

**REVIEW OF COUNTER-TERRORISM AND SECURITY  
POWERS**

**A REPORT BY LORD MACDONALD OF RIVER GLAVEN QC**



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Presented to Parliament  
by the Secretary of State for the Home Department  
by Command of Her Majesty

January 2011

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## FORWARD

On 13 July 2010, the Home Secretary announced to Parliament that she intended to set up a Review of Security and Counter-Terrorism Powers, to be carried out by the Office for Security and Counter Terrorism (OSCT), a division of the Home Office. She added that she had invited me to provide independent oversight of the Review, and that my role would be *'to make sure that the work is conducted properly, that all the relevant options have been considered and that the recommendations of the review are not only fair but are seen to be fair.'*

The Home Office said that I was expected to *'provide independent oversight of the Review'* and to *'ensure that it is properly conducted, that all the relevant options have been considered and the recommendations are balanced.'*

In the light of this, my role is to examine the processes of the Review, to determine its comprehensiveness and the fairness of its analysis, and to assess the soundness of its conclusions in the light of the evidence. Most of my discussions with ministers and officials have focused upon the emerging conclusions of the Review and upon their consistency with the evidence as it has unfolded.

In recent months, I have paid many visits to OSCT and I have held numerous meetings with officials and ministers in the Home Office. I have been given full access to documents, submissions and briefings, including to all the classified material relating to those subject to control orders. I have also examined all the relevant threat assessments.

I was not refused access to any documents that I wished to see and no meetings that I wished to convene were declined. I am very grateful to staff at the Home Office for their forbearance and kindness. They gave me the assistance that I required to offer the independent oversight of this Review that the Home Secretary has charged me with providing.

I have also held meetings with the Deputy Prime Minister, the Secretary of State for Justice, the Attorney General, members of Parliament, senior officials of the security and intelligence agencies, the police, Lord Carlile of Berriew, the statutory reviewer of terrorism legislation, and numerous NGOs, including Liberty, Justice, Amnesty and Human Rights Watch.

In addition, I also met many members of the public, some as representatives of a variety of professional and community organisations, and others in their individual capacities.

I am very grateful to everyone who gave me their time.

**Ken Macdonald QC**

Lord Macdonald of River Glaven

House of Lords

London SW1

23 January 2011

## **INTRODUCTION**

1. The Coalition Government's stated purpose in conducting this Review was to determine whether it might be possible to roll some back some of the measures imposed by counter-terrorism and other legislation over the last decades, consistent with public safety.
2. This resulted from a widespread perception, apparently transcending political ideologies and different political parties, that the boundary between freedom and security may have started to shift in the wrong direction in the United Kingdom in recent years, partly as a result of our responses to the increased security threats we have been facing, and partly because of an apparent increase in the State's ambition to be present in the more private spheres of human life.
3. These concerns coalesced in a growing sense that some of the traditional ways in which we have always defined ourselves as Britons might be under assault. It was only outside these islands, we had been taught, that people were asked by the police for their 'papers'. We did not generally believe that the government had the right, in the absence of any evidence of crime, to gather more and more information about us and about our neighbours. And many people questioned the right of the State to deprive citizens of their liberty for ever-increasing periods before deciding whether or not they deserved a criminal charge, or even to restrict their freedom for years in the absence of a conventional conviction.
4. The first duty of the State is to protect its citizens and so it is rarely difficult to justify increasing State power. But the promise of total security is an illusion that would destroy everything that makes living worthwhile. Perhaps we need a more adult relationship between the citizen and the State, that recognises the fact that some risks are worth running in order to enjoy liberty.
5. I have approached the task the Home Secretary has given me with a simple premise: the British are strong and free people, and their laws should reflect this.

