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisations and

³ It is worth noting that in *Choudhary*, the Court averred: “*The fact that a proscribed organisation has an increased number of supporters is in itself a benefit and boost to that organisation, whether or not the support of all is manifested in practical or concrete ways.*”

conveying the impression of their legitimacy are not incompatible with the right to free expression. See, for example, *Leroy v France*⁴, in which the Court concluded that the conviction of a cartoonist for publishing a drawing of the Twin Towers attack in a Basque weekly with the slogan “We have all dreamt of it... Hamas did it” did not contravene Article 10. In publishing the drawing, the cartoonist had expressed his moral support for and solidarity with those whom he presumed to be the perpetrators of the attacks, demonstrated approval of the violence and undermined the dignity of the victims. Provocation did not necessarily need to cause a reaction to constitute an offence.

19. Whilst this case concerns the publication of material in the press which had the potential to encourage others to support a terrorist organisation, the principle translates into the context of the new offence which is not expressly limited to the output of journalists. If a person, whether or not a journalist, says something which could encourage someone to support a proscribed terrorist organisation and is reckless to that outcome even if they did not intend it, precisely the same sorts of harms that the ECtHR identified in *Leroy* as a consequence of the reckless publication of the cartoon could occur.

Publication of images

20. Clause 2 amends section 13 of the 2000 Act to introduce an offence (contained in new section 13(1A) of the 2000 Act) which criminalises the display online of an image depicting a flag or emblem which is situated in a non-public place – for example, if a photograph is posted on a publicly accessible internet forum of a Daesh flag hanging on the wall of a bedroom in a private home.

Article 8

21. Depending on the circumstances of the case, it might be that the offence engages rights under Article 8 – for example, where a person wished to publish a picture of himself in front of a Daesh flag in a WhatsApp group comprising his family members with a view to inculcating in them his beliefs.

Article 9

22. A person wishing to publish an image of items of clothing associated or any other article associated with a terrorist group, in exercise of his or her rights to manifest his religion or belief will be further restricted from doing so by this new offence.

⁴ *Leroy v. France*, 36109/03, §§ 36-48, 2 October 2008. The case is referenced in the following ECtHR publication: https://www.echr.coe.int/Documents/COURTalks_Terr_Talk_ENG.PDF

Article 10

23. Similarly, a person wishing to publish an image of items of clothing associated or any other article associated with a terrorist group, in exercise of his rights to impart information concerning those beliefs, will be further restricted from doing so by this new offence.
24. The Government considers that these intrusions can be justified as necessary in the interests of the legitimate ends referred to in paragraphs 11 to 13. The reasoning is the same: those legitimate ends are protected by measures which reduce the prospects of terrorist groups gaining more support.
25. The ECHR intrusions that are involved with this offence are also considered proportionate. The objective of the offence is sufficiently important to justify the intrusions; the offence is rationally connected to that objective because it is designed to deter people from engaging in displays which may encourage others to support a terrorist group; it is no more than necessary to accomplish the objective; and strikes a fair balance between the rights of the individual and those of the community for the same reasons as given for the new section 12(1A) offence provided for in clause 1.

Obtaining or viewing material over the internet

26. Under section 58(1)(a) of the 2000 Act a person commits an offence if he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism.
27. Clause 3 of the Bill provides that a person collects or makes a record for the purposes of section 58(1)(a) where the person does so by means of the internet (whether by downloading the record or otherwise). This is designed to ensure, for example, that a person who downloads a pdf copy of a bomb making manual and stores it on his computer so he can view it as frequently as he wishes in the future is caught.
28. Clause 3 further provides that where a person downloads terrorist material, they only commit the offence if they know, or have reason to believe, that the record contains terrorist material. Where a person collects or makes a record of terrorist material other than by means of the internet (for example, by compiling a hard copy notebook of bomb-making methods), the person is immediately and strictly liable under the offence, the justification for this being that the conduct is very unlikely to be inadvertent. In contrast, it is comparatively easy inadvertently to click on a link and download material on the internet without knowing its content in advance; a *mens rea* condition has therefore been included for cases of record-making/collection by means of the internet.
29. Clause 3 also amends the section 58 offence to ensure that if a person views terrorist material on three or more different occasions, even where no record

of the material is made on his computer (for example, by “streaming” it in real time), the person commits an offence. The safeguard that liability does not arise until the third occasion of viewing is included in acknowledgement of the facts that: (a) it is not difficult to click on a link and view material without first being aware of its content; and (b) there is some degree of subjectivity involved in deciding what counts as “information likely to be useful to a person committing or preparing an act of terrorism”. There should be some degree of latitude for a person legitimately to explore political, religious or ideological matters, and the criminal law should acknowledge that, without the person actively seeking it, this may lead him to online material that crosses the line into that which is likely to be useful to a terrorist. However, if the person views such material on three or more occasions (and the material need not be the same on each occasion – see new section 58(1B)), it is considered reasonable to infer that the person is, for nefarious reasons, deliberately viewing material useful to a terrorist, so the offence is engaged at that point (with the possibility of the reasonable excuse defence in section 58(3) being raised). This defence is available, for example, to people who are viewing terrorist material for legitimate reasons, for example, academics studying the phenomenon of extremism and terrorism, and those who are engaged in counter-terrorism work.

