

COUNTER TERRORISM AND SECURITY BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Counter Terrorism and Security Bill. The memorandum has been prepared by the Home Office with input from the Department for Transport. The Home Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that in her view the provisions of the Bill are compatible with the Convention rights.
2. This memorandum deals only with those parts of the Bill which raise ECHR issues.

Part 1 – Temporary Restrictions on Travel

Powers to seize travel documents

3. A power that, when exercised, allows the authorities to seize a person's travel documents for a total period of up to 30 days so as to prevent that person from exiting the UK would likely amount to an interference with their Article 8 right to lead a private and family life in a wide range of factual circumstances. If the power is exercised in respect of a person who is not a UK resident, such as a person who is a transit passenger, stopping off in the UK en route to another destination, then there is potentially an Article 3 interference too. This might be the case if the person has nowhere to stay in the UK for the period during which his travel documents are retained, and has no source of funds in the UK to sustain him for that period. The exercise of the power could effectively render the person destitute, constituting inhumane treatment. In addition, the exercise of the power in this way would have the effect of confining the person to the UK for the duration of the period of seizure. This would potentially constitute a higher level of interference with a person's Art. 8 rights than where the person is resident in the UK.

4. It is the Home Office's view that the measure is "in accordance with the law", as required by Article 8 as it is set out in precise terms in primary legislation. In circumstances where there are reasonable grounds to suspect that a person is travelling abroad for the purpose of engaging in terrorism-related activity, it is necessary in a democratic society in the interests of national security and to prevent disorder or crime to interfere with the person's Article 8 rights and the power is therefore permissible under the terms of Article 8(2). There are strong arguments that the courts (including the Strasbourg court) should afford national authorities a wide margin of appreciation in determining where the balance between protecting people's rights and protecting national security should be struck¹. The argument that the Government has struck the balance in the right place is arguably strengthened by the recent adoption of UN Security Council Resolution 2178/14 which

¹ See, for example, paragraph 106 of *Weber & Saravia v Germany* ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76586#{"itemid":\["001-76586"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76586#{))

requires states to take action against foreign terrorist fighters in their territory. Accordingly, where the exercise of the power is reasonably foreseeable and circumscribed by adequate safeguards so that it cannot be used arbitrarily or otherwise misused, there are strong arguments that the legislation itself is compliant with Article 8.

5. The power is circumscribed by important safeguards, including:
- The need for reasonable grounds to suspect the person is travelling for the purpose of engaging in terrorism-related activity;
 - The requirement that only police officers may determine whether or not the test is met unless the Secretary of State designates immigration or customs officers as “accredited” officers for the purpose of exercising these powers;
 - The need for the authorisation of a Superintendent or officer of higher rank in order to retain travel documents;
 - The need for officers to comply with a mandatory Code of Practice on the operation of the power;
 - A time limit of 30 days on the retention of the travel documents;
 - A review at the 72 hour point by a senior officer of at least the rank of Chief Superintendent and, in any event higher than the authorising officer;
 - A requirement to obtain a warrant from a judicial authority in order to retain the passport for longer than 14 days; and
 - The requirement for a warrant from a judicial authority to retain the passport for longer than five days where the power is being exercised in respect of the same person for the third time in a six month period; and a higher threshold for continued retention: “exceptional circumstances justifying the further use of the powers”;
 - A power to make arrangements in relation to a person who is prevented from leaving the UK through exercise of the power.

6. However, the exercise of the power, in order to meet the qualification criteria in Article 8(2), needs to be proportionate. The Home Office believes the power itself is proportionate to the legitimate end of preventing people travelling abroad to engage in terrorism-related activity but officers will have to take care in each case where they choose to exercise the power that it is proportionate in that particular case. The proportionality of the exercise of the power will also be a function of the period for which the passport is detained and whether the person is a UK resident.

7. The exercise of the power would be susceptible to judicial review and emergency injunctive challenge where appropriate. In the context of any judicial scrutiny of the exercise of the power, the person would be entitled under Article 6 to a fair and public hearing within a reasonable time by an independent tribunal established by law. Further, Article 6 requires that the person is informed, so far as possible without prejudicing national security, of the grounds on which his rights have been interfered with². This would inform the person’s decision about whether to pursue a challenge to the exercise of the power. Accordingly, a provision is included in the Bill which requires that the officer exercising the power must tell

² In addition to being an Article 6 requirement, this is a requirement under Article 30 of the EU Freedom of Movement Directive (2004/38/EC).

the person that he is suspected of intending to leave the UK for the purpose of engaging in terrorism-related activity. The Code of Practice will set out further details of the content and timings of such notification.

8. In respect of Article 14, the Code of Practice will include requirements to monitor the use of the power in terms of ethnicity, nationality and religious belief. It will also clarify, for the avoidance of any doubt, that the power must not be used in a discriminatory way. The Code will be binding on the officers that exercise the passport seizure power. Provision is also included in the Bill to allow the Secretary of State to make arrangements in relation to persons confined to the UK through exercise of this power. This will allow for provision of support and accommodation to any persons in respect of whom the power is exercised who would not otherwise be able to support themselves for the period that their travel documents were retained. Such provision will address the potential Article 3 issue.

