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REPORT ON TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

Thank you for the Joint Committee on Human Rights' report of 19 October 2011 on the Terrorism Prevention and Investigation Measures Bill.

I enclose the Government's formal response to the recommendations in your report. I am copying this to Shabana Mahmood MP and Lord Hunt of Kings Heath, and copies will be placed in the library of the House and on the Home Office website.

As you know, on 1 September the Government published a draft Enhanced TPIM Bill. We do not believe that the more stringent measures set out in the draft Bill are needed and we hope they never will be. However, we are keen that Parliament has the opportunity to consider and comment on the draft legislation now. This will enable changes to be made in advance of any requirement to introduce the legislation. The Government would be very pleased if your committee wanted to undertake the formal scrutiny of the draft Bill and would, of course, provide any assistance we can to help with that process.

James Brokenshire MP

Prior judicial authorisation

There is no "well established principle" across our legal system of executive-imposed restrictions on individuals who are not subject to any ongoing criminal process. On the contrary, the well-established principle is that executive restrictions on liberty are such a radical departure from our common law tradition that they always require prior judicial authorisation after proper legal process. It is for the Government to justify this Bill's departure from that fundamental principle. (paragraph 1.6)

The Government's assertion that there is a well established principle of preventative restrictions being imposed on individuals who are not subject to an ongoing criminal investigation was made in response to the Committee's recommendation that TPIM notices should not be imposed in the absence of a criminal investigation. The Committee acknowledges this at paragraph 1.4 of its report.

While certain preventative restrictions such as ASBOs are imposed by the courts, it remains the case that they may be imposed in the absence of a criminal investigation.

The Committee suggests that all such restrictions are imposed by the courts, and that the TPIM system is therefore exceptional. The Government does not consider that this is an accurate representation of the position. Such restrictions that are imposed by a court are not related to national security. In respect of executive actions in national security cases, and decisions based on sensitive material, it is a well established principle that it is the relevant Secretary of State, not the judiciary, who takes decisions. The judiciary then provide subsequent oversight of those decisions, as appropriate. This includes for example decisions to exclude, deport or deprive of citizenship on the basis of national security considerations and to impose an asset freeze. In relation to the latter Parliament passed only last year legislation providing for the executive to designate individuals, with subsequent judicial oversight.

This division of responsibilities is reflected in the TPIM Bill. As the Government has made clear we consider that it is appropriate for TPIM notices to be imposed by the Home Secretary, who is responsible for national security. It is the Home Secretary who is best placed to determine what is necessary in the interests of national security, with the benefit of the broader knowledge of the threat picture that sits with the role.

This is also consistent with the views expressed by the courts on the roles properly played by the Secretary of State and the courts in national security matters. The Court of Appeal explicitly recognised in its 2006 judgment in the case of *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140 (MB*) that '[t]he Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect.'

As currently drafted, the Bill provides for executive orders which are subject to ex post judicial oversight. Moreover, that oversight is to be supervisory only, interfering with the Minister's decision only where it is "obviously flawed" and

applying the principles of judicial review. What we recommend is entirely different: like our predecessor Committee when it considered the original control order legislation in 2005, we recommend prior judicial authorisation, in which the Minister makes an application to an independent court, and it is for the court itself to decide whether the measures should be imposed. (paragraph 1.8)

The Government does not accept the Committee's suggestion that TPIM notices will be imposed without any prior judicial authorisation. As set out in the Government's response (published on 1 September 2011) to the Committee's 19 July report on the Bill, the Secretary of State will normally be required to obtain the permission of the High Court before imposing a TPIM notice. Without that prior judicial authorisation she will not be able to impose the notice. In urgent cases – which we expect to be rare – she must immediately refer the case to the High Court for confirmation after the notice has been imposed.

As the Committee notes, when considering an application for permission to impose a TPIM notice the court must consider, applying judicial review principles, whether the relevant decisions of the Secretary of State are "obviously flawed". This means the court will consider whether there is an obvious error in the Secretary of State's decision making.