Articles 8 and 9

30. A person’s freedom, in his own home, to use the internet to explore his beliefs and further his understanding of political, religious and ideological matters is curtailed by the amendments made by clause 3, particularly by the criminalisation of the viewing of material.
31. The justifications for the necessity for these intrusions are the same as for amendments made by clauses 1 and 2: the need to protect national security, public safety, prevent crime and disorder and protect other persons’ rights and freedoms. A person who is considering involving himself in the commission or preparation of terrorist acts is rightly criminalised if he takes active and deliberate steps to collect, or make records of, information which would be useful to him, or to another, in carrying out terrorist acts, and the criminal law should proscribe those collecting/record-making activities regardless of where the information is obtained from.
32. The internet is the modern-day source of much of this material and it is therefore proper to criminalise the collection of material from, or making of records by means of, the internet. Likewise, the damage that can flow from repeatedly viewing material useful to a terrorist – whether or not a permanent record is made or collected – warrants the criminalisation of the act of viewing.
33. The intrusions in Article 8 and 9 rights that clause 3 involves are proportionate. The objective of the offence – to stop people taking active steps towards engaging in terrorism - is sufficiently important to justify the intrusions; the offence is rationally connected to that objective since it criminalises those active steps when they involve use of the internet, which

is the current key source of free and easily accessible information likely to be of use to a terrorist; it is no more than necessary to accomplish the objective (as reflected in the “three or more occasions” provision in connection with the new viewing offence, and the *mens rea* element for provision concerning the downloading of material); and strikes a fair balance between the rights of the individual and those of the community for the reasons given in relation to clauses 1 and 2.

Encouragement of terrorism and dissemination of terrorist publications

34. The offences in sections 1 (encouragement of terrorism) and 2 (dissemination of terrorist publications) of the 2006 Act currently require that the person intended to be encouraged by the statement or terrorist publication is likely to understand that he is being encouraged to commit, prepare or instigate an act of terrorism. This means that the offence will not necessarily catch a person who encourages a child or a vulnerable adult who may, depending on the circumstances, be objectively unlikely to understand that he is being encouraged. The person who encourages or disseminates the publication could therefore evade liability, even though he was seeking to groom or indoctrinate the child or vulnerable adult into terrorism. Clause 4 closes this gap in the two offences by making clear that the offences are committed in circumstances where a hypothetical reasonable person would be encouraged to commit terrorism.

Articles 8, 9, and 10

35. These amendments increase the Articles 8, 9 and 10 interferences that are a feature of the section 1 and 2 offences, by expanding the scope of the criminal law to catch circumstances which had previously not been caught. However, the plugging of this lacuna is consistent with the original intention that the offences catch conduct even where no-one happened to be encouraged. The justification for the ECHR intrusions remains the same as for when the offences were introduced in 2006 but, for the reasons explained earlier, the arguments are now even stronger: that the encouragement of terrorism, whether through a statement or the dissemination of a terrorist publication, can rapidly lead to such serious harms, including to others' ECHR rights, that it is necessary to curtail further a person's Article 8, 9 and 10 rights in this context.

36. The additional intrusions are proportionate because the objective of the provisions – to ensure children and vulnerable adults are not successfully encouraged to engage in terrorism - is sufficiently important to justify the intrusions; the amendments are rationally connected to that objective since they correct a lacuna whose existence currently undermines the objective; the ECHR intrusions are no more than necessary to accomplish the objective (they ensure that the original intention behind the offences is given proper effect and do not go further by, for example, criminalising a person who is subjectively unaware of the risk that what he says will encourage others); and provisions strike a fair balance between the rights of the individual and those of the community for the reasons given above.

Clauses 1 to 4: “In accordance with the law”

37. In the case of each of clauses 1 to 4, the changes to the law will, if enacted, be adequately accessible to the public as they will be clearly set out on the face of primary legislation.
38. The Government consider that the offences’ operation will be sufficiently foreseeable that people potentially affected by them will be able to regulate their conduct accordingly. The statutory definition of terrorism (in section 1 of the 2000 Act) is readily available to the public and it is likely that it will be clear in the majority of cases to the public whether what they wish to say or do is objectively likely to encourage others to support a proscribed organisation or prompt others to consider the person to be a supporter of a proscribed organisation. Likewise, it is likely to be clear in many cases that material online is or is not “likely to be useful” to a prospective terrorist. The changes made by the Bill to these offences do not introduce any greater degree of uncertainty to that which already exists and the courts have frequently entertained prosecutions for these offences in their current form and juries have been prepared to convict people for them.
39. Further, the usual safeguards apply with respect to the thresholds that have to be satisfied in order for the Crown Prosecution Service to bring prosecutions for these offences. Moreover, in England and Wales and Northern Ireland, these offences may only be brought with the consent of the Director of Public Prosecutions (“DPP”) (and, where applicable, the consent of the DPP Northern Ireland); and only with Attorney General (and, where applicable, Advocate General for Northern Ireland) consent where conduct forming part of the offence takes place outside the UK (see section 117 of the 2000 Act and section 19 of the 2006 Act). In Scotland, all prosecutions are brought by the Lord Advocate or on his behalf, where to do so is in the public interest. All of this ensures that the offences, as amended and supplemented by the Bill, are adequately safeguarded against arbitrary use and are therefore sufficiently prescribed to be in accordance with the law.

Extra-territorial jurisdiction

40. Clause 5 amends section 17 of the 2006 Act, which provides that for the offences listed therein, the UK Courts have universal jurisdiction: that is, a person, whether a British citizen or not and whether or not the offending had a link to the UK, may be prosecuted in the UK for conduct that took place outside the UK which, had it taken place here, would have been unlawful under one of the listed offences. There is no requirement under section 17 that the conduct to be prosecuted in the UK under the universal jurisdiction measure must also be prosecutable under an offence in the law of the jurisdiction where the conduct took place.
41. The safeguards in section 19 of the 2006 Act apply to any prosecution under section 17 (and will apply to section 17 as amended by clause 5): namely, that, in addition to normal Crown Prosecution Service thresholds (including

that the prosecution must be in the public interest), a prosecution may only be brought for an offence under Part 1 of the 2006 Act with the consents described in paragraph 39 above.

