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~~Normalisation of ‘preventive’ non-trial-based executive measures? From detention without trial to control orders, to TPIMs and ETPIMs: interrogating the ‘checking’ role of the ECHR~~

'Designing ETPIMS around ECHR Review or Normalisation of “Preventive” Non-Trial-Based Executive Measures?'

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Professor Helen Fenwick*

Key words: terrorism, TPIMs, ETPIMs, ECHR, Article 5

Abstract

This article considers the transition in 2012 from control orders to more ECHR-compliant ‘terrorism prevention and investigation measures’ under the Terrorism Prevention and Investigation Measures Act 2011. It argues that the interaction between security and liberty over the post 9/11 years has the appearance of a dialogue between courts and the executive that has resulted in a diminution in the repressive character of non-trial based preventive measures. But such an impression, it will be contended, is obscuring the recalibration of ECHR rights that has occurred, easing the path to the introduction of the enhanced version of TPIMs, under the Enhanced Terrorism Prevention and Investigation Measures Bill. The proposed ETPIMs exhibit many of the objectionable features of control orders and are currently ready to introduce if the threat level rises.

Introduction

The twelve years that have passed since the catastrophic terrorist strike of 9/11 have seen a complex, apparently dialogic, interaction between human rights and non-trial based counter-terrorist measures in the UK. That interaction has led to modification of such measures, seeing detention without trial give way to control orders, which in turn were superseded by terrorism prevention and investigation measures under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). But the inception of the more ECHR-compliant TPIMA was rapidly followed by the introduction of the Enhanced Terrorism Prevention and

Investigation Measures Bill (ETPIM Bill),¹ providing for enhanced measures, similar in terms of their more repressive character to control orders, but accompanied by somewhat greater safeguards, and ready to be introduced as emergency legislation. The nature of these two instruments, their ECHR-compliance, and the implications of introducing ETPIMs in reliance on the domestic control orders jurisprudence, form the subject of this commentary.

TPIMA makes provision in s26 to introduce the enhanced measures if it is urgent to do so when Parliament is in recess,² but the ETPIM Bill would allow the measures to be relied on generally in future. It appears to have been introduced, as discussed below, on the basis that in certain circumstances TPIMs might not be viewed as adequate to meet the demands of a heightened security threat, so ETPIMs could be needed as a supplementary measure. The Bill has received parliamentary scrutiny³ and is available to be brought forward at any time to meet the demands of an unspecified crisis situation; the trigger that would allow it to be enacted is not indicated in the Bill.⁴ If passed, it would grant the Home Secretary additional powers to deal with exceptional circumstances, and ETPIMs would provide a separate, parallel regime running alongside the TPIMs scheme. The ETPIM Bill has so far attracted little academic attention,⁵ but it is in many respects a disturbing, even extraordinary, legislative measure.

TPIMs, introduced from 2012 onwards, represented, this commentary will argue, a more favourable compromise between protecting both security and liberty than control orders had done, but the enhanced version, in contrast, may reintroduce the human rights challenges they presented. This article identifies a trend post 9/11 towards ‘business as usual’ in human rights

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¹ See *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* Home Office, Report Cm 8166 (2011).

² Section 26 (1) provides ‘If the Secretary of State considers that it is necessary to do so by reason of urgency, the Secretary of State may make a temporary enhanced Terrorism Prevention and Investigation order [while Parliament is in recess]’. An order made under s26 is made on the same basis and provides for certain of the same obligations as an order that could be made under the ETPIM Bill, as discussed below. No temporary ETPIMs have yet been introduced under s26. For consideration of s26 see eg TPIM Bill 2nd Reading per Lord Hunt, HC Deb vol 730, col 1139 5 October 2011.

³ The ETPIM Bill Joint Committee was set up for this purpose; see ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill,’ First Report, HL 70, HC 495, 27 November 2012.

⁴ *ibid* 3. It is to be introduced in response to ‘exceptional circumstances’ which ‘cannot be managed by any other means’. The circumstances are discussed below.

⁵ C. Walker & A. Horne have considered TPIMA in ‘The Terrorism Prevention and Investigation Measures Act 2011: ‘One Thing but Not Much the Other?’ (2012) 6 Crim LR 421, but since TPIMA is the subject, the article only devotes about two pages to ETPIMs: 427-428.

terms and to a ‘normalisation’ of crisis measures. It argues that the interaction between security and liberty over the post 9/11 years has the appearance of a dialogue between courts and the executive⁶ that has resulted in a diminution in the repressive character of non-trial based measures.⁷ But such an impression, it will be contended, is obscuring the recalibration of ECHR rights that has occurred, easing the path to the introduction of ETPIMs which exhibit many of the objectionable features of control orders. Thus, the complacent idea that ETPIMs are embedded in a process of reanimation of human rights norms requires forceful interrogation.

The changing nature of ‘emergency’ executive non-trial-based measures post 9/11

In order to seek to demonstrate that a movement towards normalisation of ‘preventive’ non-trial-based measures⁸ has occurred, it is suggested that three phases, broadly speaking, could be identified in the post-9/11 response in the UK. In the first, in the immediate aftermath of the strike, the appearance of a fundamental clash between security and liberty arose due to the legal reaction to the crisis, which in the UK included detention without trial under Part IV of the Anti-Terrorism, Crime and Security Act 2001 for suspect non-nationals, necessitating derogation from Article 5 ECHR. At that point the idea that human rights should merely continue to be adhered to was condemned as naïve or quixotic,⁹ or as a ‘gamble with people’s

⁶ On dialogic theory see P. Yap, ‘Defending Dialogue’ [2012] PL 527.

⁷ See generally: H. Fenwick & G. Phillipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process in Counter Terrorism Law and Beyond’ (2011) 56(4) McGill LJ 864; C. Gearty, ‘The Human Rights Act: An Academic Sceptic Changes His Mind but Not His Heart’ (2010) 6 EHRLR 582, 585-6.

⁸ See generally for discussion of ‘preventive’ measures in the UK: L. Zedner, ‘Preventive Justice or Pre-punishment? The Case of Control Orders’ (2007) 60 CLP 174; C. Walker, *Terrorism and the Law* (Oxford: OUP, 2011) Ch 7. See generally as regards preventive measures: J. Paust, ‘Survey of Possible Responses to International Terrorism, Prevention, Punishment and Cooperative Action’ (1975) 5(2) *Georgia Journal of International and Comparative Law* 431; P. Ruddock, ‘Law as a Preventative Weapon Against Terrorism’ in A. Lynch, E. Macdonald & G. Williams (eds), *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2008); S.B. Elias, ‘Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects’ (2010) 41 *Columbia Human Rights Law Review* 99. The use of such preventative measures and interest in introducing them has been apparent post 9/11 in various countries: see, as regards Australia, the Criminal Code Act 1995, para 104.2, 104.3, introduced by the Anti-Terrorism Act (No 2) 2005. In Canada they have been introduced in the form of security certificates: Immigration and Refugee Protection Act 2001, ss 77, 81.

⁹ For example, the then Prime Minister Tony Blair repeatedly attacked the ‘barmy’ decisions of the Special Immigration Appeals Commission (SIAC) on deportation of non-national suspected terrorists, and threatened to use legislation to undermine the outcome: see M. Elliot, ‘The War on Terror and the United Kingdom’s Constitution’ (2007) 1 *European Journal of Legal Studies* 1, 14-16. See also Tony Blair’s famous comment nearly a month after the 7/7 attacks: ‘[I]et no one be in any doubt, the rules of the game are changing’ (S. Jeffery, ‘The Rules of the Game’ *the Guardian*, 5 August 2005, at

safety'.¹⁰ The demand that a deferential judicial approach should be taken when the derogation was challenged sought to stifle dialogue,¹¹ relying instead on acceptance of an imperative to accommodate executive measures designed to enhance security.¹²

In *A and Others v Secretary of State for the Home Dept*,¹³ the House of Lords determined in effect that the government had failed to show that continued adherence to Article 5 was impossible even in the face of a 'war on terror'. The derogation order was quashed and the Part IV scheme declared incompatible with Articles 5 and 14 ECHR. Once the scheme was abandoned the preventive strategy nevertheless re-emerged in the form of control orders under the Prevention of Terrorism Act 2005 (PTA).¹⁴ But their repressive nature indicated implicit reliance on a recalibrated version of Article 5, able to accommodate to the needs of the crisis.¹⁵ Although the courts' response meant that the control orders' scheme had to be modified to achieve greater ECHR-compatibility, albeit this time without rejecting it wholesale,¹⁶ the courts partially acquiesced, it will be argued, in the notion of such

<http://www.guardian.co.uk/uk/2005/aug/05/july7.uksecurity5> (last visited 28 April 2013). As Bruce Ackerman puts it: 'No democratic government can maintain popular support without acting effectively to calm panic and to prevent a second terrorist strike. If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war against terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic': 'The Emergency Constitution' (2004) 113(5) Yale LJ 1029, 1029.

¹⁰ See I. Loader, 'The Cultural Lives of Security and Rights' in B. Goold & L. Lazarus (eds), *Security and Human Rights* (Portland, OR: Hart, 2007) 27, 39.

¹¹ For example, the Secretary of State argued in *A and Others v Secretary of State for the Home Dept* [2005] 2 WLR 087, as regards the claim that Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ACTSA) breached the Article 14 rights of the appellants, that the standard of review was whether 'it was legitimately open to the primary decision-makers to draw the dividing line where they did' [86]. The key argument on behalf of the government was: 'As it was for Parliament and the Executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters... calling for an exercise of political and not judicial judgment...' [107].

¹² In relation to judicial responses T Poole terms this model one of 'deferential accommodation', finding that within it judges are prepared to 'accommodate executive needs by recognising a broad area of largely untrammelled executive discretion.' 'Courts and Conditions of Uncertainty in "Times of Crisis"' [2008] PL 234, 238.

¹³ [2005] 2 AC 68. See for discussion: A. Tomkins, 'Readings of *A v Secretary of State for the Home Department*' [2005] PL 259; T. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 MLR 655.

¹⁴ For a detailed account of the control orders regime see generally: C. Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395.

¹⁵ See the discussion of early 'heavy touch' control orders below. See also H. Fenwick, 'Recalibrating ECHR Rights, and The Role of The Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the "War On Terror"?' (2010) 63 CLP 153. Under Poole's view such accommodation does not involve the overt suspension of constitutional norms or an extensive use of the concept of non-justiciability; rather, it involves an attitude of extreme deference in relation to the executive view of measures needed to combat risk: n 12 above. Oren Gross takes a somewhat similar view in speaking of an 'emergency interpretation' of the US Constitution as opposed to an explicit suspension of it, meaning that constitutional limitations can be redefined in order to seek to overcome the emergency rapidly: 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale LJ 1011, 1064.

¹⁶ See in particular *Secretary of State for the Home Department v AP* [2010] 3 WLR 51, discussed below.

accommodation. However, a process of reanimation of the rights via court action did occur,¹⁷ meaning that the scheme itself became in various respects, less repressive.¹⁸ To an extent, the control orders scheme incrementally accommodated Article 5 rather than the other way round.¹⁹

The control orders saga could therefore be characterised as representing a new phase in dialogic terms, during which a scheme in 2005 compatible with the ECHR only on the basis of presupposing a narrow interpretation of Article 5,²⁰ was transmuted into a modified version of itself by 2011 that came closer to achieving such compatibility. However, in terms of its impact the dialogue, it is argued, had a ‘negative suppressive quality’²¹ in the sense that since significant interferences with liberty²² without trial had been accepted by the courts as compatible with Article 5, such interferences could then be viewed as having received judicial imprimatur. That process of an apparent return to ‘business as usual’ in human rights’ terms might be said then to have led to the third, current phase in which preventive measures appear to have become ‘normalised’. The modifications of control orders, directed towards compliance with Article 5, meant that their abandonment²³ and the transition in 2012 to still more Article 5-compliant TPIMs under the Terrorism Prevention and Investigation Measures Act 2011 was of a less dramatic nature than the Coalition government has claimed. The introduction of TPIMs as ‘softened’²⁴ control orders apparently formed part of a process of reaffirming a commitment to liberty under the government post-2010.²⁵ That might also be said of the abandonment of the very broad power of suspicion-less stop and search under s44

¹⁷ See in particular the decisions in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642; *A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber) and *Secretary of State for the Home Department v AF (No 3)* [2007] 3 WLR 681. See for general discussion Fenwick, n 15 above.

¹⁸ See eg *Secretary of State for the Home Department v B and C* [2010] 1 WLR 1542.

¹⁹ Fenwick n 15 above, 198-199.

²⁰ This was apparent in relation to the early control orders which were then found to create a deprivation of liberty under Article 5: *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 (discussed below).