Temporary Exclusion from the United Kingdom

9. It is proposed that the Secretary of State should be able to impose a Temporary Exclusion Order (TEO) on a person with the right of abode in the UK if she reasonably suspects that the individual is or has been involved in terrorism-related activity outside the UK. The TEO will require the person not to return to the UK without complying with certain procedures. The TEO will also impose limited in-country obligations. A TEO will last for two years, but the necessity of the TEO will be subject to ongoing review by the Secretary of State. If the subject complies with specified requirements, primarily the making of an application in a prescribed form, the Secretary of State will have to allow the subject to return to the UK within a reasonable period. The Secretary of State will have the option of allowing the individual to return quickly without going through the formalities of making an application. The UK will accept the subject of a TEO if he or she is deported by another country.

Articles 2, 3, 5 and 6 extra-territorially

10. The Home Office considers that the new provisions are capable of being exercised compatibly with the ECHR. The Home Office notes that TEOs may only be imposed on subjects outside the UK. As such, the ECHR is not directly engaged. The ECtHR (Fourth Section) has considered the territoriality of the ECHR recently in its inadmissibility decision in *Khan v UK* (Application No. 11987/11). The ECtHR noted:

24. Whether Articles 2, 3, 5 and 6 are engaged in the present case turns on whether, although he is in Pakistan (having returned there voluntarily) the applicant can be said to be “within the jurisdiction” of the United Kingdom for the purposes of Article 1 of the Convention. SIAC and the Court of Appeal, by applying the principles set out in Bankovic and Others ... found that he was not. There is nothing in this Court’s subsequent case-law, or in the applicant’s submissions, to cast doubt on the approach that SIAC and the Court of Appeal took.

11. The proposition that the ECHR will not be engaged extra-territorially has been endorsed domestically, including in the case of Mr Khan. In *Khan & Ors v SSHD* (SIAC open judgment, 18 May 2010), SIAC noted that the ‘United Kingdom has no jurisdiction over

Pakistani citizens physically present in Pakistan' (§ 41). In a more recent deprivation case, SIAC considered that the deprivation of British-Pakistani dual nationals, while those concerned were in Pakistan, did not engage the ECHR (see paragraphs 21 – 30 of *S1, T1, U1 and V1 v SSHD*, SIAC judgment 21 December 2012)³.

12. The Home Office considers that the conclusion that the ECHR does not apply extra-territorially applies *a fortiori* in respect of temporary exclusion as opposed to deprivation. Compared with deprivation, temporary exclusion involves manifestly less significant interference with an individual's ability to request the UK's assistance overseas or to travel to the UK.

13. The Home Office notes that, in respect of deprivation decisions, the Secretary of State has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of articles 2 or 3 if they were within the UK's jurisdiction and those articles were engaged. The Secretary of State proposes to adopt an equivalent practice in respect of decisions to impose TEOs.

Article 8 extra-territorially

14. The Home Office acknowledges that temporary exclusion may involve Article 8 considerations. As the ECtHR noted in *Khan* (§ 27):

There is support in the Court's case-law for the proposition that the Contracting State's obligations under Article 8 may, in certain circumstances, require family members to be reunified with their relatives living in that Contracting State.

15. The Home Office therefore accepts that, where a British citizen is temporarily excluded from the UK, there will be a temporary interference with the individual's ability to enjoy his or her family and private life in the UK; and that a TEO will therefore engage the Article 8 rights of the individual's family members, and arguably other social contacts, in the UK. The Home Office notes, however, that TEOs will only be imposed when the Secretary of State reasonably suspects that the individual is or has been involved in terrorism-related activity outside the UK, and when she reasonably considers that the TEO is necessary, for purposes connected with protecting members of the public from a risk of terrorism. In addition, the subject of a TEO will be able to bring any interference in his or her family or private life (and therefore any interference in the family or private lives of his or her contacts in the UK) to an end by complying with specified procedures. Such procedures are not onerous: the subject can secure return to the UK within a reasonable period of an application to return being made. The Home Office therefore considers that any interference in the Article 8 rights of the subject's contacts in the UK is capable of being necessary and proportionate, subject to consideration of the facts of each case.

³ This case is subject to appeal.

Article 8 domestically

16. The Home Office considers that the domestic effects of a TEO are unlikely to engage the subject's Article 8 rights. The in-country obligations that may be imposed under a TEO are so minimal, in the Home Office's view, as to have no real impact on the subject's right to respect for his family and private life.

17. The Home Office considers that TEOs are capable of being imposed compatibly with the Convention rights of all those engaged.

Part 2 – Terrorism Prevention and Investigation Measures

18. A TPIM comprises a package of measures⁴, each of which is imposed on an individual where the Secretary of State reasonably considers the measure is necessary to prevent or restrict a person's ability to engage in terrorism-related activity (section 3(4) of the TPIM Act). Examples of TPIM measures include the requirement to refrain from contacting certain persons, to report in person to a police station and to wear an electronic monitoring tag. The imposition of the TPIM and each of its measures generally interferes with the subject's right to respect for his private and family life under Article 8, and many TPIM measures will impact on his right to freedom of association under Article 11.