42. Clause 5 adds to the list of universal jurisdiction offences the section 2 of the 2006 Act offence of disseminating terrorist publications; the section 13 of the 2000 Act offence of wearing uniforms etc associated with proscribed organisations; and the offence under section 4 of the Explosive Substances Act 1883 (making or possessing explosives under suspicious circumstances) so far as committed for the purposes of an act of terrorism. Clause 5 also expands the universal jurisdiction currently applicable to section 1 of the 2006 Act (encouragement of terrorism), by removing the limitation that the section 1 offence only has universal jurisdiction to the extent that "Convention" offences are encouraged (that is, those offences listed in Schedule 1 to the 2006 Act, which give effect to the criminal offence obligations in the conventions listed in the Annex to the 2005 Council of Europe Convention on the Prevention and Suppression of Terrorism (the "2005 Convention")).

Articles 8, 9, and 10

43. The intrusions into Article 8, 9 and 10 rights that are a feature of the section 13 of the 2000 Act and sections 1 and 2 of the 2006 Act offences have been set out above, as has the justification for the increased intrusions brought about by clauses 1, 2 and 4. The amendments made by clause 5, however, broaden the circumstances in which people currently subject to those offences might find themselves criminally liable, and therefore clause 5 increases the levels of Article 8, 9 and 10 intrusions present in those offences. Further, clause 5 increases the pool of people who might be liable under UK law for the new offences, bringing within their scope any people who are located outside the UK at the time of the offending, whose ECHR rights will be interfered with by the existence of UK criminal laws which seek to dissuade their conduct. Clause 5 also criminalises conduct which might be lawful in the jurisdiction where it was committed.
44. The necessity and proportionality justifications for these ECHR interferences are the same as those set out in respect of clauses 1 to 4. In particular, the severity of the current terrorism threat to the UK and its residents, and the significant focus of that threat on individuals involved in conflicts or otherwise located with terrorist groups overseas, warrants an extension of the UK courts' jurisdiction over these offences, in order to dissuade harmful conduct and bring the perpetrators of these offences to justice even if their activities took place on foreign soil. This is particularly necessary in light of the phenomenon of people (including both British citizens and - especially given the UK's deprivation policy - other nationalities, who may or may not be British residents but who nonetheless pose a threat to the UK) travelling to theatres of war to join terrorist organisations in the fighting or to support propaganda, recruitment, logistics or external attack planning efforts. Such people may pose a very real threat to the UK while they are overseas through their engagement in activity of

the kind covered by clause 5, even if they have not necessarily had any previous connection to the UK, and they can similarly (and simultaneously) pose a threat to the UK's international partners. Law enforcement partners confirm that such individuals have been particularly active online whilst abroad, reaching back to radicalise individuals in the UK and elsewhere in the world. This has included promoting their affiliation to proscribed organisations such as Daesh and encouraging people to support or travel to join those organisations, through methods including the display of emblems or flags of the organisation online. Their activities have also included encouraging UK nationals and others to commit terrorist attacks in their home countries; and distributing extremist propaganda, training material and other terrorist publications through online channels. In addition to the harm that they are likely to have caused while overseas, if they return (or travel for the first time) to the UK, such individuals are likely to pose a significant threat to the public in this country as a result of their exposure to and engagement in terrorist activity while overseas (including of the kind covered by clause 5). The high level of threat that these individuals pose, and the significant harm that arises from the terrorist activities covered by clause 5, mean that the necessity and proportionality in ECHR terms of clause 5 can be made out.

45. In terms of the foreseeability requirement, whose satisfaction would ensure clause 5 is "in accordance with the law", the Government contends that there is adequate foreseeability: all of the extensions of jurisdiction to be effected by clause 5 are extrapolations of existing universal jurisdiction which has subsisted for a number of years, in respect of terrorism offences for which there can be little scope for surprise that expansive jurisdiction is taken. For example, section 17 of the 2006 Act, in conjunction with section 1, provides universal jurisdiction for the encouragement of offences listed in the 2005 Convention; clause 5 of the Bill extends that to encouragement of all terrorism offences, not just those listed in the Convention.
46. Clause 5 also extends universal jurisdiction to section 2 of the 2006 Act, which prohibits the dissemination of terrorist publications, that is, those which may encourage others to commit terrorism or which contain material useful to a terrorist. The extension of universal jurisdiction to this offence is the logical extension of the principle sanctioned by the Council of Europe in requiring universal jurisdiction for the encouragement of 2005 Convention offences.
47. Similarly, in providing for universal jurisdiction for the offence of displaying articles in a manner that arouses a reasonable suspicion of membership or support of a proscribed terrorist organisation (section 13 of the 2000 Act), clause 5 is in keeping with the principle enshrined in the 2005 Convention that states should be able to prosecute conduct which has the effect of encouraging terrorism regardless of where that conduct takes place and regardless of the nationality of the perpetrator.
48. Finally, the 2005 Convention offences include sections 2, 3 and 5 of the Explosive Substances Act 1883 ("the 1883 Act") which, respectively,

criminalise the causing of an explosion likely to endanger life; the preparation of explosions; and ancillary offences (for example, aiding and abetting). Clause 5 of the Bill extends universal jurisdiction to section 4 of the 1883 Act (making or possessing explosives under suspicious circumstances), where that conduct is committed for the purpose of an act of terrorism. Section 4 of the 1883 Act is cognate to the offences for which the Convention obliges states to take jurisdiction. It seems very unlikely, given this context, that a non-UK defendant could reasonably argue that the offences for which clause 5 confers universal jurisdiction do not meet the foreseeability requirement for ECHR compliance.