## **THE PROCESS OF THE REVIEW**

1. As I have indicated, this Review was conducted internally, by OSCT. At first sight, this might have seemed challenging: much of the legislation under review came squarely within OSCT's area of responsibility and it was in that sense 'owned' by OSCT. But, beyond this situation leading to a number of spirited discussions, I did not find that officials were terminally confined within policy silos.
2. Some issues presented particular stresses, particularly the areas of pre-charge detention and control orders, but in all six main strands of work I found there to be rigorous analysis and appropriate movement on all sides.
3. The evidence base for the Review's conclusions was extensive. Obviously government departments and security and law enforcement bodies were consulted, but I also found a real desire to engage with NGOs and professional and community organisations. There was also a well-designed programme to involve members of the public. I do not think that any area of evidence likely to be of assistance to the Review was overlooked.
4. Of course, the imperative for any impartial review, whether it is internal or external, must be to consider all the evidence fairly, from whatever source it emanates. It is one thing to consult, it is quite another to do so in a serious spirit of inquiry. In other words, the Security Service's view on a particular issue must not prevail over, say, Liberty's, simply because it arrives from Thames House rather than from Tabard Street.
5. But this does not mean that the conclusions of the Review should be equally balanced between the opposing arguments. As judges sometimes say, all witnesses enter the court as equals- they do not necessarily leave it that way.
6. As one would expect, the more security-related a particular issue was, the more challenging it became to achieve this ideal in debate and discussion. In the end, though, I found that it was mostly the stronger arguments that prevailed. That this may not have been, in my view, invariably the case will be apparent from the body of my Report. Nevertheless, I found the process, overall, to be sound.

## **PRE-CHARGE DETENTION**

1. It is my clear conclusion that the evidence gathered by the Review failed to support a case for 28 day pre-charge detention. No period in excess of 14 days has been sought by police or prosecutors since 2007, and no period in excess of 21 days has been sought since 2006.
2. Bearing in mind that the power to detain suspects beyond 14 days was always regarded by Parliament as a temporary and quite exceptional measure, this paucity of use in recent years hardly speaks of pressing need.
4. Furthermore, on the occasions when the power has been used, it has not always demonstrated its fundamental utility. For example, of the two men charged after 21 days in *Operation Overt* (the airline plot), one case was stopped by the trial judge, and the second resulted in a jury acquittal.
5. In the circumstances, the Review is plainly right to recommend that the maximum period of pre-charge detention should be reduced to 14 days.
6. The Review is also right to reject the option of a further 14 days of strict bail being made available to the police. This new restriction would not have been justified by any evidence gathered by the Review, and it would have been widely regarded as an unwarranted form of control order. It is unnecessary.
7. I agree with the Review's conclusion that the risk of an exceptional event, requiring a temporary return to 28 days, is best catered for by having emergency legislation ready for placing before Parliament in that eventuality. This is the option most strongly supported by the evidence gathered by the Review.

## **TERRORISM STOP AND SEARCH (SECTION 44)**

1. The Review has concluded, correctly, that the European Court of Human Rights case of *Gillan* has rendered the continuing exercise of random 'without suspicion' searches in their present form unlawful. The Review is therefore right to recommend the repeal of *section 44*.
2. At the same time, the Review has uncovered a significant and, in my view, understandable concern that blanket abolition of 'without suspicion' searches might compromise public safety to an unacceptable degree. It is worth pointing out that Liberty appears to support this view.
3. If, for example, the police received credible intelligence of a plot to car bomb Parliament Square, it would seem proportionate and reasonable to allow the police to carry out random 'without suspicion' searches of cars in that location for a limited period.

4. I agree with the Review's conclusion that the key is to devise a form of authorisation for such practices that limits them sufficiently in place and time, and links them appropriately to *specifically anticipated terrorist activity*, so that both the spirit and the substance of the decision in *Gillan* may be respected. In my view, the Review's conclusions achieve this sensitive balance, and the model proposed is unlikely to fall foul of *Gillan*.