19. The amendments to the TPIM Act made by the Bill provide for the Secretary of State to be able to impose measures that (a) require a TPIM subject to reside in premises in any locality in the UK that the Secretary of State considers appropriate (subject to the agreement of the person if the premises are more than 200 miles away from his residence); (b) restrict a TPIM subject's travel outside the area where the subject lives (travel measure); (c) comprise certain prohibitions in relation to the TPIM subject's access to firearms and explosives; and (d) require a TPIM subject to attend appointments with specified persons or persons of specified descriptions (in order, for example, to identify the root cause of the subject's extremism and to tackle it). The Bill also increases the sentence for breaching the travel measure from a maximum of five years to a maximum of ten years, where the person leaves the UK or breaches a requirement not to travel outside the specified area where they reside. Where the person breaches by leaving the UK, the Bill provides that they do not have the possibility of advancing a reasonable excuse in order to avoid liability. These amendments involve an expansion of the conditions that can be imposed by the Secretary of State on a TPIM subject (conditions which it is a criminal offence to breach) and therefore all increase the degree to which the Secretary of State can interfere with the Article 8 and 11 rights of the TPIM subject. However, a further amendment raises the threshold for imposing any TPIM, regardless of which specific measures are imposed, so that the Secretary of State must be satisfied on the balance of probabilities (rather than that she must reasonably believe) that the person is or has been engaged in terrorism-related activity. Another amendment places the Secretary of State under a duty to publish the factors that are considered appropriate to take into account when deciding to impose restrictions upon a person under the travel measure. Another amendment narrows the definition of terrorism-related activity by providing

⁴ Single measure TPIMs can be imposed but in practice all TPIMs have involved a package of measures.

that no longer will giving support to a person who is either facilitating or encouraging the commission, preparation or instigation of acts of terrorism constitute terrorism-related activity. It will remain the case that giving support to a person engaged in the commission, preparation or instigation of terrorism will constitute terrorism related activity.

20. Articles 8 and 11 are qualified rights. Interferences may be justified under Articles 8(2) and 11(2) where they are in accordance with/prescribed by law and necessary in a democratic society for various legitimate ends, including the interests of national security, public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. The Home Office considers these measures are in accordance with the law since they are set out in primary legislation, and that that the expansion of these TPIM measures by the amendments in the Bill, together with the amendments to the offence provisions, can be justified within the terms of Articles 8(2) and 11(2) given the important public interest in preventing terrorism. Moreover, the raising of the threshold for imposing a TPIM in the first instance represents an increase in the safeguards that apply to Article 8 and 11 interferences.

21. David Anderson QC has reviewed the operational requirement for changes to the measures that can be imposed – particularly the relocation element – and considered whether these can be achieved under existing powers. He has concluded that, in the absence of a relocation power, “exclusion zones can do nothing to prevent a subject from meeting harmful associates on his home patch for the purposes of terrorist plotting, facilitating an abscond or simply maintaining links and networks.” David Anderson has also previously expressed the view that the threshold for imposing a TPIM should be raised to the balance of probabilities.

22. The making of these amendments to the TPIM Act to expand the scope of the restrictions that can be placed on a TPIM subject do not themselves give rise to Article 8 or 11 interference; only upon the exercise by the Secretary of State of any of these expanded powers of restriction would the TPIM subject’s ECHR rights be interfered with, and will have to be justified on necessity and proportionality grounds in the circumstances of the case in hand. The inclusion of a duty to publish factors to be taken into account when exercising the travel measure will give a higher degree of certainty over how this power may be used while retaining the flexibility necessary for these powers to be operationally effective. The raising of the threshold for imposition of a TPIM represents an increase in the level of safeguards against unwarranted interference in ECHR rights, as does the narrowing of the scope of terrorism-related activity.

Part 3 – Retention of relevant internet data

23. Clause 17 will amend the Data Retention and Investigatory Powers Act 2014 (DRIPA) to enable the Secretary of State to require telecommunications operators to retain an additional category of communications data, namely data that will allow relevant authorities to link the unique attributes of a public Internet Protocol (IP) address to the person (or device) using it at any given time.

24. Communications data is the context not the content of a communication. It can be used to demonstrate who was communicating; when; from where; and with whom. It can include the time and duration of a communication, the number or email address of the originator and recipient, and sometimes the location of the device from which the communication was made. It does not include the content of any communication: for example the text of an email or a conversation on a telephone.

25. Communications data is used by the intelligence and law enforcement agencies during investigations regarding national security, as well as serious and organised crime. It enables investigators to identify members of a criminal network, place them in specific locations at given times and in certain cases to understand the criminality in which they are engaged. Communications data can be vital in a wide range of threat to life investigations, including the investigation of missing persons. Communications data can be used as evidence in court.

Article 8

26. It is established that mail, telephone and email communications are covered by the notion of private life and correspondence in Article 8(1). There is a series of cases to the effect that interception of the content of communications is an interference with those rights. There is limited Strasbourg case law on the application of Article 8 to communications data, but the case of *Malone v UK* (1984) 7 EHRR 14 (paragraphs 83 to 88) provides some limited guidance, to the effect that while it is to be distinguished from the interception of the content of communications, Article 8 issues still arise. In that case, the release of telephone metering information to the police constituted an interference with an Article 8 right.

27. Article 8 may also impose positive obligations on States to adopt measures designed to secure respect for private life between private persons. It follows that there may be a breach of such positive obligations if the State requires private persons to interfere excessively with the privacy of others, or in the absence of adequate safeguards⁵.