49. Furthermore, the safeguards referred to above, in the normal Crown Prosecution Service thresholds and additionally in section 19 of the 2006 Act concerning DPP/DPP for Northern Ireland consent, and additionally Attorney General/Advocate General for Northern Ireland permission to give that consent, apply to the offences to which universal jurisdiction is being applied or extended by the Bill. This is a powerful safeguard against arbitrary or disproportionate use of the offences, or usage that is not in the public interest, and ensures that clause 5 is in accordance with the law. In the course of any prosecution, the judge would be responsible for ensuring that the normal procedural safeguards apply in relation to providing a fair trial, and the admissibility of evidence.

Amendments to notification requirements imposed by Part 4 of the Counter-Terrorism Act 2008; and power to enter and search home address of a person subject to the notification requirements

50. Part 4 of the Counter-Terrorism Act 2008 (“the 2008 Act”) provides that those convicted of terrorism offences or offences determined to have a terrorist connection must notify the police of specified information and re-notify at specified intervals. Depending on the offence for which the conviction was obtained and the sentence handed down, the duration of the period during which the person must comply with the notification obligations can be 30 years, 15 years or 10 years.
51. Clause 11 of the Bill adds to the information to be notified and provides for notification and re-notification in additional circumstances. An equivalent regime exists under the Sexual Offences Act 2003 (“SOA 2003”). Clause 11 replicates with minor modifications certain requirements of the SOA 2003 scheme (details of financial information and identity documents, notification of foreign travel of any duration, and more frequent re-notification for those with no sole or main residence) and imposes additional requirements (to notify information about email addresses, telephone numbers and vehicles).
52. Clause 12 provides a power of entry under warrant for the police to enter and search the home of a person subject to the Part 4 regime, to assess the risk posed by the person. This mirrors an existing power of entry in the SOA 2003 regime.

Article 8

53. The extension of the regime by the Bill will similarly engage Article 8 rights and will increase the interference. This is particularly so for those with no sole or main address in the UK, who will be particularly affected by the obligation to re-notify information on a weekly basis. More regular re-notification is necessary in order to ensure that the police have sufficient up to date information to enable monitoring of the risks posed by this group of offenders. Nevertheless, the requirements are not unduly onerous and apply only to those convicted of serious terrorism-related offences and sentenced to terms of imprisonment of over 12 months. They do not prevent any particular activity – they just require notification of certain details, and they will be in accordance with the law.
54. In R (on the application of Irfan) v Secretary of State for the Home Department⁵, the Court of Appeal held that the existing Part 4 measures were proportionate. In particular, the Court observed that terrorism offences fell into a special category of seriousness. Although the amendments in clauses 11 and 12 create a greater Article 8 interference, they may be similarly justified as necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights and freedoms of others. Managing the risks posed by convicted terrorists is intended to protect against the damage caused by acts of terrorism. The majority of the requirements already apply to those subject to the SOA 2003 regime⁶ which have been found compatible with Article 8. Terrorism offences fall into a special category of seriousness such that a precautionary approach is appropriate.
55. Overall, considering the significant damage that can be done by a terrorist act, imposing enhanced notification requirements on those convicted of terrorist activity is proportionate and each requirement can clearly be linked to managing the risks associated with terrorist activity. For example, bank details can help in the detection of further crime and notification of foreign travel can help prevent a person travelling abroad to prevent them receiving further terrorist-related training.
56. Although the amended regime will in some circumstances apply to those who committed the trigger offence prior to the coming into force of the new provisions, the application of the regime is not a penalty but is preventative and so Article 7 is not engaged.⁷

⁵ [\[2012\] EWCA Civ 1471](#)

⁶ In [F v Secretary of State for the Home Department \[2010\] 1 W.L.R. 76](#) the original SOA 2003 notification requirements were held to unjustifiably interfere with Article 8 rights, but it was their indefinite application, rather than their substance, which was problematic. No successful challenge has been brought to the amendments subsequently made to the SOA 2003 by means of the Criminal Justice and Immigration Act 2008, the Sexual Offences Act 2003 (Notification Requirements) (England and Wales) Regulations 2012/1876 and the Sexual Offences Act 2003 (Notification Requirements) Regulations (Northern Ireland) 2014/185 which are reflected in the current Bill.

⁷ See *Ibbotson v UK* (40146/98), [1999] Crim LR 153, (1998) 27 EHRR CD332, [1998] ECHR 119 and *M v Chief Constable of Hampshire* [2012] EWHC 4034 (Admin), in which the ECHR

Retention of biometric data for counter-terrorism purposes

57. The Protection of Freedoms Act 2012 (“POFA”) introduced strict controls on the circumstances in which the police can retain the fingerprints and DNA samples and profiles of people who have not been convicted, and the periods for which they can do so.
58. Clause 17 of, and Schedule 2 to, the Bill make amendments to the provisions introduced by POFA, including an amendment concerning “national security determinations” (“NSDs”).
59. In counter-terrorism cases a Chief Constable can make a NSD authorising the retention, for up to two years, of biometric data that would otherwise be required to be destroyed, subject to approval by the Commissioner for the Retention and Use of Biometric Material (“the Biometric Commissioner”). A NSD may only be made if the responsible officer determines that it is necessary for the material to be retained for the purposes of national security. NSDs are renewable.