The court will have before it a range of material, including all the information the Secretary of State will have considered in deciding to impose the TPIM notice. This includes: the proposed TPIM notice; a witness statement from the Secretary of State setting out the necessity of the proposed measures and the matters that have been taken into account in determining them; and a classified statement or letter from the Security Service setting out the intelligence case, and assessing the risk posed by the individual and the need for a TPIM notice to manage that risk.

At this stage the court may consider the Secretary of State's application without the individual who would be subject to the measures being aware, or having the opportunity to make representations. This is important as it avoids him being given advance warning of the intention to make him subject to a TPIM notice, mitigating the risk of him absconding, or accelerating attack plans, before the TPIM notice may be served on him.

The nature of the permission hearing – in particular the fact that it is normally necessarily *ex parte* – means it is not possible for the courts to hear and consider full evidence to decide determinatively whether the conditions have been met. We therefore consider that the 'obviously flawed' test is the appropriate level of scrutiny for this initial permission stage.

The Committee's recommendation could also be read as implying that this initial judicial scrutiny of whether the imposition of a TPIM notice is 'obviously flawed' is the only judicial consideration of each notice. The Committee will appreciate that that is not the case. Indeed, the main, in depth, substantive High Court review will occur after the measures have been imposed, and it is here that full and intense scrutiny of the decision to impose a TPIM notice, including each of its constituent measures, will take place. We consider that this is the right approach as this higher level of scrutiny

requires the individual to be present and represented – and for the individual's interests to be represented by a special advocate during the closed aspects of the hearing – and for them to have the opportunity to put forward evidence of their own for the court to consider. This would not be possible at the initial permission stage, which is an additional preliminary safeguard but does not replace the full automatic review which will take place under clause 9 of the Bill. As the Government explained in its response to the Committee's 19 July report on the Bill, the *MB* judgment ensures that the oversight provided by the court in control order cases is particularly vigorous and we would expect this to continue under the TPIM system.

The permission hearing and the full substantive review hearing are part of the extensive, multi-layered court oversight and review of the Home Secretary's decisions provided for by the TPIM Bill. The Bill also makes provision for rights of appeal against the Secretary of State's decisions to extend a notice; to vary a measure without the individual's consent; or to refuse a request by the individual to revoke his notice or to vary any measure imposed under the notice.

We also note that Lord Lloyd has tabled amendments to the Bill which have the effect that TPIMs are imposed by the court on the application of the Home Secretary. We support those amendments which in our view replace executive orders with prior judicial authorisation of the kind which both human rights law and our common law constitutional tradition require. (paragraph 1.8)

We note the Committee's support for these amendments. However the Government has made clear that it does not agree that TPIM notices should be imposed by a judge. We continue to consider that it is appropriate, for the reasons outlined above, for TPIM notices to be imposed by the Home Secretary, with extensive judicial oversight of the Home Secretary's decisions.

If the Government accepts that a judicial re-interpretation of legislative language [in relation to the interpretation of "the principles applicable on an application for judicial review"] is justified in order to render it compatible with the ECHR (as here), it ought not to re-enact the same language, but use different language which reflects the compatible interpretation and does not require to be read as meaning something quite different from what it says. Parliament should bear in mind that human rights law requires statute law to be both accessible and readily intelligible on its face, and take this opportunity to rewrite the statutory language so as to define with clarity the true nature of the judicial function in relation to these measures. (paragraph 1.10)

The Government has been clear that full judicial oversight of the process of imposing measures must be a key feature of the new regime. The involvement of the courts is an important safeguard for the rights of the individual and the Bill takes a comprehensive, multi-layered approach to this.