28. Clause 17 will enable the Secretary of State to impose requirements and restrictions on telecommunications operators, by notice under section 1 of DRIPA, in respect of an additional description of communications data. Article 8 imposes positive obligations upon the State as a whole to regulate the performance of the duties imposed on operators under section 1 of DRIPA and, in particular, to ensure that there are appropriate safeguards in place. The requirement to retain data must be assessed together with all other relevant measures that are in place to respect and protect privacy⁶.

Article 8(2)

29. Justification of an interference under Article 8(2) requires that the interference in question is: (i) "in accordance with the law", (ii) for a legitimate aim (or aims) and (iii) proportionate, having regard to the aim (or aims) at issue.

⁵ See e.g., *Botta v Italy* (1998) 26 EHRR 241, at para. 33.

⁶ See *Von Hannover v. Germany* (2004) 40 EHRR 1.

30. The interferences will be in accordance with the law because there will be clear provision in legislation governing the requirement on operators to retain communications data (i.e. in DRIPA as amended by the new legislation), and the circumstances in which the communications data may be obtained by relevant public authorities (i.e. in Chapter 2 of Part 1 of RIPA). These provisions are formulated with sufficient precision to enable a person to know in what circumstances and to what extent the powers can be exercised. It is the Home Office's position that the relevant test of foreseeability in the context of the retention of and access to communications data is whether the law indicates the scope of any discretion and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. The provisions of DRIPA and the Data Retention Regulations 2014, together with the provisions of Chapter 2 of Part 1 of RIPA, meet that test.

31. The interferences with Convention rights will be in pursuit of a legitimate aim. The ability of law enforcement and intelligence agencies to resolve IP addresses and identify the parties to a communication is vital in protecting national security, preventing and detecting crime and protecting the public. Communications data is used not only as evidence in court, but also to eliminate people from law enforcement investigations. It can be used to prove a person's innocence as well as his or her guilt. It is essential that communications data of this sort is available to be obtained by the law enforcement and intelligence agencies and other relevant public authorities.

32. A notice imposing a requirement on a provider to retain data may only be given if the Secretary of State believes that it is necessary and proportionate to do so for one or more of the legitimate aims set out in section 22(2) of RIPA:

- a. in the interest of national security,
- b. for the purpose of preventing or detecting crime or of preventing disorder,
- c. in the interests of the economic well-being of the United Kingdom,
- d. in the interests of public safety,
- e. for the purpose of protecting public health,
- f. for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department,
- g. for the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health,
- h. to assist investigations into alleged miscarriages of justice , or
- i. where a person ("P") has died or is unable to identify themselves because of a physical or mental condition-
 - i. to assist in identifying P, or
 - ii. to obtain information about P's next of kin or other persons connected with P or about the reason for P's death or condition.

33. The interferences with these rights will also be proportionate given the extensive range of safeguards and restrictions against abuse set out in DRIPA.

34. The notice-giving power in section 1 of DRIPA enables the Secretary of State to limit the requirement to retain to a description of data held by a provider, so a notice need not require the retention of all data by a particular operator (but may extend to all relevant data if that requirement is necessary and proportionate). The requirement to retain data may be for a maximum period to be provided for in the 2014 Regulations, of no more than 12 months. A notice may impose different requirements in respect of different types of data, so, for example, a shorter retention period could be specified in respect of a certain category of data. The requirements of a notice will be tailored according to the assessment of the necessity and proportionality of retention. A notice must be kept under review.

35. DRIPA and the 2014 Regulations also provide for an extensive range of safeguards against abuse of retained data to ensure that operators are subject to all the obligations necessary to secure respect for the private life of individual telecommunications users. These include: a requirement to secure the integrity of retained data and subject it to the same security and protections as the data on the operator's systems; a requirement to secure, by organisational and technical means, that data can only be accessed by specially authorised personnel; and a requirement to protect the retained data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful retention, processing, access or disclosure. The retained data must be destroyed by the operator if the retention of the data ceases to be authorised. Data must be deleted in such a way as to make access to the data impossible. The Information Commissioner has a duty to audit compliance by providers with the requirements in respect of the retention of data.

36. Section 1(6) of DRIPA provides that operators may only disclose retained data in accordance with the scheme under Chapter 2 of Part 1 of RIPA, which provides guarantees against abuse, or in accordance with a court order or warrant. Under section 22 of RIPA access is only permitted by authorised public authorities. Public authorities are authorised to access different categories of data for different purposes. A notice or authorisation to access communications data must be necessary and proportionate for one of the authorised purposes, taking into account any collateral intrusion.

37. Section 57(2) of RIPA provides for the independent Interception of Communications Commissioner to keep under review the exercise of powers and duties under Chapter 2 of Part 1. The Commissioner must have previously held high judicial office. His inspection team actively examine applications to ensure the decision making (around necessity and proportionality) is appropriately rigorous. The Commissioner publishes a report annually which outlines where mistakes have been made in the application process, as well as outlining full statistics for all public authorities who have used their powers.

38. If any person believes their data has been acquired inappropriately they can complain to the independent Investigatory Powers Tribunal, which can investigate the details of the case, and order compensation.

39. The Home Office accordingly considers that interferences with the Article 8(1) rights will be proportionate.

Article 1 of Protocol 1

40. The imposition of requirements upon telecommunications operators under the Bill may give rise to interferences with their rights under Article 1 of Protocol 1. Operators may incur costs in complying with obligations under the Bill, which could constitute an interference with their peaceful enjoyment of their possessions, in the form of their business interests.