Article 8

60. The retention of fingerprints, DNA samples and profiles engages Article 8, and the extension by the Bill of the retention period from a maximum of two years to a maximum of five years increases the Article 8 intrusion. These additional intrusions are necessary because since the NSD provisions were originally enacted (by the Crime and Security Act 2010), experience has shown, in the views of operational partners who run the NSD review system, that review at the two year mark is too early because risk-assessments based on the intelligence picture concerning a person are generally unlikely to shift substantively over a two year period. Terrorists can become more or less active over time, and can disengage and re-engage for a variety of reasons, without necessarily changing their underlying views or their long-term willingness to become involved in terrorism, and therefore the threat they can potentially pose to the public. Biometrics can provide vital intelligence to indicate that the person has re-engaged in terrorist activity and to identify them in a future terrorism investigation, or can support watch-listing and identification at the border of returning foreign fighters who may have travelled from the UK more than two years previously. The increased retention period is intended to ensure that the NSD retention power reflects patterns of radicalisation and that biometric data is available to support terrorism investigations and to identify suspects who pose a threat to the public, without placing a disproportionate burden on the police and MI5 to keep the data under more frequent review than is needed.
61. In his 2017 Annual Report, the Biometric Commissioner expresses support for the principle of extending the maximum period of a NSD:

and the Court concluded that the SOA regime, on which the Part 4 CTA 2008 regime is modelled, found no Article 7 breaches because the measures did not amount to a “penalty”.

“NSDs are being reviewed at two yearly intervals as Parliament intended. For some NSD cases, my judgment is that the evidence/intelligence against the relevant individuals is such that they could be granted for longer than two years. The Government may wish to consider this issue as part of the CT legislation review ordered by the Prime Minister”.

62. Therefore, the additional Article 8 intrusion that accompanies the increase in maximum NSD retention period is in accordance with the law and is a necessary and proportionate response to the need to protect national security interests, ensure public safety, prevent disorder and crime and uphold the rights and freedoms of others.

Traffic regulation

63. The Road Traffic Regulation Act 1984 (the “1984 Act”) provides for anti-terrorism traffic regulation orders (“ATTROs”), under which vehicle or pedestrian traffic can be restricted for counter-terrorism reasons. One of the amendments made to the ATTRO power by the Bill may introduce an Article 1, Protocol 1 interference because it enables a traffic authority to impose a charge of such amount as it thinks reasonable on promoters of “relevant events” and occupiers of “relevant sites” who enjoy the protection of an ATTRO for the costs associated with the order. A “relevant event” is defined as: (a) a sporting event, social event or entertainment; or (b) any other event that is organised for commercial, charitable or not for profit purposes. A “relevant site” means a site on which activities are carried out in connection with the supply of essential goods, systems or services (for example, an oil refinery).

64. The principle of “user-pays” is already reflected in the Local Authority (Transport Charges) Regulations 1998, which permit authorities to charge event organisers for the costs associated with other, non-terrorism-related, orders made under the 1984 Act. In practice, the possibility of charges being levied is discussed with affected stakeholders in advance, so there is the opportunity for objections to be raised and even, in theory, for events to not to be held if the charges are thought excessive. The provision of the Bill which allows for the costs of ATTROs to be met is necessary to ensure the costs of national security-protecting measures can be recouped, which in turn ensures that sufficient resources will be available to provide ATTROs in the circumstances where the terrorism threat dictates that they are needed. The power to recoup these costs, and any associated Article 1, Protocol 1 interference, is proportionate to the need to ensure these tools are available to safeguard national security and protect members of the public.

Part 2: Border security

Port and border controls

65. Schedule 3 contains a power in paragraph 1 for “examining officers” (constables or designated immigration or customs officers) to question any person who is in a port in the UK or in the Northern Ireland border area for the purpose of determining whether the person appears to be, or has been, engaged in “hostile activity”. The power to examine a person can be exercised whether or not there are grounds for suspecting that a person is engaged in hostile activity. The paragraph 1 power is modelled on that in Schedule 7 to the 2000 Act which allows examining officers to question people in ports and the border area to determine whether they appear to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. This is also a “no-suspicion” power.
66. Paragraph 1(5) and (6) provides that a person is or has been engaged in hostile activity for the purposes of Schedule 3 if the person is or has been concerned in the commission, preparation or instigation of a “hostile act” that is or may be:
- a) carried out for, or on behalf of, a State other than the UK, or otherwise in the interests of such a State; and
 - b) threatens national security, and/or threatens the economic well-being of the UK, and/or is an act of serious crime.
67. Paragraph 2 of Schedule 3 provides a separate power for an examining officer to question a person who is in the border area for the purpose of determining whether the person’s presence in the area is connected with the person’s entry into, or departure from, Northern Ireland.
68. The core power to question is supplemented by the subsequent provisions of Schedule 3 which, apart from those described in paragraphs 81 to 90 below, mirror those available to examining officers under Schedule 7 to the 2000 Act and give examining officers additional powers in relation to a person questioned under paragraph 1 or 2:
- To stop: under paragraph 4 the officer may stop the person in order to question him.
 - To require production of documents carried: under paragraph 3 the person questioned must give the officer any information in his possession that the officer requests; provide his passport or another document verifying his identity; and hand over any document requested if he has it with him.
 - To search: under paragraph 8 the person may be searched, an intimate search is not permitted and a strip search is allowed only when there are reasonable grounds for suspecting concealment of something which

may be evidence the person is engaged in hostile activity, and then only on the authority of a second and senior officer.