²¹ Fenwick & Phillipson n 7, 916; See generally as regards idea of dialogue K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

²² They included some acceptance of up to 16 hours a day house detention: *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 [105]. This could be combined with forced relocation where no special features particularly ‘destructive of family life’ arose: *Secretary of State for the Home Department v AP* [2011] 3 WLR 53 [19]-[24].

²³ Both Houses of Parliament voted to renew Control Orders for another year in 2010 despite a highly critical report on renewal from the JCHR (‘Counter-Terrorism Policy and Human Rights’ HL 64, HC 395 (2010)) pointing to the grave incursions into human rights norms they represented. See also HC Deb vol 717 col 506 1 March 2010, and HL Deb vol 717 col 1545 3 March 2010. In March 2011 Parliament voted to renew the PTA until December 2011. TPIMA, s1 also provided for repeal of the PTA.

²⁴ See Walker & Horne n 5, 437.

²⁵ See HC Deb vol 524 col 205, 1 March 2011. See further eg: K. McVeigh, ‘Nick Clegg Scraps Control Orders’ *The Guardian*, 2 January 2011, at <http://www.guardian.co.uk/politics/2011/jan/02/nick-clegg-scrap-control-orders> (last visited 28 April 2013).

Terrorism Act 2000 (TA)²⁶ which was replaced by sections 60-63 of the Protection of Freedoms Act 2012.²⁷

Superficially it appeared that as 9/11 receded a more measured assessment of the threat occurred, conducive of a return to normality and a re-balancing in favour of human rights, largely through court action, but with some Parliamentary intervention. The process could be viewed as a classic movement in public law terms, but so doing could aid in enabling repressive measures to creep in under the radar – as arguably has occurred in respect of ETPIMs – and in removing the spotlight from the prolonged use of ‘emergency’ measures. The government took the stance in relation to the TPIM and ETPIM legislation that the *principles* underlying non-trial based interference with liberty and use of closed material proceedings, had been accorded a clean bill of human rights health by the courts during the control orders saga.²⁸ This was put forcibly to parliamentary committees scrutinising the legislation, partly via the use of ‘ECHR memos’²⁹ – in general supportive of dialogue, but in this instance, it is argued, partially mis-used – and the way was paved for the continued reliance on such measures, including the repressive turn taken in the form of ETPIMs.³⁰ The ‘checking’ role of the ECHR gave way, to an extent, to a ratification role, as this commentary will argue, which itself fosters accommodationism in an insidious manner.

Purpose of the TPIMs and ETPIMs schemes

²⁶ Repealed under Protection of Freedoms Act 2012, s 59.

²⁷ Section 61 inserted s 47A into the TA, creating a more tightly worded power. It might also be noted that a consultation on Sched 7 TA has occurred which might lead to reform of that heavily executive-dominated process to create clearer human rights compliance, although no commitment to such reform is as yet evident. See: ‘Review of the Operation of Schedule 7 Terrorism Act 2000 A public consultation’ Home Office, September 2012, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157896/consultation-document.pdf (last visited 28 April 2013).

²⁸ See in particular, ‘Terrorism Prevention and Investigation Measures Bill’ Memorandum on ECHR, Home Office, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98372/echr-memorandum.pdf (last visited 28 April 2013); see also *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* Home Office, Report Cm 8536 (2013) para 22.

²⁹ *ibid*; see also ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill’ Memorandum on ECHR, Home Office, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98426/echr-etpim-memorandum.pdf (last visited 28 April 2013). Also see the Joint Committee on Human Rights (JCHR) 16th Report ‘Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill’ HL 180, HC 1482 (2011).

³⁰ See ETPIM Bill Joint Committee ‘Oral Evidence taken before the Committee’ 11 July 2012, HC 495-i per Anderson: ‘[the ETPIM Bill] seems very familiar to something that has been litigated with great intensity for years on end [control orders] and that operates...perhaps not with complete fairness but about as fairly as a measure of this kind could operate’ (Answer to Q8).

Post 9/11 the rise of ‘neighbour’ or ‘home grown’ terrorism in the UK became more apparent.³¹ Thus measures suitable for use against nationals deemed a security risk where prosecution is viewed as problematic,³² or – more rarely – against non-nationals,³³ continue to be perceived as necessary.³⁴ Since the model used for control orders had not been found in itself to breach Article 5, as it apparently had the ability to impose restrictions falling just outside Article 5(1), which were credited with success in security terms,³⁵ it was continued under the Coalition government with modifications, in the form of TPIMs and ETPIMs. Continued use of preventive non-trial-based measures had received the support of the Counter-terror Review 2011.³⁶

³¹ For example, British nationals perpetrated the 7/7 bombing. See A.J. Beutel, ‘Radicalization and Homegrown Terrorism in Western Muslim Communities’ *Minaret of Freedom Institute*, 30 August 2007, Section II, <http://www.minaret.org/MPAC%20Backgrounder.pdf> (last visited 28 April 2013); Walker, n 14 above, 1398-1399. ‘Home-grown’ terrorism may currently be linked to a change in strategy by Al Qaeda and linked groups, whereby more spectacular, complex operations that can be fairly readily detected by Western intelligence agencies are to be abandoned in favour of more minor strikes by small groups against soft targets such as high profile sporting events or shopping centres, where security is weak. See eg Robert Crilly, ‘...recent issues of *Inspire*, a magazine published by al-Qaeda..have carried advice and guidance for “lone wolf” attackers ...in the form of excerpts from a book by Abu Mus’ab Al-Suri, a prominent theologian and strategist within the al-Qaeda movement...who has promoted the idea of using isolated cells made up of Muslims already inside the country’ (‘Who’s behind the Boston Bombing?’ *the Telegraph* 16 April 2013, at <http://blogs.telegraph.co.uk/news/robcilly/100212312/whos-behind-the-boston-bombing/> (last visited 28 April 2013)). Recent foiled terrorist activity, including planned attacks, in Luton, Rochdale and Yorkshire in 2013 appears to have been of that type; see eg J. Kelly, ‘Birmingham Men Guilty of Mass Bomb Plot’ *BBC News*, 21 February 2013, at <http://www.bbc.co.uk/news/uk-21534048> (last visited 28 April 2013). ‘Luton terror plot: four jailed over plan to bomb army centre.’ *the Guardian* 18 April 2013, at <http://www.guardian.co.uk/uk/2013/apr/18/luton-terror-plot-four-jailed> (last visited 28 April 2013).

³² Prosecutions are viewed as problematic partly because security material would have to be presented in a criminal trial, which might jeopardise operations, put informers at risk or breach agreements with other Security Services. See: TPIMA 2011 Explanatory Notes para 15; Fenwick & Phillipson n 7 above, 912.

³³ Detention/imposition of strict bail conditions followed by deportation and attempts at deportation, with assurances where necessary, provides an alternative non-trial-based process in relation to suspect non-nationals. Detention or stringent bail conditions can be imposed if deportation can be seen as imminent, while assurances are negotiated, since the exception under Art 5(1)(f) ECHR is viewed as applicable: *R (on the application of Hardial Singh) v Governor of Durham Prison* [1984] WLR 704. See in relation to deportation with executive assurances where a breach of Art 3 might occur in the receiving country *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512; also *Othman v UK* (2012) 55 EHRR 1. See further C. Walker, ‘The Treatment of Foreign Terrorist Suspects’ (2007) 70 MLR 427.

³⁴ According to David Anderson QC, Independent Reviewer of Terrorism Legislation, 10 persons are currently subject to TPIMs of whom 9 are British citizens; see ‘Terrorism Prevention and Investigation Measures in 2012’ First Report, March 2013, paras 4.1-4.17, at <http://terrorismlegislationreviewer.independent.gov.uk/publications/first-report-tpims?view=Binary> (last visited 28 April 2013).

³⁵ See Anderson ‘Control Orders in 2011,’ Final Report, March 2012, paras 6.7-6.8; at <http://www.official-documents.gov.uk/document/other/9780108511417/9780108511417.pdf> (last visited 28 April 2013); see also as regard TPIMs, ‘TPIMs in 2012’, n 34 above, para 11.7. See also Lord Carlile of Berriew QC ‘Sixth Report of the Independent Reviewer Pursuant to s14(3) of the Prevention of Terrorism Act 2006’, 6 February 2011, para 13.

³⁶ See the government review of counter-terrorism powers: *Review of Counter-Terrorism and Security Powers* Home Office, Report Cm 8004 (2011) which concluded that control orders should be abandoned but such measures should be maintained, and that an enhanced version – which emerged in the form of ETPIMs – might also be needed to meet an emergency: (para 30(v)). See also ETPIM Bill Joint Committee, n 3, para 80.

This model has often been termed preventive as opposed to punitive,³⁷ in the sense that it relies on targeting terrorist suspects to curtail their liberty without the need for a trial, by imposing specific restrictions on them, related to the particular types of activity it is thought that they might engage in, with the aim of preventing future terrorist activity before it occurs. Since reliance on TPIMs/ETPIMs has essentially the same purpose as control orders had, both TPIMA and the ETPIM Bill rely heavily on the control orders model: so the legal design of both instruments is similar in a range of respects³⁸ since both measures have the same ‘preventive’ aim.

The more repressive ETPIMs appear to be designed to address a heightened threat. They could be used against any terrorism suspect, as discussed below. More specifically, nine suspects who had been subjected to control orders were transferred onto TPIMs at the beginning of January 2012³⁹ and they will come to the end of their TPIMs at the end of December 2013. The question will be whether certain suspects, deemed especially high risk,⁴⁰ should be subjected to no constraint or to an ETPIMs notice⁴¹ if they are still perceived as presenting a threat to security.⁴² If the ETPIMs Bill is introduced the enhanced measures provide the opportunity of imposing greater restraint on such suspects, thereby providing a solution of sorts to the problem for another two years (till end December 2015). That possibility could provide a rationale for introducing the ETPIMs Bill, as David Anderson QC has acknowledged.⁴³ The case could also be made that the powers available under a TPIMs notice are insufficient in relation to particular suspects. The basis on which Parliament might be asked to accept the introduction of the Bill remains uncertain⁴⁴ and does not exclude the possibility that a trigger circumstance might arise if the security service advice was that it was not acceptable for certain of the suspects currently under TPIMs to be able to move

³⁷ See further n 8 above.

³⁸ The ETPIM Bill also relies heavily on the 2011 Act: a large number of the sections of TPIMA are also applied to ETPIMs (under clause 3 ETPIM Bill): ss4-16, 17(1) and (2), 18, 22-24, Schedules 2-6.

³⁹ See Anderson ‘TPIMs in 2012’ n 34 above, paras 4.1-4.17.

⁴⁰ Anderson *ibid* found that certain suspects were at the very high end of risk, even by the standards of international terrorism: para 4.12.

⁴¹ Or to a new TPIMs one, but in that case only if fresh terrorism-related activity is reasonably believed to be present.

⁴² So long as the threshold for the imposition of ETPIMs – on the balance of probabilities – is met. It may be noted that Anderson (n 34 above, para 11.33-11.38) has argued that the probation service and services provided as part of the government’s counter terror Prevent strategy should be relied on more heavily in relation to TPIM subjects in terms of de-radicalisation.

⁴³ See above n 30, 6 (‘if you had...people who are assessed to be very dangerous, coming to the end of a two-year TPIM...that would be one such situation [in which the ETPIM Bill would be enacted]’).

⁴⁴ See text to n 4, and the government response to the report of the ETPIM Committee, n 28, paras 2-6.

freely around the country or meet with certain associates when their two-year period is up, where surveillance would not meet the heightened threat or would require resources to do so that were not available.⁴⁵ The leeway, discussed below, under the ETPIM Bill for transferring such suspects to an ETPIM from a TPIM, may contradict the notion that ETPIMs are reserved only for a new crisis situation.

Imposition of TPIMs and ETPIMs

TPIMs and ETPIMs can be imposed by the Home Secretary⁴⁶ on an individual if certain conditions are met, and then subjected to review by a court.⁴⁷ Those conditions (A to E) are set out at sections 3(1)-(6) TPIMA and, with some changes, in clause 2 ETPIM Bill.⁴⁸ Under section 3(1) TPIMA the standard of proof required under Condition A is low: it relies on asking only whether ‘the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity’ (TRA).⁴⁹ This is a slightly higher standard than that which was required for control orders under the PTA, which relied only on the ‘reasonable grounds for suspicion’ standard. However, in practice it appears that the higher level of suspicion is not likely to make a significant difference to the ability of the Home Secretary to impose TPIM

⁴⁵ It may be noted that Anderson in his review of control orders in 2011 found that the government had decided to make up for the lack of a relocation requirement in TPIMA by according extra funding for surveillance, in order to avoid increasing the risk in national security terms: Anderson ‘Control Orders in 2011,’ n 35, para 6.35. He found that the increased budget for surveillance did not fully solve the problem: ‘surveillance – which begins and ends with observation – is not a complete substitute for disruptive measures such as relocation’.