41. Article 1 of Protocol 1 is a qualified right. The imposition of requirements on telecommunications operators will be in accordance with the law because they will be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The requirements will be in the general interest because they will secure the availability of communications data which is essential to the law enforcement intelligence agencies in protecting national security, preventing and detecting crime and protecting the public. The requirements will be proportionate for the reasons set out above and because the expectation is that most of the operators' costs of complying with any new obligations in the Bill will be met from public funds (i.e. so as to ensure that the operators will in effect receive 'compensation' for any interferences with their rights under Article 1 of Protocol 1).

42. Accordingly, the Home Office considers the Bill is compatible with Article 1 of Protocol 1.

Part 4 – Aviation, Maritime and Rail

43. Clause 18 replaces the existing authority to carry scheme at section 124 of the Nationality, Immigration and Asylum Act 2002 with a new extended scheme. A scheme or schemes made under this provision may require carriers to seek authority to carry the following categories of passenger: all those with a right of abode in the UK, those exercising free movement rights under Directive 2004/38/EC and to third country nationals. It enables a scheme or schemes to be established in relation to both inbound and outbound journeys. A scheme made under this provision will define which passengers are captured by that scheme and will enable the Secretary of State to refuse particular classes of carrier authority to carry particular classes of passenger where it is necessary in the public interest. Any scheme may specify when specified information should be provided, the manner and form in which it should be provided and the manner and form in which carriers should be able to receive communications from the Secretary of State, granting or refusing authority to carry. Clause 19 is an enabling power to establish a civil penalty regime penalising breaches of the requirements of any such scheme. Clause 20 refers to the amendments at Schedule 2. Part 1 of that Schedule amends existing powers to require passenger, crew and service information to ensure the provision of accurate and complete data using interactive systems. It also provides for the Secretary of State to make subordinate legislation imposing a standing requirement to provide passenger, crew and service information on specified classes of carrier in the form and manner which the Secretary of State specifies. In addition, it provides for two enabling powers to establish civil penalty regimes: one penalising the failure to comply with a requirement or request by the Secretary of State to provide

passenger, crew or service information and the other penalising the failure to comply with such requirements or requests by the police.

44. These are the principal ECHR issues arising in relation to these provisions.

Article 6

Effective Remedy

45. In respect of the scope for challenge to decisions for those in relation to whom authority to carry has been refused, it is considered that judicial review is capable of providing an effective remedy and provides a means of determining civil rights compatibility with Article 6. The Home Office is therefore satisfied that the provisions relating to the authority to carry scheme are compatible with the ECHR as far as Article 6 in its domestic application is concerned.

46. In relation to those for whom authority to carry is refused on the basis of their immigration status on an inbound journey, the appropriate route of challenge would be by way of challenge to the immigration decision which forms the basis of that refusal. Equally, where the direction is based on another legislative restriction on travel such as the condition of a TPIM, the appropriate route of challenge would be a challenge under the relevant legislative framework which established the original restriction.

47. An administrative review process will be available for those individuals who believe that in respect of their case, the carrier has been denied authority to carry them in error.

Article 6 & Article 1, Protocol 1

Civil Sanctions

48. In the case of *International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158* the Court of Appeal held that a civil penalty regime established to penalise hauliers and drivers carrying clandestine entrants into the UK was penal in nature. The civil penalty regimes provided for in relation to the authority to carry scheme and the collection of passenger, crew and service information are arguably criminal penalties for the purposes of the ECHR and so Article 6 may be engaged. The further specific concerns that the Court had with the regime in *Roth* were the scale and inflexibility of the penalty without the possibility of mitigation or the right for the penalty to be determined by an independent tribunal and the fact that the scheme imposed an excessive burden on the carriers and drivers which was disproportionate to the objective to be achieved and was a breach of Article 1, Protocol 1.

49. The schemes will be established by regulations and will be similar to the civil penalty for undocumented passengers at sections 40 to 41 of the Immigration and Asylum Act 1999, as reflected in the existing regulations made under section 124 of the Nationality, Immigration and Asylum Act 2002. The proposed scheme is compatible with Article 6 and Article 1, Protocol 1 because the level of penalty will be flexible and can reflect the level of

culpability, there will be a right of objection to the Secretary of State and there will be a right of appeal where the court will be able to consider evidence which was not before the Secretary of State and will have regard to the secondary legislation and supporting guidance.

50. The Home Office considers that the civil penalty schemes do not amount to criminal penalties for the purposes of the ECHR. The aim of both schemes is to promote the exercise of reasonable care by carriers to comply with the requirements of the relevant border agencies for accurate, complete and timely passenger, crew and service information and to comply with the requirements of any authority to carry scheme.

51. The Home Office considers that any potential interference with Article 1, Protocol 1 can be justified as these penalties will be imposed in the pursuit of a legitimate aim in the public interest and are proportionate to that aim. This is to prevent illegal entry, to address national security risks, to address risks around criminality, to assist in targeting response on arrival, to ensure compliance with and enforcement of the immigration laws and to tackle threats to the security of vessels, aircraft, trains and their passengers travelling into the UK.

Article 8

52. The effect of denial of authority to carry in relation to individuals captured by the scheme may involve Article 8 considerations on the basis that family members may be denied the opportunity to be reunited with their relatives living in that Contracting State or, in respect of the outbound scheme, another Contracting State.