- To copy and retain material: paragraphs 11 to 15 contain provisions for the retention of material handed over or found; this includes power to copy and retain electronic data contained on any device carried (see further below in relation to these powers which give rise to particular ECHR considerations).
- To detain: under paragraph 4 the officer may detain the person, for the purpose of exercising the questioning powers under paragraphs 1 and 2; by paragraph 5 he may not continue the questioning beyond one hour without invoking the more formal rules which attend detention (which cannot last beyond a further five hours); these are found in Parts 2 and 3 of Schedule 3 (treatment and review of detention) which replicate those in Schedule 8 to the 2000 Act, which govern the treatment and review of detention of those detained under Schedule 7 to that Act. These include, for example, the rights to consult lawyers and inform people of detention (with powers to delay the exercise of such rights in certain circumstances); powers concerning the taking, destruction and retention of biometric material from people detained under Schedule 3, including the possibility of renewable national security determinations being made over such material for up to five years; and provisions concerning the periodic review of the continued necessity of someone's detention for questioning under the Schedule 3 powers.
- The amendments being made to the 2000 Act by clauses 14 (evidence obtained under port and border control powers) and 15 (detention of terrorist suspects: hospital treatment) of the Bill are replicated in paragraphs 5 and 6 of Schedule 3, ensuring that there is a statutory protection against self-incrimination and "stop-the-detention-clock" provision for when someone is hospitalised.
- Paragraph 16 of Schedule 3 contains a criminal offence for anyone who wilfully fails to comply with a duty imposed under or by virtue of Part 1 of Schedule 3 or who wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of that Part. This is modelled on the offence in paragraph 18 of Schedule 7.
- Part 4 of Schedule 3 obliges the Secretary of State to issue codes of practice concerning the exercise of functions under the Schedule and obliges examining officers to perform their functions in compliance with the codes. The codes are brought into effect by regulations subject to the affirmative procedure, will be published generally and will be available wherever the powers may be exercised. The codes will make similar provision to that which governs the use of Schedule 7 powers, including: (i) that examining officers must be specially trained and authorised for the purpose and must normally be police officers, with immigration or customs officers to be used only exceptionally and when specifically designated by the Secretary of State after consultation with

the chief officer of police on both his training and the proposal for his designation; (ii) persons questioned must be informed clearly of the statutory basis for what is being done and of the procedure for feedback or complaint; (iii) if a person questioned but not detained asks to notify a third party and/or to consult a solicitor, these requests should be granted; (iv) records must be kept of the fact and duration of each examination and detention and examinations of those in detention must be video-recorded with sound; and (v) guidance will be given as to when it may be appropriate to exercise the power of detention (for example, when this is made necessary by lack of co-operation), and officers will be instructed that if questioning is to last longer than an hour, formal detention must take place before the hour elapses.

- Part 5 of Schedule 3 contains related powers of entry, the use of reasonable force and to compel the production of information, for which equivalents are found in the 2000 Act relation to the exercise of Schedule 7 powers.
- Part 6 of Schedule 3 provides for independent review of the operation of the Schedule 3 powers by the Investigatory Powers Commissioner, who must as soon as reasonably practicable after the end of each calendar year, make a report to the Secretary of State about the outcome of the review for that calendar year. On receiving a report, the Secretary of State must publish it and lay a copy before Parliament.

Article 8

69. When the Schedule 3 power is exercised in respect of a person, the person's Article 8 rights will be interfered with. In order to be justified under Article 8(2) the interference must be in accordance with the law and a proportionate means to a legitimate end.

70. The new power meets the first requirement of legality in that, if enacted by Parliament, there will be a lawful domestic basis for it.

71. For Article 8 compliance, however, its operation must be sufficiently foreseeable so that people who are subject to it can regulate their conduct; and it must contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised.

72. At this point it is helpful to consider the Supreme Court's ruling in [Beghal v DPP](#)⁸, in which Schedule 7's compliance with the Convention was considered. In paragraph 38 of the ruling, Lord Hughes contrasted the "no suspicion" power in section 44 (as was) of the 2000 Act, which allowed for stop-and-search, with the Schedule 7 power, observing that the latter is:

"confined to those who are passing through ports of entry/exit. The public in this country has historically enjoyed the right to free movement about

⁸ [2015] UKSC 49

the streets and the power to stop and search is, as Lord Brown observed, a substantial intrusion upon it. In this country, there is no general requirement for identity documents to be carried and produced on demand when a citizen is out and about. By contrast, those who pass through our ports have always been adjusted to border controls, including the requirement to identify oneself and to submit to searches and answer questions in aid of general security [emphasis added]. The potential importance of intercepting, detecting and deterring terrorists at border points is generally recognised. The current public concern about those leaving this country with a view to joining terrorist groups abroad is simply an example. The intrusion inherent in stopping for questioning and/or search is accordingly less at border points.”

73. This echoes Lord Lloyd’s point, made in his 1996 report⁹, in which he stated that:

“10.27 As an island nation it has long been the British way to concentrate controls at its national frontiers, and to maintain a correspondingly greater freedom from random checks inland. This is not always the practice adopted in continental countries which have long land frontiers. But our geography gives us a unique opportunity to target checks where they are most effective; namely at the ‘choke points’ provided by our ports and airports.”