As the Committee notes, the explanatory notes to the TPIM Bill explain that relevant case law means that control orders are subject to a particularly intense level of scrutiny by the High Court. And the Government has been clear that it intends for this to be applied in court reviews of TPIM notices under clause 9 of the Bill. This

intense level of scrutiny has proved effective in relation to control orders in holding the Government's decisions to account. The courts have not been hesitant to rule against the Government and to quash or direct the revocation of control orders, or control order obligations, using their powers in the Prevention of Terrorism Act 2005 which are replicated in this Bill. We are of the view that the courts will apply relevant case law to TPIM proceedings as appropriate – and this will of course include the case law on the type of review undertaken by the courts.

There are numerous aspects of the control order system which were identified in the Review of Counter-Terrorism and Security Powers as needing changing under the new system. However, in relation to the level of scrutiny applied by the courts in control order proceedings, the Review concluded that that level was thorough and appropriate and, of course, that it complied with individuals' Article 6 rights. The Review concluded that there was no good reason to change the approach that was working successfully, and that the best way to achieve this was through requiring the courts to conduct the review on judicial review principles, together with reliance on existing case law, which will be applied by the courts as appropriate. The courts have made it clear that judicial review principles are flexible. The Court of Appeal in *MB* has said "So far as procedure is concerned, a court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision maker, if that is what article 6 requires". The Court of Appeal then went on to make it clear that in control order cases the court will decide for itself whether the facts relied on by the Secretary of State amount to reasonable grounds for suspecting the individual is or has been involved in terrorism-related activity and that the court will subject the Secretary of State's decisions on necessity to "intense scrutiny".

We recommend an amendment to the Bill which would require the Secretary of State to make available to the court at the merits review hearing the report of the police concerning its review of the criminal investigation of the individual. (paragraph 1.12)

The Government considers that such an amendment to the Bill is unnecessary. This information is already made available to the courts at the substantive review of each control order, and will be at the review of each case in which a TPIM notice is imposed.

The police provide written confirmation in each case in which a control order is imposed – and will do so in relation to TPIMs when introduced – that it is not currently possible to prosecute the individual for a terrorism offence. And they provide updates on this on a quarterly basis when each case is reviewed by the Control Order Review Group. The TPIM Bill will place this regular reporting on a statutory footing by, in addition to replicating the statutory duties relating to the prosecution of controlled individuals contained in the Prevention of Terrorism Act 2005, introducing a duty on the police to report to the Secretary of State on the outcome of the police review of the prospects of prosecution.

The Secretary of State routinely discloses these reports to the court at the substantive review of each control order, alongside all the other relevant material, in

accordance with the usual disclosure requirements. This practice will continue, and the normal disclosure requirements will continue to apply, in relation to TPIM notices. There is therefore no requirement for a separate statutory duty.

Standard of proof

In our view, reasonable belief is too low a threshold for the imposition of such intrusive measures as are envisaged in the TPIMs Bill. The standard should be the balance of probabilities. We support the amendment to clauses 3 and 6 to be moved in Committee by Lord Lloyd, to the effect that the decision of the court as to whether the individual is, or has been involved in terrorism-related activity is to be taken on the civil standard of proof, that is, the balance of probabilities. (paragraph 1.14)

The issue of the appropriate test for imposing a TPIM notice was carefully considered as part of the Review of Counter-Terrorism and Security Powers. The conclusion we reached was that it was right to raise the threshold for imposing a TPIM notice to reasonable belief of involvement in terrorism-related activity, from the test of reasonable suspicion currently required to make a non-derogating control order.

Raising the threshold to reasonable belief provides an additional safeguard in the new regime. And it is consistent with the approach we have taken to the provisions relating to terrorist asset freezing in the Terrorist Asset Freezing etc Act 2010.

The TPIM system is a preventive regime intended to protect the public from a risk of terrorism, and in reaching the decision to move to reasonable belief we considered whether the change could put the public at risk. We are satisfied that a change to reasonable belief will be unlikely to be prejudicial to national security. However, we concluded that a move to balance of probabilities would provide the wrong balance for the main TPIM regime in terms of ensuring that the public will be protected.