53. Where a person seeking to join relatives in the UK is denied boarding as a result of denial to the carrier of authority to carry by the Secretary of State, there will be a temporary interference with the individual's ability to enjoy his or her family and private life in the UK. This will therefore engage the Article 8 rights of the individual's family members and arguably other social contacts in the UK. The Home Office notes, however, that in the majority of cases, the individual will be able to travel back to the UK by other means or on another journey at a later date and therefore to bring any interference to an end. In relation to those refused authority to carry due to immigration restrictions such as exclusion or cancellation of a visa which mean that they would be refused admission if they presented at the UK border, these can be justified as supporting the economic wellbeing of the country. Where an individual presents a direct threat to the security of a vessel or craft, this interference can be justified on national security grounds. The Home Office therefore considers that any interference in the Article 8 rights of the subject's contacts in the UK as a result of the operation of the scheme is capable of being necessary and proportionate, subject to consideration of the facts of each case.

54. Any specific considerations in relation to temporary exclusion orders and those who are not resident in the UK who may be prevented from travelling onwards as a result of the operation of an outbound scheme are considered elsewhere in this memorandum.

55. The power to require a carrier or operator to provide advance passenger and crew information in relation to those on board may also engage Article 8. This mirrors and

supplements other existing powers for the Secretary of State to require this information in primary legislation and captures a category of journeys not captured by existing legislation. The provisions will work in such a way that they do not impose two obligations on the same carrier.

56. Any interference can be justified on the basis that provision of this information enables the Home Office to identify potential security threats and immigration risks, to deny authority to carry those intending to travel to the UK where they fall within an existing scheme and, in appropriate circumstances, to divert resources to attend to meet passengers and crew at ports which would not otherwise be staffed. This can be justified in the interests of national security, in respect of immigration risks, to protect the economic wellbeing of the UK.

Amendments to the Aviation Security Act 1982, the Aviation and Maritime Security Act 1990 and the Channel Tunnel (Security) Order 1994

57. Clause 20 atc03 makes provision, set out in Part 2 of Schedule 2 to the Bill, to enhance and clarify the Secretary of State's existing ability to direct ship, aircraft and Channel Tunnel train operators who intend to operate in the UK or to enter a UK harbour to undertake additional screening of passengers or to apply specified security measures before they may enter into the UK or in the case of a ship, before it may enter a UK harbour. In addition, notice periods for the provision of information to the Secretary of State are removed and further provision may be made for electronic service. The purpose for which directions may be made and information requested remains limited to the protection of marine, aviation and rail from acts of violence. With specific regard to the Aviation Security Act 1982, an enabling power is given in order that the Secretary of State may make a scheme for civil sanctions by way of regulation.

Civil Sanctions (Aviation only)

58. The proposed civil penalties regime engages Article 6. As discussed in paragraph 48 above, civil penalties can in certain circumstances be considered to be criminal in nature, thereby engaging Articles 6(2) and 6(3). There is also a possibility that Article 1, Protocol 1 may be breached if the burden of the penalty is considered excessive.

59. The scheme does not constitute an interference with Article 6(1). It will be established by regulations whereby the level of the penalty will be flexible and can reflect the level of non-compliance, there will be a right of objection to the Secretary of State, a right of appeal where the court will be able to consider evidence which was not before the Secretary of State and will have regard to the secondary legislation and supporting guidance. The Department for Transport also does not consider that the civil penalty scheme proposed for aviation security amounts to a criminal sanction; the purpose of the scheme is to encourage compliance with aviation security directions and information requests – criminal offences for non-compliance already exist. It is also considered that the potential interference with Article 1, Protocol 1 can be justified as these penalties will be flexible, imposed in the pursuit of a legitimate aim in the public interest and are proportionate to that aim, namely the prevention of acts of violence to civil aviation.

Search Measures

60. The amendments give further power to require searching of individuals and their luggage and this may in some circumstances be considered an interference with the right to respect to private and family life (Article 8). In addition, there is potential that Article 1, Protocol 1 right interference may occur to the extent that the power could require passengers to do certain things with their luggage and that marine, aircraft and train operators are likely to incur costs in complying with the requirements (thus interfering with their business interests). However, powers will be exercised in the interests of national security for the protection of marine, aviation and rail entities from acts of violence and are only permissible to the extent that this is the case, therefore the interference is proportionate, and justifiable on public interest grounds.

Part 5 – Preventing People being drawn into terrorism

Support etc., for people vulnerable to being drawn into Terrorism

61. The Bill requires that local authorities ensure a panel is in place to assess the vulnerability of persons identified to them by the police as vulnerable to being drawn into terrorism, and, where appropriate, to provide support to such persons who consent to receive it, with a view to reducing that vulnerability. The clauses also establish a duty of co-operation (subject to the qualification of “so far as appropriate and reasonably practicable”) which bites upon “partners” of such panels (partners include local authorities and police representatives who are not on the panel in question; health and education sector partners; and probation service providers). The co-operation duty extends to the provision by panel partners of information about the identified individual. This also entails panel partners being required to provide information to the police in order to assist them identify people who might be identified to a panel as a candidate for support; and to provide information to providers of health or social care services, in those cases where an identified person is not to be offered support by the panel but where the panel considers that the person ought to be referred to other support providers. To the extent that personal information is shared, this represents an interference with the person’s Article 8 rights to respect to private and family life (as well as constituting a processing of personal data (likely in many cases to be sensitive personal data) under the terms of the Data Protection Act 1998. The Bill states that nothing requires or the authorises the making of a disclosure that would contravene the Data Protection Act).