#### **PHOTOGRAPHY AND THE USE OF COUNTER-TERRORISM POWERS**

1. Recently, there has been a good deal of unease about the extent to which police and security guards may have been relying upon counter-terrorism legislation quite unjustifiably to prevent members of the public from innocently taking photographs in public places. It has been suggested that this policing has been insensitive, improper and disproportionate. It is difficult not to have sympathy with this stark analysis.
2. Most of this questionable police activity is likely to have resulted from the provisions of *section 44 of the Terrorism Act 2000*, which the Review has rightly recommended should be repealed. This should, as the Review states, solve most of the problems.
3. However there may be additional legislation relied upon by the police in order to prevent members of the public from taking photographs.
4. In particular, *section 58 of the Terrorism Act* makes it an offence to '*collect or make a record of a kind likely to be of use to a person committing or preparing an act of terrorism.*' A 'record' specifically includes a photograph.
5. *Section 58A of the Terrorism Act 2000* makes it an offence to '*elicit, or publish or communicate information about...a constable or a member of the armed forces or intelligence services.*' 'Information' includes photographs.
6. The question immediately arises as to whether *section 58A* adds anything to *section 58*. It seems very unlikely that it does. But this is a finely judged issue, because in Northern Ireland, where this provision originated, the terrorist targeting of police and security officials is widespread. Further, following the Good Friday Agreement, it is not acceptable to have counter-terrorism legislation in one part of the United Kingdom but not in another. There have, anyway, been cases of soldiers being targeted in England too, with *Operation Gamble* (a plot to behead a British soldier in the Midlands) posing just one example.
7. I conclude that the Review is entitled, therefore, to conclude that *section 58A* has freestanding importance as a counter-terrorism measure, whose repeal might be misinterpreted to seriously deleterious effect.

8. The Review is equally right to conclude on the evidence that the repeal of *section 44*, coupled with strengthened statutory and non-statutory guidance to police officers and security guards about photography, is the appropriate response to the difficulties that have arisen in recent years.

## **THE REGULATION OF INVESTIGATORY POWERS ACT AND LOCAL AUTHORITIES**

1. This section of the Review deals with the use of surveillance techniques by local authorities under the auspices of the *Regulation of Investigatory Powers Act* (RIPA). There has been a good deal of public and media concern in recent years that local authority activity in this area has been excessive and inadequately policed. Certainly, evidence gathered by the Review appears to indicate that confidence in the processes is low.
2. In response to these concerns, the government has committed itself to stopping all local authority use of surveillance, unless it is for serious crime and approved by a magistrate.

### *Magistrates' approval*

3. The Review's conclusion that a magistrate's approval should be required before a local authority can conduct *any* activity under RIPA is well evidenced. Such a reform would be a proportionate response to public concern and it would provide a necessary degree of reassurance that local authorities' use of surveillance is at appropriate levels and properly policed.

### *Serious crime*

4. The Review's conclusion that the serious crime test should only apply to the most serious form of surveillance, that is directed surveillance, which involves the covert surveillance of members of the public in public places, is also well evidenced. Much low level, but important local authority activity, for example in the area of weights and measures and trading standards, would otherwise be seriously compromised. This would hardly be in the public interest.
5. The Review is also right to set the serious crime threshold at offences resulting in terms of imprisonment of six months. This would allow directed surveillance in cases that warranted it, but not in less serious investigations like dog fouling, or checks into where individuals are living for school admission purposes.
6. Finally, the evidence from local authorities supports the Review's concession that the serious crime threshold should not apply to investigations into underage sales of alcohol and tobacco, because of the

importance of covert surveillance to these investigations, which are very much in the public interest.

### **ACCESS TO COMMUNICATIONS DATA**

1. Access by public authorities to communications data is a matter that rightly raises major public concern, and the Home Secretary is committed to examining the question of access to communications by public authorities more generally, in addition to this Review's scrutiny of data access by local authorities.
2. At present RIPA provides the only legal framework designed specifically to govern the acquisition and disclosure of communications data.
3. But although RIPA is the principle legal framework under which communications data may be acquired, there is a wealth of other statutes under which local authorities may also acquire such data. The Review has found that these were mostly not designed with the acquisition of communications data in mind, so that they contain significantly fewer safeguards. This is a very unsatisfactory situation and it needs to be addressed with real urgency if public confidence is to be maintained.
4. The Review is therefore right on the evidence to recommend that the general legislative framework should be streamlined, so that RIPA becomes the *only* mechanism by which communications data may be acquired by local and public bodies. This reform would do much to lessen abuse and to build public confidence that local authority activity in this area is properly policed, proportionate and conducted with an appropriate respect for privacy. This work should be given high priority by the government.