⁴⁶ Under TPIMA, s 2(1) : ‘The Secretary of State may by notice (a “TPIM notice”) impose specified terrorism prevention and investigation measures on an individual if conditions A to E are met’. Essentially the same wording is used in the ETPIM Bill, cl 1.

⁴⁷ Under TPIMA, s 9(2) (discussed below) the court, on the full hearing on the order, has to decide whether the Secretary of State’s decision is ‘flawed’, applying judicial review principles, which include compliance with Convention rights. This echoes the position regarding control orders, and will apply to ETPIMs (ETPIM Bill, cl 3 applies TPIMA, ss 4-16 to ETPIMs).

⁴⁸ Since temporary ETPIMs can be imposed under TPIMA, s 26 the provisions governing their use reflect those changes now also contained in the ETPIM Bill: s26(6) ‘The provision of a temporary enhanced TPIM order which corresponds to section 3 must include appropriate variations from the provision contained in that section...’.

⁴⁹ Terrorism-related activity is defined in TPIMA, s 4(1); the definition is very broad, as under the PTA. It covers *inter alia* encouragement of the preparation of such acts: ‘involvement in terrorism related activity is any one or more of the following (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within (a)-(c) and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.’ Under s 4(2) it is immaterial whether the involvement in the activity took place before or after the passing of TPIMA. Under both PTA, s 15(1) and TPIMA, s 30(1) ‘terrorism’ has the same meaning as in the Terrorism Act 2000 s 1(1).

notices.⁵⁰ Condition B, discussed below, concerns the (misleading) requirement that the terrorist activity in question must be ‘new’ to impose the measure. Condition E requires imposition of a TPIM (or ETPIM) by a court *unless* the case is deemed urgent⁵¹ – as will normally be the case. Under section 3(3) TPIMA. Condition C is that the Secretary of State reasonably considers that it is necessary for a TPIM to be imposed ‘for purposes connected with protecting members of the public from a risk of terrorism’. Condition D (section 3(4)) provides that the Secretary of State must reasonably consider that it is necessary for the specified terrorism prevention and investigation measures to be imposed on the individual ‘for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity’.⁵²

In *Secretary of State for the Home Department v CC, CF*⁵³ it was confirmed that the requirement in TPIMA of showing reasonable belief imposes a higher threshold than that which previously applied under the PTA. Reliance was placed on *A and Others v Secretary of State for the Home Department*⁵⁴ in which Laws LJ said: ‘Belief is a state of mind by which the person in question thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case’.⁵⁵ In *Secretary of State for Home Department v BM*,⁵⁶ and in *CC, CF*, the argument was rejected that under TPIMA the standard of proof is *higher* than ‘the reasonable belief’ standard in that the foundation of past facts upon which the belief is predicated must be proved on the balance of probabilities.⁵⁷

⁵⁰ All the suspects at that time on control orders were transferred to TPIMs, so the material supporting the level of suspicion previously applicable was also deemed to be sufficient under the slightly higher standard: see ETPIM Bill Joint Committee n 3, 7. On the other hand, police evidence is apparently to the effect that certain suspects who had not been subjected to control orders were not placed on TPIM notices due to this higher standard of proof: Anderson ‘TPIMs in 2012,’ n 34 above, para 2.23.

⁵¹ Condition E (in both instruments, but in ETPIM Bill, cl 2) is that the court must give permission for the imposition of the TPIM, but under s 3(5)(b) (clause 2(5)(b) ETPIM Bill) permission is not needed if the Secretary of State ‘reasonably considers’ that the case is urgent.

⁵² It may be noted that the term ‘purposes connected with’ slightly dilutes the requirement for control orders that each obligation imposed had to be considered necessary for the purpose of protecting the public from a risk of terrorism.

⁵³ [2012] EWHC 2837.

⁵⁴ [2005] 1 WLR 414.

⁵⁵ *ibid* [229]; *R v Saik* [2006] 2 WLR 993 was also referred to, in which Lord Brown observed that ‘to suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so’ [120].

⁵⁶ [2012] 1 WLR 2734.

⁵⁷ *ibid* at [25]. It was found in *BM*, which was relied on in *CC, CF*, that ‘to found a reasonable belief that a subject is or has been involved in TRA and that a TPIM is necessary does not involve the requirement to establish involvement in specific TRA to any higher standard than that which can properly give rise to such a belief. No doubt some facts which go to forming the belief will be clearly established, others may be based on an assessment of the various pieces of evidence available’ [34].

Under the ETPIM Bill, Conditions B,C,E, as indicated, are similar. Under Condition A the standard of proof is somewhat higher: the Secretary of State must be satisfied on ‘the balance of probabilities that the individual is, or has been, involved in terrorism-related activity’,⁵⁸ reflecting the more onerous obligations that can be imposed under an ETPIM notice. (This standard is also required for imposition of temporary ETPIMs under section 26 of the TPIMA.) Although ETPIMs are potentially more repressive, the *seriousness* of the TRA itself appears to be irrelevant. The only indication as to the difference between the TRA needed to impose a TPIM and to impose an ETPIM arises from Condition D,⁵⁹ which provides that the Secretary of State must ‘reasonably consider that some or all of the measures to be imposed’ are not measures that can be imposed by a TPIM.

The requirement under Condition B in both instruments that some or all of the TRA must be ‘new’⁶⁰ gives the impression at first glance that the involvement of a person in TRA is being monitored, and if there is no new TRA, then these measures cannot be deployed, taking account of possible deradicalisation or disengagement from certain associates. The apparent emphasis on ‘new’ TRA appears to be designed to avoid giving the impression that persons who have been placed on control orders for some years might merely then be ‘parked’ on the new measures without scrutiny of their current activities. In fact, the position is far less transparent than that, as discussed below. It can be concluded that the appearance of rectitude created by setting out this range of Conditions in both instruments is to an extent belied by the reality.

Time periods under TPIMs, ETPIMs or both combined

A TPIM notice can only be imposed for a two-year maximum period,⁶¹ although a fresh TPIM can then be imposed if a reasonable belief can be shown that ‘new’ terrorism-related

⁵⁸ Clause 2(1) ETPIM Bill. If the presence of the TRA is established on the balance of probabilities, it appears that either a TPIMs or ETPIM notice could be imposed, but not both at the same time (ETPIM Bill clause 4(1)). Since s26 TPIMA provides for the use of temporary ETPIMs (see n 2 above) the same threshold is used. It may be noted that reliance in the Bill on a number of provisions of TPIMA, includes the definition of Terrorism-related activity (TRA) in TPIMA s4(1).

⁵⁹ Clause 2(4).

⁶⁰ Condition B in both: TPIMA s 3(2), ETPIMA cl 2(2). ‘New’ is defined in TPIMA, s 3(6) and ETPIM Bill, cl 2(6).

⁶¹ It can be imposed for one year initially; it may only be imposed for a further year if Conditions A,C,D are met: so it is *not* necessary for suspicion of new TRA to be present – s 5(1),(2),(3). Where a TPIM has expired it can be ‘revived’ (s 13(6)) without an application to a Court if it has not been revoked, or extended under s 5 (s 13(6)), and can be revived regardless of revocation or extension if an application to court has been made (s

activity has occurred after the imposition of the first notice,⁶² or, if two or more TPIM notices have been in force, the ‘new’ TRA must have occurred after the coming into force of the most recent notice.⁶³ These time periods under TPIMA differentiate the scheme significantly from the control orders one since the orders could be renewed indefinitely. However, the term ‘new’ (in Condition B) is otiose under TPIMA if no TPIM notice has ever been in force against the individual since the TRA can have occurred ‘at any time’ before or after the coming into force of TPIMA,⁶⁴ and it is *not* a requirement that if a person has been subjected to a control order previously, the new TRA should have occurred since the order was imposed.⁶⁵ That position obviously made it easy to transfer all the controlees to TPIMs in January 2012. As Collins J. observed in *Secretary of State for the Home Department v BM*,⁶⁶ ‘new’ is therefore a somewhat ‘odd adjective’ to use.⁶⁷ However, he pointed out that the *age* of the terrorism-related activity is relevant in considering whether Condition C is satisfied since an order will not be necessary unless there is a need to protect the public from a risk of terrorism.⁶⁸ In other words, if there has been a very significant time lapse between the point at which the TPIM is being considered and the suspected TRA, Condition C might not be satisfied since the *current* need to protect the public might not appear to be established.

The position under the ETIM Bill in respect of the need for ‘new’ TRA is very similar except, significantly, in relation to suspects who *have* been subjected to a TPIM previously. Again, the term ‘new’ should not be taken at face value, but as creating in effect three categories of suspect.⁶⁹ First there is the category covering those who have never been placed under an

13(7)); it can be revived regardless of it being extended under s 5: s 13(7), s 6(1)(b). Also a TPIM notice may be revoked (s 13(2)) and later renewed when a TPIM subject is taken into custody when he/she has been charged with a criminal offence, meaning that the clock can be stopped: the two-year period could thus be somewhat lengthened, even if the charge is then dropped.

⁶² TPIMA, ss 3(2), (6)(b).

⁶³ TPIMA, ss 3(2), (6)(c).

⁶⁴ TPIMA, s 3(6)(a).

⁶⁵ This follows from s 3(6)(a) and para 4 of Sched 8 which provides that the Secretary of State’s powers under the 2011 Act ‘are not affected by a control order having been made in relation to that individual’; provided the conditions set out in s3 are satisfied, the Secretary of State is entitled to impose measures by a TPIM notice on an individual in respect of activities which wholly or in part founded the making of the control order. See *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (Admin) per Mitting J. [13]; *Secretary of State for the Home Department v CC and CF* [2012] WLR(D) 283, [21].

⁶⁶ [2012] 1 WLR 2734.

⁶⁷ *ibid* at [16].

⁶⁸ *ibid* at [15].

⁶⁹ The position differs under TPIMA, s 27 which applies to temporary ETPIMs under s 26: ‘s 27(1) A temporary enhanced TPIM order, except for designated transitional and saving provision, ceases to have effect—

(a) at the end of the period of 90 days beginning with the day on which the Secretary of State makes the order, or

ETPIM. The position is the same as under TPIMA: the TRA could have occurred at any time.⁷⁰ Again, the need to show ‘new’ terrorism-related activity is in fact merely a need to show TRA: the term ‘new’ does not impose an extra condition and so is misleading. That is of particular significance since it means that a suspect could *already* have been subject to a TPIM, and the intention is to transfer him or her to an ETPIM. He or she can be so transferred *without* showing ‘new’ TRA, meaning that the two year period during which a TPIM can subsist can in effect be extended to four years via an ETPIM, if the ETPIM Bill becomes law,⁷¹ so long as the *previous* TRA relied on could satisfy the ‘reasonable belief’ requirement.⁷² It would also need to be apparent – to an unspecified standard of proof – that the TPIM restrictions were not sufficient to deal with the risk the suspect created.⁷³ Thus, a person could have been subjected to a control order, followed by a TPIM, and then by an ETPIM *without* having re-engaged in new TRA. However, the point made in *BM* as to Condition C would also apply to ETPIMs: the fact that the TRA is four years or more old, could be taken to mean, especially in relation to less high risk suspects, that the imposition of the ETPIM is not *necessary* to protect the public from a risk of terrorism.⁷⁴

Secondly, suspects can be transferred from an ETPIM to a new ETPIM after two years. In that category it *is* necessary to show that ‘new’ terrorism related activity occurred after the first notice came into force to impose the new notice.⁷⁵ Significantly, clause 11(3) of the ETPIM Bill indicates that after an ETPIM has been imposed, the requirement of ‘new’ TRA allows for previous TRA also to be taken into account in deciding to impose a further

(b) at such earlier time (if any) as is specified in the order’.

⁷⁰ Clause 2(6)(c).

⁷¹ Note that if the Act is repealed, then any enhanced TPIM notices may remain in force for a transitional period of 28 days only, after which they cease to have effect: ETPIM Bill, cl 10.

⁷² This was addressed in the ETPIM Bill ECHR memo, n 29, para 11:

The power to impose an enhanced TPIM notice is not affected by the individual having been subject to a standard TPIM notice or vice versa (clause 4). An enhanced TPIM notice may therefore be imposed on an individual who, when the Bill comes into force, is subject to a standard TPIM notice. A person cannot be bound by a standard TPIM notice while the ETPIM notice is in force (clause 4(1) ETPIM Bill). In such a case, the standard TPIM notice must be revoked before an enhanced notice may be imposed.

⁷³ Clause 2(4)(b). The clause only requires that the Home Secretary ‘reasonably considers it necessary’ to employ the more onerous restrictions.

⁷⁴ ETPIM Bill, cl 2(3) Condition C.