62. Any person who is to receive support arranged by a panel with a view to reducing that person’s vulnerability to being drawn into terrorism must expressly consent to receiving that support, and can withdraw consent at any time. When a person is offered support by a panel, the person is advised that information will be shared about them in the course of the panel’s deliberations. If, in that knowledge, the person agrees to receive support, they consent to Article 8 interference. However, there may be information sharing in contexts where no prior consent has been given (that is, where information is given to the police in respect of a person to assist the police in their determination of whether the person should be referred to a panel in the first place; and in cases where panels decide to refer a person to other social or health care providers). In all of these cases, whether consent has been given or otherwise, the sharing of information must be limited to that which is necessary and

proportionate to the legitimate end of reducing the person's vulnerability to being drawn into terrorism if it is to be in compliance with Article 8(2) and the provisions of the Data Protection Act. The qualification to the co-operation duty assists in ensuring that information disclosure is limited to that which is necessary and proportionate.

Part 6 – Amendments of or Relating to the Terrorism Acts

Insurance against payments made in response to terrorist demands (Clause 34)

63. The Bill inserts a new offence at section 17A Terrorism Act 2000 (TACT).

64. Subsection 1 of new section 17A will make it an offence for an insurer, under or purportedly under an insurance contract, to make a payment to an insured party where the insurer knows or has reasonable cause to suspect, that the payment is made in respect of money or property that has been or is to be handed over in respect of a claim made wholly or partly for the purposes of terrorism.

65. Provision is made in respect of both corporate and individual liability (given that in the majority of cases, if not all, insurance contracts are provided by corporate bodies). Transitional provision is made with respect to payments made after commencement in respect of contracts entered into before that day, or in respect of money or property handed over before that day. New provision is inserted into section 23 TACT which will enable a court to forfeit any amount paid under or purportedly under the insurance contract where a person is convicted of the new offence.

66. The offence will apply to the whole of the UK and by virtue of section 63 TACT will have extra territorial application. Consequently, arrangements made to conduct financial transactions outside the UK are liable to be caught. Given the way in respect of which kidnap for ransom operates (particularly in the terrorist context), with victims typically kidnapped outside the UK, ransom payments typically made outside the UK and at least some aspects pertaining to reimbursement under an insurance contract taking place outside the UK, limiting the offence to the UK would severely undermine its effectiveness.

Article 1, Protocol 1

Forfeiture following conviction for an offence at section 17A

67. The Bill amends section 23 TACT to provide for forfeiture on conviction of an offence under section 17A of the amount paid under, or purportedly under, the insurance contract.

68. 'Possessions' for the purposes of Article 1, Protocol 1 are not limited to physical goods and can extend to a right or interest of a pecuniary nature. Consequently, it is arguable that this Article is engaged with respect to any insurance monies paid out pursuant to a contractual obligation, which are then liable to forfeiture by reference to a conviction under section 17A.

69. If engaged, forfeiture of such insurance monies would amount to an interference which needs to be justified. In order to be justified, any interference with the right to property

must serve a legitimate objective in the public, or general, interest. It must also be proportionate.

70. There is a compelling public interest in ensuring that money is not paid out to terrorists or for the purposes of terrorism. This is underpinned by international law as well as domestic law. Consequently, the national legislature has a wide margin of appreciation in how it seeks to give effect to this. The ability to seek reimbursement of monies paid out under an insurance contract encourages such payments in the first instance. Criminalising the reimbursement of the same with attendant powers of forfeiture will act (certainly in many cases) as a disincentive to make such payments in the first instance. It therefore serves a legitimate interest.

71. Further, the forfeiture provision gives the court a discretion to order forfeiture. It is not mandatory. Consequently, where the court perceives that it would be unfair to order forfeiture the court may decline to make such an order. This is clearly relevant to the issue of proportionality.

Retrospective application of forfeiture provision

72. Clause 34(3) of the Bill provides that whilst section 17A will only apply to payments made by an insurer after commencement, it will apply in respect of an insurance contract entered into before that day or in respect of money or other property handed over before that day.

73. It is conceivable, given the transitional provision at clause 34(3) that a court could order forfeiture of monies paid by an insurer pursuant to a claim made under an insurance contract which existed and in respect of which a ransom was paid prior to the commencement of clause 34(2), although only in respect of those ransom payments made following introduction of the Bill (clause 34(4)). The payment of a ransom to terrorists is likely to constitute a criminal offence in and of itself, either because it engages section 15 and/or 17 TACT (both of which have extra territorial application by virtue of section 63 TACT) or because it engages similar offence provisions under the laws of the State in which it is paid (UNSCR 1373 requires all Member States to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets etc. available for terrorist purposes). Consequently, there is a compelling public interest in forfeiting any reimbursement of the same. However, as discussed, this is a discretionary power and the court itself must have regard to Article 1, Protocol 1 ECHR in determining whether to order forfeiture in such circumstances, as well as to general considerations of fairness. This renders such application proportionate.