The Government has, however, concluded that balance of probabilities is the appropriate test for the imposition of an Enhanced TPIM notice, should the exceptional circumstances necessitating the introduction of the ETPIM Bill ever arise.

Full merits review

We disagree with the Government's reasoning. The surest way to deliver the intense scrutiny that the Government says it intends is to write it explicitly into the Bill. We therefore recommend that the Bill be amended to make clear on the face of the Bill that the review to be conducted by the courts at the review hearing is a "merits review" (as opposed to a supervisory review) and to delete the requirement that the court must apply the principles applicable on an application for judicial review. We support the

amendments to clause 9 to be moved by Lord Pannick in Committee to that effect. (paragraph 1.17)

The Government's views in relation to this issue are set out above in response to the Committee's similar recommendation at paragraph 1.10 of its report.

The right to a fair hearing

We do not accept the Government's analysis. The Government's premise is that the disclosure obligation in AF (No. 3) does not necessarily apply to all TPIMs because some will not be sufficiently "stringent" to engage Article 6. This is an argument that the Government has already made and lost before the High Court in relation to "light touch control orders". In our view, the AF (No. 3) disclosure obligation applies in all proceedings concerning TPIMs and should not be left to the court to decide whether the obligation applies on a case-by-case basis, and the Bill requires amending to make this clear. In our view two amendments are necessary to give practical effect to the principle in AF (No. 3). (paragraph 1.20)

The provision in Schedule 4 of the Bill which the Government says is designed to ensure that TPIM proceedings will operate in a way that is compatible with Article 6 ECHR, requires strengthening to give effect to the AF (No. 3) decision. We support the amendment to be moved in Committee by Lord Pannick which would introduce into that provision an overriding requirement that rules of court must provide that the individual on whom the measures are imposed is entitled to be given sufficient information about the allegations against him or her to enable him or her at the review hearing to give effective instructions to his or her representatives, and information to the special advocate, in relation to those allegations. This amendment will ensure that the AF (No. 3) disclosure obligation applies in all proceedings concerning TPIMs. (paragraph 1.21)

In the Green Paper on Justice and Security, the Government is consulting on a range of issues in relation to closed material proceedings, including the issue of whether to legislate in relation to *AF (No. 3)* disclosure requirements. This is therefore a wider issue than one just concerning TPIM proceedings. The Government does not wish to pre-empt the outcome of that consultation. It would not be appropriate to adopt a piecemeal approach by legislating for the *AF (No. 3)* requirements in the TPIM Bill in advance of the outcome of the Green Paper work.

This does not however, mean that the requirements of *AF (No. 3)* will not apply where appropriate in TPIM proceedings. As the Government explained in its response to the JCHR's 19 July report on the TPIM Bill, the right to a fair trial of individuals subject to a TPIM notice is already fully protected by the provisions contained in the TPIM Bill and the application of existing case law as appropriate by the courts. Paragraph 5 of Schedule 4 to the Bill expressly provides that that the courts are to ensure that TPIM proceedings operate compatibly with Article 6. And

how Article 6 applies, including the requirement to gist closed evidence, will be defined by the courts in each case, in line with current case law.

We can be confident that the courts will apply the requirements of *AF (No. 3)* as appropriate in TPIM cases notwithstanding the fact that those requirements do not appear on the face of the Bill. Common law is just as much a part of our legal system as statute law. Further legislative provision on this in the TPIM Bill is not necessary.