⁷⁵ Clause 2(6)(b). The government made it clear in its response to the Select Committee on ETPIMs that that possibility would be available: ‘If the individual re-engages in terrorism-related activity, it is open to the Home Secretary to consider whether to impose a fresh TPIM or, in exceptional circumstances, an ETPIM notice. It would also be possible to consider imposing a TPIM notice on an individual following the end of an ETPIM notice...’: n 28, 6 para 2.

measure on the controlled person.⁷⁶ If two or more ETPIM notices have been in force the ‘new’ TRA must have occurred after the coming into force of the most recent notice.⁷⁷ The third category covers suspects being transferred from an ETPIM to a new TPIM. Under section 3(6) of the TPIMA no provision is made requiring new TRA if the suspect had not previously been subject to a TPIM. However, it would appear that the term ‘TPIM’ in section 3(6)(b) arguably should be interpreted to include the term ‘ETPIM’, meaning that new TRA would be needed.

David Anderson QC, the current government appointed Independent Reviewer of Terrorism Legislation, has found that the two-year limit for TPIMs could have positive results, ‘in terms of concentrating minds on the need for serious efforts to prosecute, deport or de-radicalise controlled persons’.⁷⁸ However, that is clearly less likely to be the case in relation to ETPIMs, given that the need for ‘new’ TRA fails to provide an inhibiting effect on imposing an ETPIM after a TPIM. But even if ETPIMs are introduced, and certain suspects are subjected to them after being subjected to a TPIM, some new TRA would be needed after two years to subject them to a further measure,⁷⁹ a clear improvement on the position under control orders.

TPIM or ETPIM restrictions affecting association, communication, movement, property

The obligations that can be imposed under TPIMs are less onerous than those that could be imposed under control orders, or under ETPIMs, in a range of respects. Greater access to electronic communications is allowed since a minimum level of access is specified,⁸⁰ relevant to the investigative element of the TPIM scheme, discussed below. Under an ETPIM notice greater restrictions on telephone and internet access can be specified without such a minimum

⁷⁶ Clause 11(3): ‘In a case where: (a) an enhanced TPIM notice has come into force in relation to an individual, and (b) by virtue of the coming into force of that enhanced TPIM notice, terrorism-related activity which occurred before the coming into force of that notice has ceased to be new terrorism-related activity (within the meaning of s2(6)) in relation to that individual for the purposes of that section, the Secretary of State is not prevented from taking account of that activity for the purposes of the continued imposition, or subsequent imposition, of measures on that individual’.

⁷⁷ Clauses 2(2), 2(6)(c).

⁷⁸ ‘Control Orders in 2011,’ n 35 above, para 6.34.

⁷⁹ Taking account of the provision in clause 11(3).

⁸⁰ The 2011 Act provides in Sched 1 para 7(1): ‘The Secretary of State must allow the individual to possess and use (at least) one of each of the following descriptions of device (subject to any conditions on such use as may be specified under sub-para (2)(b)) – 3(a) a telephone operated by connection to a fixed line; 3(b) a computer that provides access to the internet by connection to a fixed line (including any apparatus necessary for that purpose); 3(c) a mobile telephone that does not provide access to the internet’.

level so that a *total* ban on access to such devices can be imposed.⁸¹ The option to prevent travel abroad is retained under TPIMA⁸² and under the ETPIM Bill,⁸³ as is the option to require daily reporting to the police.⁸⁴ The option to prevent transfer of funds abroad under the PTA is replaced by an option under TPIMA to place restrictions on transfers of property and requirements to disclose details of property;⁸⁵ the same provisions are available under the ETPIM Bill.⁸⁶

The association measures are much more restrictive under the ETPIM Bill: a suspect under a standard TPIM notice can be required to seek prior permission from the Secretary of State before meeting or communicating with ‘specified persons or specified descriptions of persons’,⁸⁷ whereas under the ‘enhanced’ form of such a measure, a suspect can be required to seek permission before meeting or communicating with literally anyone – ‘other persons’,⁸⁸ but provision is made to allow the individual, without seeking permission, to communicate with persons specified by the Secretary of State.⁸⁹ Thus, under a TPIM notice a suspect can be barred from any communication or association with specific people, whereas under its enhanced form, he/she can be barred from communication or association with anyone at all, apart from specific permitted persons. In contrast, the work or studies measures and the monitoring measures that can be specified under a TPIM notice or under its enhanced form are identical. Under both the Secretary of State can impose a requirement not to carry out specified work or studies,⁹⁰ and the individual can be required to cooperate with measures allowing communications, movement (via electronic tagging) or other activities to be monitored.⁹¹ These restrictions, including limitations on electronic means of communication, affect the qualified ECHR rights in Articles 8-11 but they have tended to be upheld by the courts as necessary and proportionate interferences with those rights.⁹² However, some of

⁸¹ Sched 1 cl 8.

⁸² Without permission of the Secretary of State (TPIMA, Sched 1 para 2).

⁸³ Sched 1 clause 2.

⁸⁴ TPIMA, Sched 1 para 10; ETPIM Bill, Sched 1 cl 11.

⁸⁵ TPIMA, Sched 1 para 6.

⁸⁶ Sched 1 clause 7.

⁸⁷ TPIMA, Sched 1 para 8(2)(a).

⁸⁸ Sched 1 clause 9; the employment of a total ban on association and communication appears in clause 9(2)(a). See also TPIMA, s 26(3)(d)(ii) which makes the same provision in relation to temporary ETPIMs.

⁸⁹ Sched 1 clause 9(3).

⁹⁰ TPIMA Sched 1 para 9; ETPIM Bill Sched 1 para 10.

⁹¹ TPIMA, Sched 1 para 12; ETPIM Bill, Sched 1 cl 13.

⁹² For example in *AM v Secretary of State for the Home Department* [2011] EWHC 2486 (Admin) the High Court upheld control order conditions that included bans on any internet access at the individual’s home and on the use of USB memory sticks to transfer any data from his home to his university, restrictions on his access to the internet at university and when visiting his parents.

them could also be taken into account under a holistic evaluation of the deprivation of liberty concept under Article 5(1),⁹³ to which this comment now turns.

The ‘deprivation of liberty’ jurisprudence underlying design of obligations imposed under control orders, TPIMs or ETPIMs

Introduction

Under the PTA any obligations that the Secretary of State considered necessary for the purpose of preventing or restricting involvement in terrorism-related activity could be imposed,⁹⁴ with the implied requirement that they did not breach Article 5 ECHR.⁹⁵ Under TPIMA and under the ETPIM Bill, however, the obligations are specified in Schedule 1 in both instruments. Under TPIMA the obligations are also more limited; they are clearly designed to ensure that Article 5 is very unlikely to be breached, taking account of the control orders case-law. In contrast, ETPIMs under Schedule 1, Part 1 of the ETPIMs Bill, can impose measures very similar to those that could be imposed under ‘heavy touch’ control orders.

TPIMs and ETPIMs have been presented to Parliament as avoiding the creation of deprivations of liberty for the purposes of Article 5(1) ECHR, basing this contention on the control orders case-law.⁹⁶ The problem, which this article turns to below, is that in so far as that case-law and executive responses to it can be said to represent a dialogue between the domestic courts, the executive and Parliament⁹⁷ it has arguably had a ‘negative suppressive’

⁹³ See *Secretary of State for the Home Department v AP* [2011] 3 WLR 51; the Supreme Court found that the fact that a restriction affects a qualified right, in that case Article 8, does not preclude it from being viewed as also relevant to analysis under Article 5(1). In *Guzzardi* [1980] 3 EHRR 333, relied on in *AP*, lack of social contacts was taken into account in finding a deprivation of liberty ([50]). This could now include eg limitations on use of the internet, preventing access to social media.

⁹⁴ The obligations listed in the PTA were, formally speaking, only illustrative, although in practice they were relied on.

⁹⁵ The PTA operated subject to an implied – but unclear – restriction to the effect that the obligations imposed must not breach Article 5 ECHR. That was the apparent position, since otherwise, obviously, the orders could not be viewed as ones that did not require a derogation from that Article. Certain orders were quashed on the basis that they were in fact derogating orders which the Home Secretary had had no power to make – see *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642.

⁹⁶ This is necessary since the interferences with liberty they create would not fall within the narrow exceptions to Article 5, and in each instance the decision was taken by the government in question not to seek a derogation from that Article. See ‘TPIMA ECHR memo’, n 28, para 23 ‘ETPIM Bill ECHR Memo’ n 29, para 24 and the ETPIM Bill Joint Committee n 3, para 98.

⁹⁷ See the annual PTA renewal debates from 2006 to 2011: see eg UK, HC Deb vol 506, col 725, 1 March 2010 (David Heath). See also responses to oversight bodies, including the JCHR: for example, ‘Counter-Terrorism

quality in relation to the ETPIM Bill, meaning that it appears to have provided ratification for the view that the Bill is Article 5-compliant, stifling parliamentary concerns,⁹⁸ and obscuring the departure from the *Strasbourg* jurisprudence that appears to be underway. The discussion below centres on the sense in which ETPIMs have the potential to create a deprivation of liberty.

The concept of 'deprivation of liberty' under Article 5(1) at Strasbourg

The autonomous Strasbourg concept of deprivation of liberty under Article 5(1)⁹⁹ creates a deliberate disconnect between the commonly understood idea of taking liberty away, and the idea of an intensified 'deprivation' of it which requires justification within the specified and narrow exceptions under Article 5. That disconnect opens up an imprecise area for state action interfering with liberty which measures of the type of control orders, TPIMs or ETPIMs can inhabit, although Article 5 itself contains no exception allowing for forms of executive detention to protect national security. Article 5 was designed at a time when only *paradigmatic* deprivations of liberty – arrest, detention – were in contemplation by the drafters of the ECHR.¹⁰⁰ Since then a range of non-paradigm interventions have arisen, based on the control order model. Such measures may fall just short of the point at which the concept of such deprivation converges with that of an interference with movement under Protocol 4 Article 2,¹⁰¹ which the UK has not ratified. No control order case has yet been decided at Strasbourg, but the leading Strasbourg decision in *Guzzardi v Italy*¹⁰² potentially enables Article 5 to encompass such measures since it focuses on the impact of restrictions on the life the person subject to them would otherwise have been living.¹⁰³ In *Guzzardi* it was found in relation to non-paradigmatic interferences with liberty that the difference between a deprivation of and a restriction on liberty was one of degree, not of substance, and that it was for the court to assess into which category a particular case fell, taking account of a range of criteria, including the 'type, duration, effects and manner of implementation of the measure in

Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation' 2010 HL 64, HC 395 (2010).

⁹⁸ See the ETPIM Bill Joint Committee n 3, para 88.

⁹⁹ Article 5(1) provides: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.'

¹⁰⁰ See: P. van Dijk & G. van Hoof, *Theory and Practice of the European Court of Human Rights* 2nd ed (Dordrecht, Netherlands: Kluwer Law International, 1990) 255; J. Murdoch, 'Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence' (1993) 42 ICLQ 494, 497-499.

¹⁰¹ See E. Bates, 'Anti-terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29 LS 99. [1980] 3 EHRR 333.

¹⁰³ *ibid* at [95].

question'.¹⁰⁴ The curfew of nine hours daily that had been imposed was *not* the core issue in the finding that the restrictions amounted to a deprivation of liberty.¹⁰⁵ *Ashingdane v UK*¹⁰⁶ re-emphasised the point made in *Guzzardi* that the core obligation of confinement should *not* be given overwhelming weight,¹⁰⁷ as did *Storck v Germany*.¹⁰⁸ Strasbourg has also found in a number of cases on supervisory house arrest that daily periods of about 12 hours curfew or house detention may fall outside the deprivation of liberty concept (*Trijonis*,¹⁰⁹ *Ciancimo*,¹¹⁰ *Raimondo*).¹¹¹ Below, the Strasbourg understanding of that concept, especially as stated in *Guzzardi*, is contrasted with that adopted in the control orders jurisprudence.

Domestic Article 5 jurisprudence on non-derogating control orders

When non-derogating control orders were introduced they included (initially) 18 hours daily house detention/arrest (curfew) and forced relocation.¹¹² As the decisions briefly discussed below indicate, their use therefore relied in effect on a derogation from Article 5 by stealth, or

¹⁰⁴ *ibid* at [92]. *Guzzardi* was confined on a small island for 16 months within a confined area and subject to house detention for 9 hours overnight daily. That meant that he had to remain in his home (where his family was allowed to reside but which was dilapidated) between 10 pm-7 am; he also had to seek permission to make phone calls or have visitors. He was ordered (although there was no physical restraint such as a fence) to remain in an area of 2.5 square kilometres. The Court noted that there were few opportunities for social contacts.

¹⁰⁵ The Court found: 'the treatment complained of resembles detention in an 'open prison...or committal to a disciplinary unit'. *Ibid* [95].