74. The Government considers that, as with Schedule 7, the intrusions into Article 8 rights that flow from the exercise of the new Schedule 3 power are limited given the general expectation on the part of the public that they be subjected to checks at the border; and that the imperative to conduct those checks – to detect hostile activity (for example, espionage, sabotage and state-sponsored assassination) which is harmful to national security, the nation’s economic well-being and which may involve serious crime – is as equal a legitimate end as detecting and preventing terrorism. It is sufficiently foreseeable from the public’s perspective that they may be stopped and questioned at the choke points of ports to determine whether they pose such risks.

75. In *Beghal*, the Supreme Court also considered the “no suspicion” feature of Schedule 7. Lord Hughes accepted the then Independent Reviewer of Terrorism Legislation, David Anderson QC’s points concerning the utility of the “no suspicion” feature in the struggle against terrorism (see paragraphs 20-24 of the judgment). Similar benefits will accrue from the no-suspicion element of the new Schedule 3 power. The no suspicion element is, furthermore, an operational necessity since were the power contingent on a prior reasonable suspicion of hostile activity, that would risk making it obvious to, for example, foreign intelligence agents that the UK’s security services were aware of their activity.

⁹ Inquiry into Legislation Against Terrorism - Command Paper No. 3420

76. However, the fact the Schedule 7 power has utility by virtue of the no suspicion feature does not of itself entail legality. But in paragraph 44, Lord Hughes opined that:

“The fact that questioning is not dependent on the existence of objectively established grounds for suspicion does not by itself mean that there are not adequate safeguards or that the power is not in accordance with the law.”

At paragraph 45 Lord Hughes also stated that:

“the need for safeguards is measured by the quality of intrusion into individual liberty and the risk of arbitrary misuse of the power. The intrusion into individual liberty is of a significantly lesser order at ports than in the streets generally. There are sufficient safeguards against the arbitrary use of this power.” Those Schedule 7 safeguards are:

- The restriction to those passing into and out of the country;
- The restriction to statutory purpose;
- The restriction to specially trained and accredited police officers;
- The restrictions on the duration of questioning;
- The restrictions on type of search;
- The requirement to give explanatory notice to those questioned, including procedure for complaint;
- The requirement to permit consultation with a solicitor and the notification of a third party;
- The requirement that examining officers, as public authorities, are obliged by section 6 of the Human Rights Act to exercise their functions compatibly with the Convention;
- The availability of judicial review (if bad faith or collateral purpose is alleged, and also via the principle of legitimate expectation where a breach of the Code of Practice or of the several restrictions above is in issue); and
- The continuous supervision of the Independent Reviewer, which *“very clearly amounts to an informed, realistic and effective monitoring of the exercise of the powers and results in highly influential recommendations both for practice and rule change where needed”* (paragraph 43(x)).

77. These safeguards are (or, to the extent they reside in the Schedule 7 Code will be, once the Schedule 3 code is drawn up) also present in the new Schedule 3 power, which ensure the principle of legality is satisfied.

78. The Government considers that the Article 8 intrusions made possible by Schedule 3 can be justified as a proportionate means to achieving the legitimate ends of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others.

79. The intrusions into Article 8 rights that the new Schedule 3 power would entail are proportionate to the attainment of the legitimate ends identified above:

- The objective of this new power – to detect and disrupt the activities of those who are or have been engaged in hostile activity directed against the UK - is sufficiently important to justify the limitation of these fundamental rights;
- The new power is rationally connected to the objective since it provides examining officers with the ability to question a person to determine whether they are or have been involved in such activity, and it is obvious that many hostile actors will either be coming into the country from abroad or leaving the country, which makes it rational to provide for the power to be exercisable at ports rather than in-land;
- The power to examine and detain for this purpose (which is limited to six hours and subject to significant safeguards such as the obligations to keep detention under review, and the rights and protections afforded to those detained by Parts 2 and 3) is no more than necessary to accomplish the objective;
- Having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community (bearing in mind that the State is entitled to a generous margin of judgment in striking this balance – paragraph 48 of *Beghal*). The gravity of the risk posed by those engaged in hostile activity to the public at large, to national security and to the nation’s economic well-being (the recent events in Salisbury provide a recent example of these harms) is such that it is proper to curtail the Article 8 rights of persons who are stopped and questioned in ports and the border area to determine whether they appear to be involved in such activity.

Article 5

80. In *Beghal* the Supreme Court concluded that Article 5 of the Convention was not engaged (see paragraphs 52 to 56 and 73 of the judgment); the Government consider, therefore, that the facsimile detention power in Schedule 3 does not engage Article 5.

Property retention, copying and the treatment of confidential information

81. Other than the purpose for which questioning can be directed under Schedule 3, the key differences between that Schedule and the powers in Schedule 7 are: the broader power to retain articles and copies of material taken from such articles; and the provisions concerning the treatment of any “confidential material” which is found on such articles (paragraph 12(9) and (10) of Schedule 3 essentially defines confidential material as items subject to legal privilege, confidential journalistic material and commercial material held in confidence).

82. These differences are driven by a risk that arises particularly in the hostile state activity context (and which does not, at present, arise in the terrorism context), namely, that it is possible for foreign intelligence officers to pose as journalists and secrete material which is capable of damaging the UK's national security in formats which are ostensibly journalistic in nature and held in confidence (it is also possible, of course, for *bona fide* journalists to be foreign intelligence officers). There is therefore a national security imperative for the police to be able to review material which is, or is ostensibly, journalistic, confidential material. Further, given that foreign intelligence officers may be able to conceal their activities or material by posing as lawyers, and citing legal professional privilege over material in their possession, or otherwise by claiming it is commercial material held in confidence, there is equally a national security imperative to be able to access such material.