We agree with the special advocates that the Secretary of State ought to be required to apply her mind to what disclosure Article 6 requires at the very outset of the proceedings, instead of much later in the course of the review hearing, by which time the measures will have been in force for a considerable time and the practical value of the procedural protection of AF (No. 3) considerably diminished. We note the amendment to clause 8 to be moved in Committee by Lord Pannick which would require a direction to be given at the directions hearing that the Secretary of State shall provide the individual who is the subject of the TPIMs with sufficient information about the allegations against him or her to enable them to give effective instructions to their legal representatives, or information to the special advocate, in relation to those allegations at the review hearing. This goes some way to meeting the concern expressed by the special advocates to the Public Bill Committee. That concern would be met completely if the direction proposed by Lord Pannick were given earlier in the process, at the preliminary hearing, to ensure that the individual can give effective instructions before the review hearing takes place. (paragraph 1.23)

The Government agrees with the principle that the Secretary of State should have in mind her obligations in relation to disclosure at all stages of the process of imposing a TPIM notice, including at the very outset of that process. When considering whether to impose a TPIM notice the Secretary of State will always have in mind whether she is likely to be able to gist sufficient of the material forming the case against the individual to meet the requirements of article 6, including *AF (No. 3).* If the Secretary of State imposed a TPIM notice, and was not subsequently able to meet her disclosure obligations, the notice would be quashed by the court with the individual subsequently able to claim damages.

As outlined above, the Government is consulting in the Green Paper on Justice and Security on a range of issues in relation to closed material proceedings, including the issue of whether to legislate in relation to *AF (No. 3)* disclosure requirements. Whatever the outcome of that consultation, it should be noted that in TPIM proceedings the specific gists to be disclosed in each case will be determined by the court, not the Government, following due process. The court will consider what disclosure is to be made in the particular context of each case, having considered submissions from both the special advocate and the Secretary of State and, where the individual has filed evidence, in light of the individual's answer to the allegations against him. This process takes place in advance of the full review hearing but the court will continue to keep the requirements of *AF (No.3)* under review until the proceedings have been determined.

Consequently it is not possible for the Secretary of State to determine with certainty at the outset of the proceedings precisely what disclosure will eventually be required to satisfy her *AF (No.3)* obligations. And it would not be possible for the court to give a direction as to the necessary disclosure at the outset, because the careful process of consideration it must undertake in order to make its determination will not yet have been completed.

Annual review and renewal

We remain of the view that TPIMs are an extraordinary departure from ordinary principles of criminal due process, and we support the amendments to the Bill to be moved in Committee which would replace the five year sunset clause currently in the Bill with a requirement of annual review and renewal. (paragraph 1.27)

This returns to a recommendation in the Committee's first report on the Bill. The Government set out its position in its formal response to that report, including that it had tabled an amendment – which has now been incorporated into the Bill as clause 21 – providing for renewal every five years.

Clause 21 specifies that the operative powers under the Bill will expire after five years, unless they are renewed by the Secretary of State, by order subject to the affirmative resolution procedure. This will ensure that there will be a statutory requirement to consider regularly the necessity of the legislation, and that each new Parliament will have the opportunity to debate this in the context of the situation at the time, and to take its own view. This is in line with the length of Parliaments provided by the Fixed Term Parliaments Act 2011.

But we do not believe that such a review is necessary on an annual basis. The Bill is being subjected to full Parliamentary scrutiny, to the usual timetable, and this will allow for a settled position to be reached. This is in contrast to the control orders legislation it replaces, which was rushed through with little opportunity for debate, making annual renewal an appropriate safeguard – but one that is not necessary in respect of this Bill.

Renewal every five years therefore provides an appropriately balanced approach. It reflects on the one hand the seriousness with which the Government takes these powers, and the need to build in effective safeguards to ensure that they do not remain in force longer than is necessary. And on the other hand it reflects the competence of Parliament to apply intense scrutiny to legislation, and to arrive at a position which will not need to be reviewed annually and will be able to operate on a more stable basis.

In addition to the requirement for renewal by affirmative resolution, clause 21 also provides power for the Secretary of State to repeal the powers at any time. So the powers may quickly be removed from the statute if it becomes clear that they are no longer needed at any point during the five-year period between renewals. And of course, if it becomes clear that the powers should be changed, the legislation can be amended by Parliament at any time in the usual way.