¹⁰⁶ (1985) 7 EHRR 528.

¹⁰⁷ *Ibid* [41]-[42]; here confinements (a) in a closed psychiatric hospital with high security (which included barred windows, a high perimeter fence; visits to family twice in 7 years) and (b) in an open hospital with only an overnight residence requirement on three days a week were both found to create a deprivation of liberty. In the open hospital he had regular, unescorted leave to visit his family, going home every weekend from Thursday till Sunday and he was free to leave the hospital Monday-Wednesday, during the day. He argued that the restrictions to which he was subject at the open hospital were such as to constitute restrictions on his freedom of movement only and not a deprivation of liberty. The Court found that the applicant had remained a detained patient during his stay in the open hospital in the sense that his liberty, and not just his freedom of movement, was circumscribed both in fact and in law.

¹⁰⁸ (2006) 43 EHRR 96 at [74]; the Court found: 'the notion of deprivation of liberty within the meaning of Article 5(1) does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time'. The Court went on: '...the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question' (2006) 43 EHRR 96 at [71], [74]. The Court added: 'A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question'. The Court relied on *Guzzardi v Italy*, [92] and on a range of cases in which various aspects of 'deprivation of liberty' were in doubt, including the question whether confinement in a large area could fall within the term 'deprivation': *Nielsen v Denmark* (1989) 11 EHRR 175 at [67]; *HM v Switzerland* (2002) 38 EHRR 314 at [42], [46].

¹⁰⁹ *Trijonis v Lithuania* (App No. 2333/02), 17 March 2005.

¹¹⁰ *Ciancimo v Italy* (1991) 70 DR 103.

¹¹¹ *Raimondo v Italy* (1994) 18 EHRR 237 [39].

¹¹² They also included random house searches, geographical restrictions, electronic tagging, bans on visits by non-approved persons, and prohibitions on electronic communication. Under s1(3) of the 2005 Act there was no limitation on the measures that could be imposed under non-derogating control orders, except that the Home Secretary could only impose those deemed necessary to prevent TRA. See further Walker n 14.

on an implicit executive presupposition as to the need for acceptance of an attenuated or recalibrated version of Article 5.¹¹³ The precise limits imposed by Article 5(1) at Strasbourg, as discussed above, undeniably left some leeway, not only to put forward the scheme as a whole as compatible with the Article, but also to allow for argument that the obligations imposed under individual early control orders did not overall fall within Article 5(1). But a deprivation of liberty was found by the House of Lords in *JJ*¹¹⁴ due *inter alia* to the imposition of house detention for 18 hours daily and restriction of movement to specified areas.¹¹⁵ The majority accepted that the difference between deprivation of and restriction on liberty was one of degree, not of substance. The court's task was to take account of a range of criteria from *Guzzardi v Italy*¹¹⁶ to assess the impact of the restrictions on the controlees in the context of the life they might otherwise have been living. *Secretary of State for the Home Department v E*¹¹⁷ followed *JJ*, but Lord Bingham focussed more strongly on the issue of restraint on *physical* liberty, finding that the restrictions cumulatively could not 'effect a deprivation of liberty if the core element of confinement, to which other restrictions...are ancillary, is insufficiently stringent.'¹¹⁸ *Secretary of State for the Home Department v MB and AF*¹¹⁹ gave some support to the finding of Lord Brown in *JJ* that sixteen hours daily house detention appeared to be the upper limit.¹²⁰ These three decisions were interpreted by the then Labour government in various public statements to mean that the Lords had given support to the control orders scheme,¹²¹ due to the apparent acceptability of 16 hours house detention, combined with other restrictions, within Article 5.

However, *AP v Secretary of State for the Home Department*¹²² relied on *Guzzardi* in finding that the imposition of fourteen hours daily house detention combined with forced relocation had created a deprivation of liberty since due to the suspect's particular family circumstances

¹¹³ See Fenwick n 15 above.

¹¹⁴ *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642.

¹¹⁵ Restrictions also included spot searches of residences and electronic tagging.

¹¹⁶ [1980] 3 EHRR 333.

¹¹⁷ [2007] 3 WLR 720.

¹¹⁸ *ibid* at [11].

¹¹⁹ [2007] 3 WLR 681: the Lords unanimously found in that there was no deprivation of liberty in respect of 14 hours detention, combined with a geographical restriction and a range of other restrictions. That finding should be taken in conjunction with the rejection of 18 hours daily house detention in *JJ*.

¹²⁰ In *JJ* at [105] Lord Brown considered that a 16 hour curfew would be acceptable. He considered that 12 or 14 hour curfews were consistent with physical liberty. But see also Lord Brown in *Secretary of State for the Home Department v AP* [2011] 53 WLR 53 at [3] in which he emphasised that this was not the majority view in *JJ*, and that curfew length was only one factor among many.

¹²¹ See: *Counter Terrorism Policy and Human Rights (ninth report) Annual Renewal of Control Orders Legislation 2008* Home Office, Report Cm 7368 (2008) 4.

¹²² [2011] 3 WLR 51.

he had suffered an unusually high degree of social isolation.¹²³ Although this decision took a more holistic view of the deprivation of liberty concept, the Supreme Court may be said to have given its imprimatur to the use of executive measures of this type since the decision indicated that fourteen-hour to sixteen-hour periods of home detention, repeated over a long period of time, would not create a deprivation of liberty, even combined with forced relocation, *unless* the particular circumstances of the suspect relocation or other conditions satisfied the ‘unusually destructive of normal life’ test. When the findings in *AP* on forced relocation were applied in subsequent cases, it was found that specific relocations would not infringe Article 5, barring special circumstances,¹²⁴ and that under Article 8 the relocation obligation would usually be found to be a necessary and proportionate measure to protect the public.¹²⁵ Where particular social isolation might arise, it has been found that it could be alleviated by requiring the Secretary of State to contribute to the travel costs incurred by the controlee’s family in visiting him.¹²⁶

Directly liberty-invading restrictions under TPIMA and the ETPIM Bill

It is clear that in the decisions discussed the domestic courts brought the application of the control orders scheme into somewhat closer compliance with Article 5, *without* rejecting the scheme as a whole,¹²⁷ thus in effect paving the way for the introduction of both TPIMs and ETPIMs, and influencing the legal design of the new measures.¹²⁸ The obligations available under both instruments, while designed to interfere with the liberty of suspects in such a way as to prevent them from engaging in forms of terrorism-related activity, nevertheless had to avoid creating, in legal terms, a ‘deprivation of liberty’ under Article 5(1). But a political decision was taken, *not* fully necessitated by the control orders’ jurisprudence, to rely on a

¹²³ *ibid* at [4]. Lord Brown found that a control order with a 16-hour curfew and *a fortiori* one of 14 hours, would not be struck down as involving a deprivation of liberty, unless the other conditions imposed were ‘unusually destructive of the life the controlee might otherwise have been living’.

¹²⁴ In *BM v Secretary of State for the Home Department* [2011] EWHC 1969 (Admin), the High Court upheld the Secretary of State’s decision to require BM to live in a city outside London. The Court considered that the relocation did amount to a serious infringement of Article 8 rights, but the Court accepted the reasons for the relocation and found that any such infringement was both necessary and proportionate.

¹²⁵ Eg in *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin) at [53], the relocation obligation was found to represent a necessary and proportionate measure to protect the public under Article 8.

¹²⁶ *ibid*. The court dismissed an appeal brought by CD against the Secretary of State’s decision to refuse to remove an obligation that required him to reside away from his previous area of residence. The control order was not found to lead to a breach of Art 5.

¹²⁷ See generally as regards control orders K. Ewing & J. Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] PL 668.

¹²⁸ See ECHR memoranda for both instruments: TPIM, n 28, paras 16-2, 24-42, and ETPIM, n 29, paras 19-24.

less liberty-invading scheme for TPIMA¹²⁹ which did *not* explore the limits of Article 5 tolerance, but fell well within them, as part of a much-trumpeted movement after the General Election 2010 towards the restoration of liberties.¹³⁰ In pursuit of that determination the more lengthy house detention requirements under control orders were relaxed, becoming only an ‘overnight residence requirement’, and the relocation provisions were dropped.¹³¹ Thus, it is *not* the case that TPIMA was mainly the result of a ‘suppressive dialogue’ influencing parliamentary and judicial acceptance of a variant of the control orders model. Rather, it was the result of a serious engagement with human rights arguments by the executive and Parliament which transcended the judicial engagement with them under the Human Rights Act (HRA).

The ‘overnight’ requirement under TPIMA is ‘a requirement, applicable overnight between such hours as are specified, to remain at, or within, the specified residence.’¹³² Clearly, the requirement leaves open room for interpretation of the term ‘overnight’. It has been viewed by the Secretary of State in imposing the early TPIM notices as a requirement for the controlled person to remain at his/her residence between the hours of 9.00 pm and 7.00 am daily. In *Secretary of State for the Home Department v BM*¹³³ Collins J found that ‘overnight’ in common parlance should be taken to bear some relationship to the hours between which most people would regard it as reasonable to assume that people might be at home, the evening having come to an end. He considered that the hours that could be specified would not extend beyond the period 9.00pm to 7.00am.¹³⁴ In *Secretary of State for the Home Department v CC, CF*¹³⁵ a challenge to an overnight measure covering those hours as beyond the powers accorded by TPIMA Schedule 1 was rejected, applying that test.¹³⁶ Thus at present a TPIM notice can specify a 10 hour curfew, between those hours, which is well

¹²⁹ Anderson indicated in his review of TPIMS that it was a political decision ‘TPIMs in 2012,’ n 34 above, 37.

¹³⁰ For example, in July 2010 Theresa May suggested that the counterterrorism review that led to the Protection of Freedom Bill would “...restore the ancient civil liberties that should be synonymous with the name of our country”: ‘Counter-terrorism powers to face government review’ *BBC News*, 13 July 2013, at <http://www.bbc.co.uk/news/10619419> (last visited 28 April 2013).

¹³¹ See Sched 1 para 1, TPIMA. Anderson was doubtful in his review of control orders in 2011 (n 35), as to whether relocation should have been excluded from the TPIM scheme, in national security terms. His view was that relocation was effective and therefore freed up resources for surveillance of other suspects: para 6.9. He took the view that relocation should have been retained if proportionate to the threat that appeared to be posed by the suspect to the reasonable belief level.

¹³² Sched 1 para 1(2)(c), TPIMA.

¹³³ [2012] EWHC 714 (Admin).

¹³⁴ *ibid* at [51]-[52].

¹³⁵ [2012] EWHC 2837 (Admin).

¹³⁶ *ibid* at [65].

within the limits placed on house detention in the domestic control order cases and within the time limits accepted at Strasbourg, as discussed. Control orders could impose general geographical boundaries, whereas imposition of such boundaries are not available under TPIMA; instead there is a power to exclude the controlled person from particular specified places, such as streets and specified areas or descriptions of places, such as tube stations or airports.¹³⁷

In contrast to their influence on the legal design of TPIMs, those four leading control order decisions were centrally determinative in relation to ETPIMs, which were designed to remain *just* within the outer limits of the Article 5 tolerance that they delineated. The acceptance that ETPIM notices can impose relocation¹³⁸ and lengthy periods of house detention,¹³⁹ well beyond the overnight residence requirements of TPIMs, clearly relies on those decisions. That was made explicit in the explanatory notes accompanying the ETPIM Bill and in the ECHR memo, relying on *JJ* and *AP*.¹⁴⁰ Forced relocation had attracted particularly severe criticism, being dubbed a form of internal exile by the JCHR,¹⁴¹ but, as discussed, the domestic courts accepted that the principle of forced relocation can be compatible with Article 5, and post-*AP* courts have upheld the Secretary of State's decision on relocation.¹⁴² Again, the *combinations* of restrictions, and in particular the question when to combine house detention with forced relocation, are a matter of executive discretion. In Schedule 1 the Bill sets limits to a number of the obligations, although they are broader than those under TPIMA, but in the case of house detention it does not, leaving the length of the detention to executive discretion.¹⁴³ Thus, the wide executive discretion created by the PTA, which led to findings that the package of measures imposed by *individual* control orders breached Article 5, is

¹³⁷ TPIMA, Sched 1 para 3.

¹³⁸ Sched 1 clause 1(2)(a) combined with clause 1(3). See also TPIMA, s 26(3)(a)(i) in relation to temporary ETPIMs.

¹³⁹ The period is not specified in the ETPIM Bill, Sched 1. That is also the case in relation to temporary ETPIMs under s26(3)(a)(iii) TPIMA.

¹⁴⁰ TPIMA, Explanatory notes, para 41. See also TPIMA ECHR memo n 28, para 24.

¹⁴¹ The JCHR has found that its impact on both the suspect and the suspect's family can be described as 'extraordinary': see n 29 above, para 41.