### **GROUPS THAT ESPOUSE OR INCITE VIOLENCE OR HATRED**

1. We already have legislation that outlaws the incitement of racial or religious hatred. In addition, other forms of hatred are prescribed by statute as aggravating features in a case and serve to increase sentence upon conviction. Similarly, inciting violence in any form is already a criminal offence.
2. The question to be considered by the Review was whether, nevertheless, the incitement of violence or hatred should become reasons for proscribing organisations that openly espouse this sort of behaviour. At present, proscription is available under the *Terrorism Act 2000* only in respect of organisations that are '*concerned in terrorism*'. The justification for this power is the special threat posed by terrorist organisations to the security of the State and the safety of the public. They are in a special category.

3. On the evidence I have seen, the Review is clearly right to conclude that the evidence points strongly against including organisations that incite violence or hatred within a proscription regime. Such a legislative step would be strikingly illiberal, extraordinarily difficult to enforce and it would probably run counter to the Review's overriding purpose to roll back State powers.
4. I agree with the Review that in this area of criminal activity, rather than 'banning' entire organisations, the more proportionate response, where the evidence exists, is to prosecute those individuals responsible for criminal offences of incitement.

### **DEPORTATIONS OF FOREIGN NATIONALS ENGAGED IN TERRORISM**

1. I have no doubt that it is entirely appropriate for the Government to seek lawfully to deport those overseas citizens whose presence in the UK is credibly considered to represent a threat to our national security. In many circumstances, however, their countries of origin may be jurisdictions in which abuse and mistreatment of suspects and prisoners are routine and unchecked.
2. In those circumstances, *Article 3 of the European Convention* and settled Strasbourg case law present an effective bar to deportation. There can be no complaint about this: no civilised country should countenance the deportation of individuals to face torture or worse abroad.
3. It is for this reason that the UK Government has sought, from time to time, to enter into arrangements with certain foreign States, with a view to obtaining reliable guarantees relating to the treatment of returned persons. The evidence obtained by the Review plainly demonstrates that these arrangements are difficult and time-consuming to develop and that negotiations are not always successful.
4. Nevertheless, a number of arrangements are in place and some nine individuals have been deported under their protection. Importantly, I have seen no credible evidence that any of these individuals have experienced mistreatment since their removal from this country.
5. Some NGOs have suggested to the Review that the UK's programme of deportations gives succour to regimes that torture or, worse, that it actively encourages the practice of abuse and mistreatment.
6. My conclusion on the evidence is that the opposite is more likely to be true. It seems to me that the very process of engaging with other countries on the issue of the appropriate treatment of prisoners, and obtaining guarantees in that regard, is likely to have a positive effect upon the regimes in question. I cannot see how UK government insistence upon

the proper treatment of detainees encourages torture and I conclude that it does not.

7. In any event, the overall supervision of the courts, to which all potential deportees have access, provides clear reassurance that their rights are appropriately respected during the deportation process.
8. The evidence turned up by the Review is strongly supportive of the government's programme of safe returns, which should be continued and, wherever possible, extended.

## **CONTROL ORDERS**

### *The priority for prosecution*

1. Where people are involved in terrorist activity, they must be detected and, wherever possible, prosecuted and locked up. The Review rightly recognises this to be a primary purpose of public policy, so that any legislative scheme that appears to impede this important aim needs the most careful scrutiny, in order to determine whether, nevertheless, it may be justified on any other grounds.
2. The evidence obtained by the Review has plainly demonstrated that the present control order regime acts as an impediment to prosecution. It places those suspected of involvement in terrorist activity squarely in an evidence limbo: current control powers can relocate suspects and place them under curfews for up to 16 hours a day, they can forbid suspects from meeting and speaking with other named individuals, from travelling to particular places, and from using telephones and the internet.
3. In other words, controls may be imposed that precisely prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment.
4. In this sense, the current control order regime turns our conventional approach to the detection and prosecution of crime upon its head. We may safely assume that if the *Operation Overt* (airline) plotters had, in the earliest stages of their conspiracy, been placed on control orders and subjected to the full gamut of conditions available under the present legislation, they would be living amongst us still, instead of sitting for very long years in the jail cells where they belong.
5. On the other hand, the State faces a clear dilemma when it confronts individuals believed to be involved in terrorism activity, but against whom there is insufficient evidence to prosecute. How are the public best protected in this situation? It is, on the evidence, precisely within this context that the Review is right to conclude that any replacement scheme for control orders should have as a primary aim to encourage and to

facilitate the gathering of evidence, and to diminish any obstruction of justice, leading to prosecution and conviction.