Articles 8 and 10

83. Accessing confidential material represents an Article 8 interference and to the extent that confidential material is journalistic, an Article 10 interference; and such interferences can only be lawful if necessary and proportionate to a legitimate end and adequately safeguarded against arbitrary abuse.

84. Under Schedule 7, there is no scope for examining these categories of material because paragraph 40 of the Code of Practice directs that examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984 ("PACE"). The Code was amended in advance of the Court of Appeal's ruling in the *Miranda*¹⁰ case, in which the Court concluded that the absence of protections for journalistic material in the 2000 Act or in the Code in operation at the time of Mr Miranda's stop rendered the regime non-compliant with Article 10. In paragraph 114 of the judgment, the Court made clear that:

"prior judicial or other independent and impartial oversight (or immediate *post factum* oversight in urgent cases) is the natural and obvious adequate safeguard against the unlawful exercise of the Schedule 7 powers in cases involving journalistic freedom."

85. In order to provide the authorities with an Article 8- and 10-compliant means of access to confidential material taken from those examined under Schedule 3, the Bill includes a series of protections and mechanisms which require the scrutiny and permission of the Investigatory Powers Commissioner, as established by the Investigatory Powers Act 2016 ("the IPA").

86. Under paragraph 11(2)(d) an examining officer may retain an article taken from an examinee while the officer believes that the article (or something on

¹⁰ [Miranda v SSHD, \[2016\] EWCA Civ 6](#), 19 January 2016

it) could be used in connection with the carrying out of a hostile act; and under paragraph 11(2)(e) the article or its contents can be retained whilst the officer believes it necessary to do so for the purpose of preventing death or significant injury. In practice, in order to come to a belief under paragraph 11(2)(d) or (e), the officer will in many cases be informed of intelligence. Whilst an article is retained under one or other of these provisions the authorities may choose to seek other lawful means (for example, production orders under Schedule 1 of PACE or warrants under the IPA) to gain access to the contents of the article. Where such access is sought and obtained, this may inform representations made to the Commissioner (see further below).

87. Where an article is retained under these limbs of paragraph 11(2), the extra protections in paragraphs 12 and 13 apply (and the Code will stipulate that examining officers who believe that an article is or contains confidential material must initially retain it under paragraph 11(2)(d) or (e) in order that the extra protections apply to such material, although if paragraph 11(2)(b) or (c) subsequently apply the continued retention and use of confidential material will also be possible under those paragraphs):

- The Commissioner must be informed of the article's retention as soon as is reasonably practicable.
- In a case where it appears to the Commissioner that there are reasonable grounds to believe that the article has or could be used in connection with the carrying out of a hostile act or where retention or destruction is necessary to prevent loss of life or significant injury, the Commissioner may: (a) direct that the article is destroyed, or (b) authorise the retention of the article subject to whatever conditions (if any) the Commissioner thinks appropriate as to its retention or use. Where the Commissioner does not think such reasonable grounds for belief exist, he must direct that the article is returned to the person from whom it was taken.
- If the Commissioner authorises the retention of an article, and the article consists of or includes confidential material, the Commissioner must satisfy himself that arrangements are in place that are sufficient for ensuring that the material is retained securely and is used only so far as necessary and proportionate for a "relevant purpose". (Use of material is necessary for a "relevant purpose" if it is necessary: in the interests of national security or the economic well-being of the UK; for the purpose of preventing death or significant injury; or for the purpose of preventing or detecting serious crime.)
- The Commissioner must invite each "affected party" (chief officer of police force of which the examining officer is a constable; the Secretary of State; and the person from whom the article was taken) to make representations about how the Commissioner should exercise any of the above functions and must have regard to these representations.
- Where a Judicial Commissioner performs the functions of the Commissioner under powers of delegation in the IPA, it is possible for an affected party to request the Commissioner himself to review

and re-take the decision taken by the Judicial Commissioner. The decisions of the Commissioner will be amenable to judicial review.

88. The above independent scrutiny mechanism and protections for confidential material are roughly paralleled by the additional protections provided for in respect of legally privileged material obtained under a targeted equipment interference warrant under section 131 of the IPA. The protections in paragraphs 12 and 13 are effectively replicated in respect of copies taken of the confidential material (see paragraphs 14 and 15).

89. In addition, the power of the Commissioner to direct the destruction, or authorise the retention, of articles seized under Schedule 3 engages Article 1/Protocol 1. The ECHR interferences are all considered necessary for the reasons given earlier, in pursuit of the legitimate ends of national security, public safety, the prevention of disorder and crime and the protection of the rights and freedom of others.

90. The intrusions into Article 8, 10 and Article 1/Protocol 1 rights that paragraphs 11 to 15 of Schedule 3 power would entail are proportionate to the attainment of the legitimate ends identified above:

- The objective of these retention and destruction powers is sufficiently important, for the reasons given earlier, to justify the limitation of these fundamental rights;
- The retention and destruction powers are rationally connected to the objective since they provide examining officers with the ability to prevent those who are engaged in hostile activity from furthering their ends by means of use of the articles which have been seized;
- The powers are no more than necessary to accomplish the objective. They do admit of the possibility of articles, material taken from those articles, or copies of such material being retained and even destroyed, so the powers permit very significant interferences with the ECHR rights mentioned above. However, given the potentially grave ramifications that might flow in national security and public safety terms of articles being returned to the examinee, it is proportionate for these powers to be available and they are subject to the significant safeguard against abuse by virtue of the involvement of the Commissioner in all dealings with retained articles;
- Having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community (the same points apply as are set out in the last bullet of paragraph 79).