¹⁴² See *Secretary of State for the Home Department v BM* [2011] EWHC 1969 (Admin); *Secretary of State v BX* [2010] EWHC 990 (Admin); and *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin).

¹⁴³ Sched 1 cl 1(2)(c): the requirement is to remain in the residence 'applicable between such hours as are specified'. Under an ETPIM notice the residence measure in Sched 1 para 1 can require the suspect to observe a curfew which can fall at any time during the day, in contrast to TPIMA's overnight requirement so, relying on the implied restriction stemming from the *domestic* Article 5 jurisprudence, an ETPIM notice can allow for a curfew of up to sixteen hours which can be combined with forced relocation.

largely replicated in the ETPIM Bill.¹⁴⁴ In a further contrast to TPIMA, the ETPIM Bill includes a ‘movement restrictions measure’ allowing restrictions to be imposed on an individual preventing him or her leaving a particular place, thus re-imposing general geographical boundaries.¹⁴⁵

Are TPIM or ETPIM notices likely to create a deprivation of liberty?

David Anderson QC considers that the ETPIMs and TPIMs schemes are ECHR-compatible,¹⁴⁶ and Parliament has been informed that both achieve compatibility.¹⁴⁷ Clearly, the possibility of finding a breach of Article 5 is most likely to occur in relation to ETPIM notices, given the ETPIM Bill’s exploration of the outer limits of the domestic deprivation of liberty concept.¹⁴⁸ The Home Office memo on the ECHR in relation to ETPIMs relied on the control orders’ case-law which strongly emphasised the period of interference with physical liberty – actual confinement¹⁴⁹ – a position which had been reaffirmed in *AP*, and assumed that the other restraints were ancillary to that confinement. But that position does not comport very obviously with the holistic *Guzzardi* approach. Further, the memo on the ETPIM Bill assumes quite readily that between fourteen-sixteen hours house detention daily a grey area is apparent within which the imposition of other unusually stringent obligations might tip the balance into a deprivation of liberty.¹⁵⁰ But as discussed Strasbourg has found that daily periods of about 12 hours, but not necessarily 14 hours or more, house detention may fall outside Article 5(1).¹⁵¹ So the Strasbourg jurisprudence is being to an extent disregarded in relation to ETPIMs.

¹⁴⁴ Lord Plant has pointed out that while the schemes may be compatible, the question is whether individual combination of measures imposed on suspects do not create a deprivation of liberty, which may not be the case: HL Deb vol 744, col GC349, 23 April 2013.

¹⁴⁵ Sched 1 cl 4.

¹⁴⁶ Anderson’s response to Lord Platt before the ETPIMS Joint Committee above n 30, Answer to Q30.

¹⁴⁷ See both ECHR memos: n 28 and n 29 above.

¹⁴⁸ The possibility that the obligations imposed under a particular ETPIM notice could infringe Art 5 raises the question whether the scheme should have been accompanied by a derogation from Art 5, but it is clear at present that the government does not intend to seek one. See also ETPIM Bill Joint Committee, n 3, where the Committee did not reach the conclusion that the scheme was incompatible with Article 5.

¹⁴⁹ See n 29 above, para 21.

¹⁵⁰ *ibid* para 22.

¹⁵¹ Therefore the JCHR took the view that the more ‘heavy touch’ control orders did breach Article 5. See eg the reports of the JCHR on control order renewal: ‘Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation’ HL 64 HC 395 (2010); ‘Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation’ HL 57 HC 356 (2008).

The question of the *duration* of the interference with liberty and therefore of the cumulative effect of measures imposed over a long period of time is one of the key indicators of a deprivation of liberty at Strasbourg. This question might arise in relation to TPIM notices, since, as indicated above, those subject to them were previously subject to control orders,¹⁵² and this matter is likely to be especially pertinent if a suspect who has been subject to a TPIM is then subjected to an ETPIM. Duration was one of the four factors expressly identified in *Guzzardi* as relevant to determining whether a deprivation of liberty had arisen, but in the domestic control order decisions it has received little emphasis. In 2013 it appears that two controlled individuals have been subjected to orders for almost eight years and a further five have been subjected to them for more than six years (including in all cases well over one year on a TPIM notice).¹⁵³ Those are obviously very significant periods of time. If some of this group of suspects is then subjected to an ETPIM notice, and the ETPIM notices are challenged, it could be expected that the issue of duration in relation to Article 5 would be pivotal. However the fact that TPIMs or ETPIMs, unlike control orders, do not subsist for an indefinite period, and so an endpoint would be in sight, would obviously be relevant.

Like control orders, the obligations imposed under TPIMs and ETPIMs are backed up by criminal sanctions. If a controlled person infringes any of the obligations imposed by, for example, leaving the residence during the controlled hours, he or she is liable to arrest and criminal charges.¹⁵⁴ The matter of coercion was emphasised in *Gillan v UK*¹⁵⁵ in the context of suspicion-less stop and search under section 44 of the Terrorism Act 2000. The Lords had found domestically that those stopped had merely been detained in the sense of being ‘kept from proceeding or kept waiting’,¹⁵⁶ and so the interference with their liberty fell outside the ambit of Article 5(1). But the Strasbourg Court refused to be seduced, impliedly or expressly, by executive arguments as to the need to maintain a narrow ambit of Article 5(1) in the counter-terrorism context,¹⁵⁷ and contemplated a higher standard as to the liberty of the

¹⁵² See Anderson, ‘TPIMs in 2012’, n 34 above, Annex 6.

¹⁵³ Anderson, ‘Control Orders in 2011’, n 35, paras 4.12, 4.28.

¹⁵⁴ Previously imposed under PTA, s 9(1)(4)(a); now contained in TPIMs Act 2011, s 23 and ETPIM Bill, cl 7. The sanctions in relation to breach of conditions under TPIM/ETPIM notices are the same as those that were available in relation to control orders. Breach of any condition imposed under the notices is a criminal offence, punishable by up to five years imprisonment.

¹⁵⁵ (2010) 50 EHRR 45 [57].

¹⁵⁶ *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537 at [25].

¹⁵⁷ On behalf of the government it was argued in *Gillan* at [55]: ‘the purpose for which the police exercised their powers was not to deprive the applicants of their liberty but to conduct a limited search for specified articles’.

subject than the House of Lords had done,¹⁵⁸ finding that the use of coercion would be relevant to the question whether a deprivation of liberty had occurred.¹⁵⁹ The element of coercion underpinning the TPIM and ETPIM obligations is therefore one of the strongest indicators that they could cause a deprivation of liberty, following *Gillan*. It might also be relevant that the coercion has subsisted in respect of all the current persons subjected to these obligations for the periods of time indicated, since all of them were previously subject to control orders. A number of the persons currently subject to TPIM notices have already spent periods of time in prison for breach of the obligations imposed under the control orders that they were previously subjected to.¹⁶⁰

Relevance of the purpose of an ETPIM?

If ETPIMs are introduced and considered in relation to Article 5(1) in future, the argument pressed upon courts in relation to control orders, but overtly rejected, that the *purpose* of an ETPIM should be capable of taking it outside the ambit of Article 5(1),¹⁶¹ might re-emerge. A similar argument for relying on proportionality-based arguments to narrow the ambit of Article 5(1) has gained some purchase at Strasbourg. The House of Lords found in *Austin v The Commissioner of Police of the Metropolis*,¹⁶² that ‘kettling’ protesters and bystanders for seven hours did not create a deprivation of liberty¹⁶³ since in making a determination as to the ambit of Article 5(1), the *purpose* of the interference with liberty could be viewed as relevant, allowing a balance to be struck between what the restriction sought to achieve and the interests of the individual.¹⁶⁴ The Grand Chamber then echoed that finding in *Austin v UK*,¹⁶⁵

¹⁵⁸ Although without finally deciding the case under Article 5, finding a breach instead under Article 8. *ibid* at [87].

¹⁵⁹ ‘[Those searched] were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5(1)’. *Gillan v UK* (2010) 50 EHRR 45 at [57]. The Court noted in support the example of *Foka v Turkey*, (App no. 28940/09), 24 June 2008, at [74]-[79].

¹⁶⁰ See JCHR ‘Counter-Terrorism Policy and Human Rights’ HL 37 HC 282 (2009) 40, Appendix 2 Q6.

¹⁶¹ This argument was deployed in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, 391-92 but rejected on a 3/2 majority at [12]-[19], [21], [23]-[24], [29], [57]-[63], [90]-[91], [93]-[96], [99]-[105], [109], [110].

¹⁶² [2009] 2 WLR 372.

¹⁶³ See on the decision: JCHR ‘Facilitating Peaceful Protest’ 10th Report HL 111, HC 684 (2011), para 15.

¹⁶⁴ *ibid* at [27]. The purpose had to take account of the rights of the individual as well as the interests of the community, and ‘therefore any steps taken must be resorted to in good faith, and must be proportionate to the situation that made the measures necessary’. If those requirements were met, however, Lord Hope at [34] concluded that it would be proper to find that ‘measures of crowd control undertaken in the interests of the community would not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted by them’ if the measures were proportionate to the aim pursued.

determining that, relying on the context of the imposition of the ‘kettle’,¹⁶⁶ the *purpose* of its imposition must be taken into account.¹⁶⁷ Although the Court did not refer expressly to proportionality, it clearly adverted to that concept¹⁶⁸ in finding that the measure taken appeared to be the ‘least intrusive and most effective means to be applied’,¹⁶⁹ and on that basis no deprivation of liberty was found. A strong joint dissenting opinion trenchantly criticised the findings of the majority as creating a new and objectionable proposition,¹⁷⁰ since if liberty-depriving measures were deemed to lie outside Article 5(1) if claimed to be necessary for any legitimate/public-interest purpose, states could circumvent Article 5 for various reasons going beyond the exceptions.¹⁷¹ The findings contradicted those in *A v UK*¹⁷² in which the Grand Chamber refused to accept that in the counter-terror context the *purpose* of a measure – detention without trial under the ACTSA – could be relied on to create a new exception to Article 5. *Austin* in effect creates a new, very broad, exception to Article 5,¹⁷³ while purporting to avoid relating the public interest argument to the issue of ambit.

Clearly, the crowd control situation in *Austin* differed from those at stake in relation to TPIMs/ETPIMs, but it could arguably be a small step from *Austin* to a finding that if a measure interfering with liberty appears to be necessary due to the demands of the terrorist threat, such a measure will not be found to create a deprivation of liberty, if the least intrusive means needed to answer to the threat (such as a ‘lighter touch’ ETPIM) is adopted. Thus, *Austin* creates some leeway to allow this purposive principle to make its way into the

¹⁶⁵ (2012) 55 EHRR 14.

¹⁶⁶ The Court found that in accordance with the *Engel* criteria for determining when a deprivation of liberty occurs (*Engel v Netherlands* (1976) 1 EHRR 647) the coercive nature of the containment within the cordon, its duration, and its effect on the applicants, in terms of physical discomfort and inability to leave, pointed towards a deprivation of liberty.

¹⁶⁷ (2012) 55 EHRR 14 at [61].

¹⁶⁸ *ibid* at [59] (The ‘context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good...[such] restrictions... so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can [not] properly be described as “deprivations of liberty” within the meaning of Article 5(1)’.

¹⁶⁹ *ibid* at [66].

¹⁷⁰ Joint Dissenting Opinion of Judges Tulkens, Spielman and Garlicki at [3] ‘implying that if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty...’.

¹⁷¹ *ibid* at [6].

¹⁷² (2009) 49 EHRR 29 (Grand Chamber).

¹⁷³ *ibid* at [61]. The Grand Chamber reiterated, on the basis of the principle of subsidiarity, that it should only interfere in a domestic decision as to facts on very cogent grounds, affirming that ‘subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19’. However, it applied that principle not to the findings of fact only, but to the interpretation of Article 5(1) despite the fact that the interpretation ran counter to the findings in *A v UK* on the point.

counter-terror context in respect of non-paradigm interferences with liberty via ETPIMs which already tend to skirt or cross the boundaries of Article 5(1) tolerance,¹⁷⁴ bearing in mind that Strasbourg has *not* so far found that 16 hours daily house detention, combined with restrictions such as relocation, necessarily falls within Article 5(1). If the *Austin* argument, creating in effect a limitation of Article 5(1)'s ambit where alternative measures were unavailable (on the basis that prosecution had been ruled out on national security grounds), were to gain purchase in this context, the question would be whether a particular ETPIM went further in constraining the controlled person's liberty than necessary to avert the threat he/she was suspected of posing. Given that the challenges to control orders and TPIMs under Article 8 as a materially qualified Article have usually failed, it can be assumed that the same conclusion would be likely to be reached under Article 5 if proportionality-based analyses were relied on.