6. Current powers that fail this test should be amended so that they comply with it or, if their inability to comply is intrinsic to their nature, they should be abolished.
7. It follows that powers created under any new scheme must also be judged against the criteria set by the Review itself: to what extent are they likely to facilitate the gathering of evidence, and to what extent are they directed towards preventing any obstruction of that process? It is, I think, only by following this quality mark that the Review's conclusions can be true to the evidence it has gathered over the last few months, as well as to the twin goals of prosecution and public protection.

*Restrictions as part of the criminal justice process*

8. I have no doubt that were a regime of restrictions against terrorist suspects to be linked to a continuing criminal investigation into their activities, many of the constitutional objections to such a regime would fall away. It is precisely because the present control order system stands apart from criminal due process that it attracts such criticism.
9. Indeed, on clear evidence, it is this separateness and the extent to which the security service, rather than the police, becomes the lead agency in these cases that is so undermining of criminal prosecutions. The security service, rightly, have their own priorities, which are very likely to be protective rather than prosecutorial in nature. This is for very obvious reasons.
10. It is true that the police are required to make regular assessments of the state of the evidence against controlees, but this is a very different process from positively setting out to build criminal cases against them. In any event, the evidence I have seen shows this scrutiny to be frankly inadequate.
11. The reality is that controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law. This is a serious and continuing failure of public policy.
12. The Review is clearly alive to this problem. It has stressed the importance of investigation, and it has sought to temper some of the more obvious features of the present policy that appear to make it more difficult to bring some suspected individuals to justice. But it might go further and consider a new scheme in which a court would only grant restrictions against suspected individuals in circumstances where:

- The Home Secretary has reasonable grounds to believe that a named individual is engaged in terrorist activity; **and**
  - In the view of the Director of Public Prosecutions, a criminal investigation into that individual is therefore justified.
13. Under such a scheme, the application would be accompanied by a certificate from the Director of Public Prosecutions to the effect that the second condition was fulfilled. The restrictions would be linked to the investigation and would last for its length, or for a maximum of two years.
  14. One obvious merit of this proposal is that it would simply mandate what should be occurring in any event: clearly there should be active police investigations into individuals who are believed by no less a figure than the Home Secretary to be involved in terrorist activity. The contrary position would be absurd.
  15. If a regime of restrictions were to be linked to a criminal investigation in this way, it would sharply highlight the need for the prohibitions positively to assist, rather than to hinder, the route to prosecution, conviction and imprisonment. Further, the restrictions themselves would be closer in character to bail conditions, and therefore inherently less objectionable. They would also retain their protective quality and they would maintain their contribution to public safety.
  16. There can be no doubt that the absence of any mandated link between control orders and criminal investigation significantly calls into question their legitimacy. The Review should give serious consideration to pursuing this option in the interests of due process.

*The requirement for protection*

17. That said, the evidence gathered by the Review demonstrates that there are circumstances in which individuals believed to be involved in terrorist activity cannot presently be prosecuted, because there is insufficient, or no admissible evidence against them *for the time being*.
18. In those circumstances, I accept that the evidence also shows that it may be appropriate for the State to apply some restrictions upon those people, so long as those restrictions are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution.
19. The Review is right to conclude on the evidence that any '*restrictions should be compatible with work and study provided these do not affect*

*public safety*” and that *‘where possible we should allow individuals to continue to maintain a typical pattern of life’*.

20. This is because the restrictions are imposed upon the basis of the Home Secretary’s belief, rather than proof openly demonstrated in a criminal court of law, and because the individuals subjected to those restrictions need be told no more than the gist of the evidence that the restrictions are said to result from. In these circumstances, the State’s right to interfere with the life and movement of the individual is necessarily to be carefully limited.
21. It is with this important overriding principle in mind that I turn to the individual prohibitions that are relevant to the Review’s consideration.

#### RELOCATION

22. This is a form of internal exile, which is utterly inimical to traditional British norms. In the absence of any intention to charge, still less to prosecute, no British citizen should be told by the government where he may or may not live. The Review is clearly right to recommend the abolition of this thoroughly offensive practice. It is disproportionate and there is no justification for its retention.
23. But this is not only because forced relocation is abusive in principle: my conclusion also flows from the fact that relocation appears, on the evidence I have seen, to be a prime example of a sanction likely to stifle the gathering of evidence. An individual in social and geographical purgatory is not a fruitful source of material justifying prosecution. Indeed, only one individual relocated under a control order has ever been charged with a terrorist offence.
24. This is a remarkable state of affairs in circumstances where the State, subjecting these individuals to the most severe sanction available under the current control order regime, plainly suspects them of being serious and persistent terrorist activists. It is also an obvious and grave failure in our counter-terrorism system, since any public protection provided by relocation is bound to be short-lived in comparison to the prison terms available for serious terrorist activity.

#### CURFEWS

25. Traditionally, these have been imposed on those charged with crime. The rationale has been that a trial is pending and that, in place of a remand in custody, individuals may remain on bail until guilt or lack of it is determined, subject to certain conditions designed to protect both justice and the public.

26. Controlees are not charged with any crime, there is no issue to be determined and they face no prosecution. Along with re-location, curfews possess certain unattractive characteristics of house arrest. But the government should not be permitted to direct house arrest in any form in the absence of criminal investigation or pending proceedings. This is simply to distinguish the rule of law from totalitarianism. The Review is right to recommend the abolition of lengthy curfews; and they are, in any event, wholly unlikely to deter motivated terrorists.
27. On the other hand, there can be no serious objection to requiring a suspected individual to notify his address and workplace or place of study. In those circumstances, it may be appropriate and proportionate to mandate overnight stays at a notified address. But a tag is of limited use here, in the absence of curfew, and neither tags nor curfews are commonly used in criminal cases where residence requirements are in place: generally, the police rely on spot visits and intelligence to enforce the requirement.
28. In the circumstances, I would regard the use of curfews and tags in this context to be disproportionate, unnecessary and objectionable. They would serve no useful purpose.

#### TELEPHONE AND INTERNET BANS

29. These bans are intrinsically hostile to evidence gathering. The State has the capacity to monitor both telephone and internet use. It is inimical to the process of criminal justice to cut off precisely those means of communication between criminals that may readily be monitored, providing evidence for prosecution. In any other investigative context, the removal of a suspect's ability to communicate with his co-conspirators on easily penetrated technology would be regarded as bizarre and wholly counter-productive.
30. This is because it would tend to forestall any serious investigation into the crimes under consideration. It would be an irrational case strategy. The particular danger that terrorism represents is no answer to this objection: on the contrary, it provides all the more reason to bring the full weight of relentless investigative and prosecutorial pressure to bear upon its suspected adherents.
31. I have therefore concluded on the evidence that the Review is right to recommend the abolition of total telephone and internet bans.
32. On the other hand, the requirement that a suspected individual should provide police with details of the telephones and computers that he uses is, I think, a relatively minor intrusion into his private life- while the value of this information to an investigator is likely to be very great. In this sense, the interference is proportionate and reasonable in the context of

investigating potential acts of terrorism, so long as it is connected to that criminal justice purpose.

33. Beyond conceding that *'some restrictions on communication will be required'* but that there will be *'greater freedom of communication'* with only *'limited restrictions'*, the Review does not elaborate. This failure to spell out its thinking in greater detail is an omission.