Conclusions

The use of TPIMs appears to fall outside Article 5(1) as far as the *detention* obligation is concerned under current Strasbourg jurisprudence since it appears that up to twelve hours house detention a day does not create a deprivation of liberty.¹⁷⁵ But the impact of a particularly repressive combination of obligations under a specific TPIM notice, including restrictions that could also affect the materially qualified rights, would be more likely to be found to create a deprivation of liberty at Strasbourg than domestically, given that a line of authority at Strasbourg has more clearly recognised a concept of non-paradigm deprivation of liberty, *not* centrally focussed on physical confinement, but in terms of coercion, duration and the impact on normal life.¹⁷⁶

But it appears to be unarguable that application of a particular TPIM notice is less likely than an ETPIM notice to create incompatibility with Article 5. At present it is probably the case that ETPIM notices would be in accord with the *domestic* Article 5 jurisprudence on non-

¹⁷⁴ See further Fenwick n 15, particularly 188-190 on this point in relation to control orders imposing 16 hours daily house detention and/or relocation.

¹⁷⁵ See in particular *Raimondo v Italy* (1994) 18 EHRR 237; *Ciancimino v Italy* (1991) 70 DR 103.

¹⁷⁶ In *Guzzardi*, as indicated above (text to note 93), greater emphasis was placed on the cumulative impact of the range of restrictions than on physical restraint; it was made clear that where there is a curfew (which could be overnight) combined with other factors severely affecting the life the applicant otherwise would have been living, a deprivation of liberty can be found. See also *Engel v The Netherlands (No 1)* (1979-1980) 1 EHRR 647.

paradigm deprivations of liberty: the matter of their compliance with the Strasbourg standard remains in doubt.¹⁷⁷ The question of compatibility between Article 5 and obligations under an ETPIM would appear to be dependent on the particular combination of obligations. The executive use of the discretion accorded under the core provisions of the ETPIM Bill resembles the effect of control orders since in effect it potentially redefines and minimises the ambit of Article 5: the obligations that could be imposed by ETPIMs might be viewed as avoiding the creation of a ‘deprivation of liberty’ only by relying implicitly on a narrow interpretation of that concept, impliedly affected by the national security context (which would be reflective of *Austin*). As discussed, Parliament and oversight bodies have accepted that ETPIMs have in effect already been given a reasonably clean bill of human rights health by the judiciary, in the control order cases. In other words, that case-law may, as argued, represent a ‘form of negative or suppressive constitutional dialogue’,¹⁷⁸ in the sense that it allows the executive to argue for the introduction of such measures on the basis of their established ECHR-compatibility. But that contention relies on a domestic interpretation of Article 5 which diverges subtly from that adopted at Strasbourg, especially as regards the lack of focus on duration and coercion. It can be concluded that the recalibration of rights that the domestic judges partially acquiesced in during the control orders saga may have obscured the potential lack of Article 5-compliance of ETPIMs.

In a period of reliance on executive measures interfering with liberty, the question whether a ‘deprivation of liberty’ refers centrally to restraint on physical liberty as in house detention, to which other interferences are ancillary, or to a much more amorphous, relativistic concept, has resonance within and beyond the terrorism context,¹⁷⁹ but has not yet been fully resolved. The tendency currently evident in the UK to rely on non-paradigmatic interferences with liberty in order to avoid the necessity of seeking a derogation from Article 5 has exposed the imprecise standard it seems to denote.¹⁸⁰ The varied ways of interfering with liberty now

¹⁷⁷ If a control orders case is decided at Strasbourg in future, and relies on *Guzzardi* in diverging from the domestic findings on house detention under Article 5(1) that could clearly change the situation via s2 HRA in relation to ETPIMs.

¹⁷⁸ Fenwick & Phillipson n 7, 871; see further as regards the notion of dialogue in this context Yap, n 6.

¹⁷⁹ In relation to Anti-Social Behaviour Orders, Serious Crime Prevention Orders (Serious Crime Act 2007, ss1-41 and Schedules 1 and 2) and powers to interfere with protest: see *Austin v Commissioner of Police for the Metropolis* [2009] 1 AC 564. For comment see H. Fenwick ‘Marginalising Human Rights: Breach of the Peace, “Kettling”, the Human Rights Act and Public Protest’ [2009] PL 737. It is also significant within other areas of counter-terror law: under eg Terrorism Act 2000, Sched 7; Protection of Freedoms Act 2012, s 61.

¹⁸⁰ As a result, Feldman argues, in the control orders context, that a new Protocol to the Convention, setting out further specified circumstances in which liberty can justifiably be infringed may be needed: D. Feldman, ‘Deprivation of Liberty in Anti-Terrorism Law’ (2008) 67 CLJ 4, 8.

available to the state under TPIMs and potentially under ETPIMs render the traditional idea of focussing mainly on physical restraint out-dated. Tying the deprivation of liberty concept most strongly to that one notion marginalises it in relation to measures, such as relocation or bars on entering specific spaces, which may appear less repressive but can have a profound impact on the lives that those subject to them might otherwise have been living.¹⁸¹

Article 6 issues

The control orders jurisprudence on Article 6 to an extent mirrors that under Article 5 in terms of the journey that has been undertaken towards a greater acceptance of fair trial standards,¹⁸² but a number of the issues are not addressed in TPIMA or the ETPIMs Bill; rather, Article 6-compliance relies on such jurisprudence and section 3 of the HRA. In most TPIM (and ETPIM) cases the review hearing under section 9 of the TPIMA (which also applies to ETPIMs) will represent the point at which court intervention occurs; it will normally arise some months after the TPIM/ETPIM has been imposed by the Home Secretary.¹⁸³ At the review hearing the court must apply the judicial review principles applicable in deciding whether the decision is flawed. In using the terminology of the PTA, it is assumed that the provisions will be applied subject to the interpretation imposed under section 3 HRA and Article 6(1).¹⁸⁴ The courts apply a more exacting standard of review, including ‘intense scrutiny’ of the necessity for the measures imposed.¹⁸⁵

The review hearing relies on closed and open material. A closed material procedure (CMP) is well established in the context of control orders/TPIMs, and has been accepted by the courts.¹⁸⁶ The provisions governing the procedure did not derive from the PTA, and the same is true of TPIMA and the ETPIM Bill. The provisions are found in the Civil Procedure Rules

¹⁸¹ The key issue in *Guzzardi*, text to n 102 above. It may be the case that the difference between fourteen and sixteen hours of house detention has less impact in terms of the life the suspect would otherwise have been living – the *Guzzardi* test – than the effects of a form of internal exile (forced relocation).

¹⁸² See for discussion Fenwick & Phillipson n 7 above, 886-889.

¹⁸³ See comments of Anderson ‘TPIMs in 2012’ n 33 above, as to the length of time which tends to elapse between imposition of a TPIM and the review hearing, (para 8.12). In non-urgent cases where the Secretary of State seeks the permission of the court the court must give it unless the decision to impose the measure was ‘obviously flawed’ (TPIMA, s6(3)(a), which will also apply to ETPIM notices).

¹⁸⁴ The Government in its ECHR memos on Article 6 in relation to TPIMs and ETPIMs considers on this basis that the provisions relating to court review are compatible with Article 6; TPIMA ECHR memo n 28, para 24-42, and ETPIM Bill ECHR memo, n 29, para 30-1.

¹⁸⁵ The test from *Secretary of State for the Home Department v MB* [2006] 3 WLR 839 at [63]–[65].

¹⁸⁶ *Secretary of State for the Home Department v MB* [2007] 1 AC 440.

(CPR),¹⁸⁷ and that position has been unaffected by the move from control orders to the new measures, although CMP have been given a further legal basis under the Justice and Security Act 2013.¹⁸⁸ The PTA case law which relied on section 3 of the HRA to seek to ensure that the procedure reached Article 6 standards¹⁸⁹ also applies to TPIMs (and would do to ETPIMs).¹⁹⁰ It is clear from *Secretary of State for the Home Department v BC and BB*¹⁹¹ that Article 6(1) is engaged by proceedings in relation to a TPIM: the argument was not accepted that the obligations imposed under ‘light touch’ control orders – similar to the obligations under a TPIM – do not require Article 6(1) compliance.¹⁹²

Although CMP are used, disclosure of the *essence* of the case to the suspect is required.¹⁹³ Thus, if the essence or gist of the case cannot be disclosed on national security grounds,¹⁹⁴ the TPIM notice cannot be sustained. The question of the degree of disclosure required to the suspect has not been fully resolved, and no attempt was made to resolve it in the TPIMA or ETPIM provisions themselves. In *AT v Secretary of State for the Home Department*¹⁹⁵ the Court of Appeal found that insufficient disclosure had occurred to satisfy Article 6. In *BM*¹⁹⁶ it was found that once some disclosure has occurred, the failure of the TPIM suspect to deal

¹⁸⁷ Part 76 CPR. The closed material is considered by the Special Advocate (SA). Provision is made for the exclusion of a relevant person and his legal representative from a hearing to secure that information is not disclosed contrary to the public interest: rule 76.22. The SA may only communicate with the relevant party before closed material is served upon him or her, save with permission of the court: rules 76.2, 76.28(2). See further M. Chamberlain, ‘Special Advocates and Procedural Fairness in Closed Proceedings’ (2009) 28 *Civil Justice Quarterly* 314.

¹⁸⁸ The Justice and Security Act 2013 makes provision for closed material proceedings (CMP) in PT II, which cover TPIM hearings (s6), but since CMP were and are being used in this context in any event, it does not appear that it will bring about significant change; see *Justice and Security Green Paper* Ministry of Justice, Report Cm 8194 (2011). The Bill, which gained assent on 25 April 2013, is notable for its complexity after extensive amendment in the House of Lords.

¹⁸⁹ See *Secretary of State for the Home Department v AF (No.3)* [2009] 3 WLR 74.

¹⁹⁰ See the ECHR memorandum on the TPIM Bill as regards Article 6, n 28, para 29-42. The ETPIM memorandum echoes this position; see n 29 above, para 30.

¹⁹¹ [2010] 1 WLR 1542. See also *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366; Lord Justice Thomas said at [19]: ‘...on the open evidence, the control order could not be justified as necessary at the time it was made as the evidence was too vague and speculative’.

¹⁹² It has been found that control orders affect civil rights and obligations; therefore Article 6(1)’s requirement of a fair hearing applies: *Secretary of State for the Home Department v MB* [2008] 1 AC 440, 470F.

¹⁹³ See *Secretary of State for the Home Department v AF (No.3)* [2009] 3 WLR 74. This is covered by the Justice and Security Act 2013, s 8: if the court gives permission not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings..

¹⁹⁴ Justice and Security Act 2013, s 8: ‘...but the court must ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security’. This provision does not affect the essential principle deriving from *AF*; it regulates its application in CMP.

¹⁹⁵ [2012] EWCA Civ 42.

¹⁹⁶ [2012] EWHC 714 (Admin).

with the allegations to the extent that was possible, having regard to the disclosure given, could be taken into account in relation to the level of suspicion.¹⁹⁷

Use of closed material proceedings is about to leach into many other civil actions with a national security dimension,¹⁹⁸ despite criticism of the quality of the information relied on.¹⁹⁹ That expansion of their use provides an example of a trend towards habituation and normalisation of measures in tension with Article 6, as is also apparent in relation to non-trial-based measures that are able to operate outside Article 5(1).

Parliamentary scrutiny

Renewal

Parliamentary scrutiny is reduced under TPIMA 2011 since, unlike the PTA, it will not expire if Parliament does not review and renew it annually, indicating the extent to which these measures have undergone normalisation. The House of Lords' Select Committee on the Constitution questioned 'whether it is constitutionally appropriate to place on a permanent basis such a scheme of extraordinary executive powers.'²⁰⁰ TPIMA is time-limited to five years under section 21 but the powers can be revived under statutory instrument for further five year periods²⁰¹ so, while it might be viewed as an emergency, last resort measure, not only is it very likely to become a familiar feature of the counter-terror landscape,²⁰² but it is also unlikely to receive significant scrutiny on renewal.

¹⁹⁷ [22]. The same approach was taken in *Secretary of State for the Home Department v CC, CF* [2012] EWHC 2837 (Admin) in which CF and CC declined to give evidence once they were made aware of the allegations against them.

¹⁹⁸ Under the Justice and Security Act 2013.

¹⁹⁹ Justice has found: 'intelligence material may contain second or third-hand hearsay, information from unidentified informants, or received from foreign intelligence liaisons, not to mention hypotheses, predictions and conjecture.' 'Secret Evidence' JUSTICE report, June 2009, at <http://www.justice.org.uk/data/files/resources/33/Secret-Evidence-10-June-2009.pdf> (last visited 28 April 2013) para 413.

²⁰⁰ House of Lords Select Committee on the Constitution 'Terrorism Prevention and Investigation Measures Bill' HL 198, 14 September 2011, 5, at <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/198/198.pdf> (last visited 28 April 2013).