#### ASSOCIATION BANS

34. These bans are intrinsically hostile to evidence gathering. To return to the theme outlined above, ordering a suspected individual to desist from meeting with a potential criminal associate would, in normal circumstances, be regarded as an unusual investigative technique. It would be more conventional to allow, even surreptitiously to encourage, the meeting to take place, and then to observe or to record the contact- in other words to facilitate the discovery of evidence against the participants.
35. Of course, terrorist crime has characteristics sometimes absent from other categories of offending, and it is particularly dangerous. I accept that the evidence gathered by the Review has demonstrated that there may be very limited and urgent circumstances in which it may be necessary to prevent someone suspected of involvement in terrorism from meeting with another person suspected of terrorist activity- and that this matter may be an imperative driven by public protection. But if the exercise of this power is not to become utterly destructive of any prosecutorial outcome, it must be very strictly circumscribed.
36. I conclude that if it remains in any form, the evidence will only support such a power if it is very strictly limited to banning an individual from meeting someone who comes into a statutorily prescribed category. For example, an individual might be prohibited from contact with
- Someone who has been convicted of terrorist or terrorist-related crime
  - Someone who is credibly believed to be part of the same terrorist network as the controlee
  - Someone who is himself subject to a restriction regime
37. The evidence gathered by the Review plainly demonstrates the importance of avoiding at all costs any replication of the present control regime in which, because of the widespread nature of the prohibitions placed upon them, controlees become *'evidence neutral'*, and prosecutions become more or less unachievable.
38. Again, beyond a finding that *'some restrictions upon association will be necessary'* but that there will be *'greater freedom of association with only*

*limited restrictions*' the Review fails to elaborate. This is a further omission.

#### GEOGRAPHICAL BANS

39. Many of the same considerations apply to these prohibitions. They, too, have the capacity to stifle the gathering of evidence. Once again, if they remain in any form, these powers should be directed towards the gathering of evidence and the prevention of the obstruction of justice. In other words, they should be connected to a criminal justice purpose.
40. So the use of this power can be justified where it is imposed, for example, to prevent a suspected individual from frustrating surveillance by entering or visiting a particular place which is difficult or impossible to surveil, such as a large open space, but it should not be used to ban him, generally, from attending entire areas. In these circumstances, the power becomes disproportionate and disconnected to the criminal justice purpose of investigating crime.
41. The Review suggests a significant reduction in the power to impose geographical bans, but, once again, beyond asserting that there will be '*greater freedom of movement*' with only '*limited restrictions*', it provides no further detail. Once more, this appears to be an omission.

#### FOREIGN TRAVEL BANS

42. I accept that in appropriate cases it may be proportionate to restrict a suspected individual from travelling overseas. This already occurs in the case of football hooligans, but in any case the right to travel overseas is not an unfettered right. It is subject to the possession of a passport and a variety of sometimes highly restrictive visa regulations.
43. I do not think that a travel restriction of this sort would so interfere in an individual's ability to go about his everyday life as to fall foul of the overriding principle that he should not be prevented from doing so in the absence of prosecution or conviction.

#### FINANCIAL MEASURES

44. I accept that limited restrictions in carefully defined circumstances on overseas financial transactions are also likely to be proportionate.

## PROCESS

- The Review is right to conclude that except in an emergency, restrictions should only be available after an application by the Home Secretary to the High Court.
- The Review is right to conclude that the test should be the Home Secretary's reasonable *belief* that an individual is engaged in terrorist activity.
- There should be a further test that the DPP is satisfied *that a criminal investigation is justified*.
- The restrictions permitted by the High Court should only last for as long as the criminal investigation continues, up to a maximum of two years.
- The Review is right to conclude that the restrictions available to the State should be listed in, and limited by, statute.

## CONCLUSION

1. I conclude that there is no doubt that the Review's recommendations, if implemented, would achieve the government's primary aim of rolling back State power, where to do so would not present a disproportionate risk to public safety.
2. The reduction in pre-charge detention to 14 days, the repeal of *section 44*, the greater regulation of local authority surveillance and the outright removal of those aspects of control orders that most resemble house arrest, are all to be regarded as reforms of real significance. They point to an unmistakable re-balancing of public policy in favour of liberty.
3. Further explanation from the government of the precise circumstances in which it believes that any remaining restrictions may properly be placed upon individuals in the absence of criminal investigation, charge or conviction, will reveal how far ministers intend to drive this important process.



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