²⁰¹ As provided for under 21(2)(b).

²⁰² See ETPIM Bill Joint Committee n 3 above, para 77: '[the Minister] confirmed the Government's position that "there will always be a need for a some form of preventative measure like TPIMs"'.

Scrutiny is similarly reduced in relation to ETPIMs, compared with control orders: in accordance with clause 9 of the draft ETPIM Bill, the operative provisions of the Bill only remain in force for one year but can be renewed or revived by order under the affirmative resolution procedure.²⁰³ Further, the Secretary of State can declare that by reason of urgency that procedure need not be followed,²⁰⁴ reducing the possibility of scrutiny still further.

Basis for the introduction of the ETPIM Bill

The Deputy Assistant Police Commissioner told the ETPIM Bill Joint Committee that ETPIMs could be introduced in response to a general rising of the threat level that could be triggered either by an increase in the danger posed by terrorists or a reduction in resources for policing.²⁰⁵ The Select Committee found that although the Minister in question had said that the resources would continue to be available, there was still uncertainty as to the types of ‘exceptional circumstances’ that would lead to the introduction of this Bill’.²⁰⁶ The Government in its Response to the Committee²⁰⁷ declined to give an exhaustive summary of the trigger circumstances, but stated that they might arise where the country faced a serious terrorist threat that the Government

on the advice of the police and the Security Service, judged could not be managed by any other means. This might include a situation where there was credible reporting pointing to a series of concurrent, imminent attack plots, or the period immediately

²⁰³ Under clause 9(1) the provisions expire 12 months after the Act is passed. Under clause 9(2)(b)(i) the Secretary of State may, by order made by statutory instrument provide that ‘the Secretary of State’s enhanced TPIM powers are not to expire at the time when they would otherwise expire under subsection (1) or in accordance with an order under this subsection; but (ii) are to continue in force after that time for a period not exceeding one year’. The order must be made by the affirmative resolution procedure under clause 9(4). The provisions may also be repealed by order at any time, under clause 9(2)(a). Under clause 9(3) Consultation with (a) the independent reviewer; (b) the Intelligence Services Commissioner; and (c) the Director-General of the Security Service must occur before renewal.

²⁰⁴ Clause 9(5). Under clause 9(6) an order that contains such a declaration (a) must be laid before Parliament after being made; and (b) if not approved by a resolution of each House before the end of 40 days beginning with the day on which the order was made, ceases to have effect at the end of that period. But under clause 9(7) if it ceases to have effect that does not affect anything done in reliance on the order, or prevent the making of a new order.

²⁰⁵ Speaking on behalf of Association of Chief Police Officers before the ETPIM Bill Joint Committee, n 30, para 8, in answer to Q39, indicating that the question of the resource-intensiveness of surveillance as opposed to use of ETPIMs could become relevant as a trigger circumstance leading to the introduction of ETPIMs. But he said that ‘given the resource currently available’ and the changes made to policing, the police ‘are adequately managing the risk posed by people subject to TPIMs at the moment (para 21, in answer to Qs 36-39).

²⁰⁶ ‘[the Minister] was vague as to the circumstances in which the ETPIMs Bill might be introduced for Parliament to consider. We accept that it would be impossible to define a hard and fast ‘trigger’ for this legislation, but we recommend that in its response to this Report, the Government set out as clearly and unambiguously as possible its understanding of the [trigger circumstances] *ibid*, para 23.

²⁰⁷ See n 28 above.

following a major terrorist incident where we faced the prospect of further attacks... [but would probably not include] a change to the overall terrorism threat level in the absence of other factors.²⁰⁸

Such uncertainty as to the trigger circumstance for introducing the Bill underpins the concerns that have arisen in Parliament that the legislation is being kept in the ‘back pocket’ to be introduced abruptly to be rushed through as emergency legislation, meaning that Parliament cannot debate it fully or subject the basis for introducing the Bill to meaningful scrutiny.²⁰⁹ The ETPIM Bill Committee suggested that members of the Intelligence and Security Committee could be briefed on the nature of the threat in question, and then asked to communicate a recommendation to Parliament as to whether the case for introduction of the Bill had been made.²¹⁰

The ‘investigative’ element of TPIMs and ETPIMs

The TPIMs/ETPIMs schemes were put forward as resembling the control orders in their *preventive* aspect, but also as having a genuinely significant *investigative* element – hence the use of the term ‘investigation’ in the title of both instruments. The term was intended to emphasise the dissimilarity between these schemes and the control orders one.²¹¹ The apparent stance of the Coalition government, implicit in the use of that term, is that TPIMs are more closely associated with facilitating the criminal prosecution of suspects, and are designed to further that end, rather than being viewed as an end in themselves.

The emphasis under control orders was on the isolation of the controlee, in physical and communicative terms; control orders barred suspects from employing technology – the internet, phones – to facilitate contact with certain associates, thereby preventing TRA. But such bars meant that data that could have been collected by way of electronic surveillance could not be available. Thus the use of control orders tended to be inimical to the prospects of prosecuting the controlees.²¹² Interference with the suspect’s use of communications technology is also a significant aspect of TPIMA. But, as discussed, the level of interference

²⁰⁸ *ibid* paras 2 and 3.

²⁰⁹ See ETPIM Bill Joint Committee, n 3, paras 27-32.

²¹⁰ *ibid* paras 37, 38.

²¹¹ See n 36: the Review proposed the abolition of control orders, partly on the basis of their detachment from the possibility of prosecution (para 23).

²¹² *Review of Counter-Terrorism Powers* Lord MacDonald, Report Cm 8003, (2011) 9.

was higher under control orders, and would be under ETPIMs, than it is under TPIMs. Thus – so the argument goes – since under a TPIM the suspect is not *as* isolated from possible associates, terrorism-related activity might occur, or past occurrences of such activity might be revealed, leading to the possibility of a prosecution, although obviously any potential risk he/she represents might thereby be enhanced. Although ETPIMs also include the term ‘investigation’, the communicative and physical isolation created by control orders can be replicated under these enhanced notices. Thus the investigative element of ETPIMs is clearly weakened, as the government has accepted,²¹³ since the placement of the suspect in a state of isolation from others, the aspect of the control orders scheme particularly criticised by the 2011 review,²¹⁴ can be recreated.

Control orders contained a specific prosecutorial review element potentially linked to investigations, which was strengthened to an extent in TPIMA s10, also applying to ETPIMs.²¹⁵ Under section 8 of the PTA the relevant chief officer of police had to keep the prospects of prosecution under review, consulting the CPS as necessary. Under section 10 there is a duty to consult the Chief Officer of the appropriate police force as to the prospects of prosecution²¹⁶ before imposing a TPIM or an ETPIM.²¹⁷ The Chief Officer must consult the relevant prosecuting authority before responding (section 10(6)), although the duty to consult can be satisfied by a consultation that occurred previously (section 10(9)). This appears to refer to the previous consultation duty under section 8 of the PTA. The Secretary of State must then inform the Chief Officer that the TPIM/ETPIM notice has been served (section 10(4)), and he or she must keep prosecution under review for the duration of the notice.²¹⁸

Given that all the controlees were transferred on to TPIMs at the beginning of 2012, and there have been no prosecutions since then of those currently subject to TPIMs, leaving aside

²¹³ See ETPIM Bill Joint Committee, n 3 above, para 77: ‘[the Minister] insisted that ETPIMs were ultimately a preventative rather than investigative measure’.

²¹⁴ See n 212 above.

²¹⁵ ETPIM Bill, cl 3.

²¹⁶ Under s10(2) this means: ‘whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism’.

²¹⁷ Whether by the urgent procedure or when applying to a court under TPIMA, s6, s10(1);, ETPIM Bill, cl 2 Condition E.

²¹⁸ The Chief Officer must: ‘secure that the investigation of the individual’s conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review throughout the period the TPIM [or ETPIM] notice is in force’ (s10(5)).

prosecutions for breach of TPIM conditions,²¹⁹ the danger that the review of the possibility of prosecution is merely part of a tokenistic, routinized, presentational exercise with no genuine investigative element²²⁰ – as it appears to have been in relation to control orders – still remains.²²¹ That danger may have been exacerbated by the two year limit on imposition of a TPIM.²²² The possibility that the two year limit might incentivise those looking for evidence to found a prosecution and create a stronger focus on so doing than was the case under control orders which could be renewed indefinitely appears remote: the time limit is more likely to mean that none will be found since a rational suspect is unlikely to engage in TRA as the end point of the TPIM comes closer, as Anderson has pointed out.²²³

Conclusions

It has been argued that the mere ‘forms of legality’ that might be said to have existed in the shape of Part 4 of the ACTSA, and to a lesser extent in the form of control orders, have come to comport more closely with genuine legality, in the form of TPIMs. Court action in reliance on the ECHR in relation to control orders brought the two closer together, and parliamentary action, in passing TPIMA, brought that process closer to completion. TPIMA represents a positive development in that it has explicitly addressed Strasbourg standards, but it has done so in the form of endorsing a domestic compromise between security and liberty that is in tension with those standards. This article has argued that reliance on this domestic compromise appears to have *legitimized* the continued use of such exceptional measures, with no solution, no new exit strategy allowing for their abandonment, currently available. Such legitimisation appears to have aided in creating some acceptance for the introduction of ETPIMs.

²¹⁹ One prosecution was brought in 2012 of a suspect who contravened his TPIM measures: Anderson ‘TPIMs in 2012,’ n 34 above, 132.

²²⁰ Anderson has said on this in his evidence before the ETPIM Bill Joint Committee: ‘if they are effective at preventing then it is hardly surprising they are not very effective when it comes to investigation, because there is nothing to investigate’. See n 30 above, Answer to Q3.

²²¹ See eg ‘From “War” to Law: Liberty’s Response to the Coalition Government’s Review of Counter Terrorism and Security Powers’ Liberty report, 2010, at <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf> (last visited 28 April 2013); see also JCHR n 29 above, answer to Q2: Anderson found that although persons on TPIMs were being investigated little was being found and the picture in that respect had not changed from that applicable under control orders.

²²² Anderson found on this: ‘I find that [lack of evidence enabling prosecutions of TPIM subjects] completely unsurprising because, if you tell people that they will be free of all constraints in two years they will, if rational, ‘keep their heads down’ and wait out the 2 years, even if they might otherwise have been inclined to indulge in terrorism-related activity’. *ibid.*, answer to Q2.

²²³ See Anderson ‘TPIMs in 2012,’ n 34 above, at para 11.33-11.38.

The problem is that in this current phase an *appearance* of constitutionality has been created, of effective dialogue between courts, executive and Parliament, which has relied on the ECHR standards to draw the ‘repressive sting’ of the control orders scheme.²²⁴ But as has been argued, the modifications to that scheme undertaken via court action failed to bring it into clear compliance with the *Strasbourg* conception of Article 5(1). As argued, such action did not fully discard the idea that certain rights, in particular Article 5, should exist in somewhat attenuated versions of themselves in this context,²²⁵ meaning that their ‘checking’ value is diminished.²²⁶ While such notions of attenuation have been resisted by the judges, the position reached at the current time remains one in which ETPIMs can appear to have the *form* of legality which, as David Dyzenhaus has argued, may be more dangerous than a complete lack of legality.²²⁷ The findings of principle emerging from the control orders dialogue have, as indicated, been pressed upon the judges during court challenges, on Parliament²²⁸ and on parliamentary oversight bodies,²²⁹ creating the impression that the ground rules have now been established in terms of the extent to which ECHR guarantees can tolerate such measures, and aiding ETPIMs in embedding themselves within the accepted counter-terror infrastructure. As discussed, it is possible that the Strasbourg Court might eventually reject the domestic version of Article 5(1) that has emerged, which legitimises ETPIMs, although the decision in *Austin* casts some doubt on that possibility. Thus at present the dialogue emerging from the control orders jurisprudence can be viewed as a negative one that is ‘suppressive’ in inviting an insidious departure from ECHR standards.

²²⁴ See Gearty n 7, 586.

²²⁵ See Fenwick, n 15.

²²⁶ See further D. Dyzenhaus & R. Thwaites, ‘Legality and Emergency—The Judiciary in a Time of Terror’ in Andrew Lynch, Edwina MacDonald & George Williams, (eds), *Law and Liberty in the War on Terror* (NSW: Federation Press, 2007) 9, 10-11.

²²⁷ *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: CUP, 2006) 2-3. Dyzenhaus was referring in particular to the rule of law, but the point is readily applicable to the ECHR rights.

²²⁸ Via ECHR memos; eg n 28 above, and HRA, s19 compatibility statements.

²²⁹ Such as the JCHR n 29 above, at para 1.35 for e.g., and ETPIM Bill Committee, n 3 above.