Refusal by an insurer to pay out under an insurance contract following commencement of section 17A

74. Most insurance contracts contain provision whereby the insurer will not pay out in the event that such payment constitutes an offence under (inter alia) UK law. With respect to premiums paid after section 17A comes into force, no issue should arise in respect of Article 1, Protocol 1 since there will be no prima facie entitlement to be paid in circumstances where section 17A is engaged. However, if an insurance premium is paid before commencement

with a view to securing cover against having to pay ransoms, a ransom is then paid, the insurer refuses to pay out under the policy after commencement because doing so would amount to a criminal offence, this may give rise to an Article 1, Protocol 1 issue.

75. The insured are usually companies or employers who have paid ransoms to secure the release of their employees who have been kidnapped in countries where terrorist kidnappings are common, for example, Columbia, Kenya and Syria. In some cases, the insurance risks are split between different insurers and give rise to claims for reimbursement from one insurer to another (i.e. to a reinsurer). Those paying the ransoms (which usually involve considerable sums of money) have not, in the experience of the Home Office, been individuals. Further, those paying such ransoms are likely to have committed an offence under TACT or an equivalent offence under the laws of a foreign State. Often those directly involved in paying ransoms cannot be prosecuted because they are outside of the jurisdiction. This makes investigation of an offence very difficult, in addition to the obvious difficulties in repatriating someone for the purposes of prosecution. Those who have made payments would, if they were within jurisdiction be at risk of investigation and prosecution of a section 15 and/or 17 TACT offence. Consequently, there is a compelling public interest in preventing reimbursement of funds paid to terrorists, which were likely paid in breach of either domestic law or the laws of other States. Insofar as the transitional provision at clause 34(3) applies to ransom payments made prior to Royal Assent, it will only bite on those made following introduction of the Bill (clause 34(4)), such that an insured, on considering whether to make such payment will, or ought to know that the offence will bite in relation to that payment. This is relevant to proportionality.

76. Further, the establishment of the offence is unlikely to make a material difference to an insurer refusing to pay out. This is because the insurer may already have concerns that an offence has been committed by the insured by virtue of section 17 TACT or otherwise and in such cases the contract will often provide that the insurer need not pay out. Alternatively, the common law provides that an insurer need not pay out in such circumstances. This is relevant to the issue of proportionality.

77. Section 21ZA TACT will apply to the offence at section 17A in the same way that it applies to the offences at sections 15 to 18 TACT more generally and thus the National Crime Agency (NCA) could give consent to an insurer to make a payment that would otherwise constitute an offence under section 17A. This would have the effect of providing a defence to what might otherwise constitute an offence and thus a knock on effect on the contractual position. The NCA will need to apply public law principles to the issue of consent, which include considerations of fairness and reasonableness. This has the potential to mitigate any unfairness that might otherwise apply in respect of applying the offence in respect of insurance contracts entered into prior to commencement or in respect of monies paid out prior to commencement in the reasonable expectation of obtaining reimbursement. The NCA however do not determine an insured's rights under the contract of insurance and it will always be open to the insured (or insurer) to challenge a consent refusal, or in the case of the insured, to bring a claim against the insurer for breach of contract in the event of a refusal to pay out. These safeguards are equally relevant to the issue of proportionality.

Port and Border controls: power to examine goods

78. Amendments are provided for to the power in paragraph 9 of Schedule 7 to the Terrorism Act 2000 (port and border controls). This allows examining officers (in practice, the police) to examine goods which have arrived in or are about to leave Great Britain or Northern Ireland on a ship or vehicle, and goods which have arrived at or are about to leave any place in Great Britain or Northern Ireland on an aircraft, to determine whether the goods have been used in the commission, preparation or instigation of acts of terrorism. This power permits interferences with the Article 8 rights of the senders and receivers of any goods which are subject to examinations. Parliament enacted the power on the basis that the Article 8 interferences are justified within the terms of Article 8(2) because of the national security and public safety reasons for this counter-terrorism power.

79. The amendments in the Bill relate to two separate issues that arise from the Schedule 7 goods examination power.

Location of examinations

80. There is no express provision in Schedule 7 as to where the goods examination power may be exercised so the Home Office wishes to clarify this by amending paragraph 9 so as to provide that that the power can be exercised anywhere within a port and in respect of goods which are in “transit sheds” beyond port perimeters (that is, premises approved by the Commissioners of Her Majesty’s Revenue and Customs under section 25A of the Customs and Excise Management Act 1979); in air and sea cargo agents’ premises; and in any other locations outside ports that are designated by the Secretary of State if she considers it necessary to do so in order for examining officers effectively to exercise their examination powers. The Home Office believes that the national security and public safety imperatives that underpin the goods examination power are sufficiently strong to justify provisions which allow for the exercise of the power beyond the perimeters of ports. In practice, goods are frequently transported very quickly away from ports when they arrive in the country, thus making it difficult in practice for the police to exercise this important counter-terrorism power whilst the goods are within a port; and goods are also frequently held for some time in air and sea cargo agents’ premises before their exportation, which is problematic since the power is expressed to be exercisable in respect of goods “about to leave” the country. The Home Office considers the amendments do not sanction any unnecessary or disproportionate interferences in the Article 8 rights of those whose goods are examined.

Opening of postal packets

81. The second amendment is to the Regulation of Investigatory Powers Act 2000, to ensure lawful authority under section 1 of that Act for any examinations under the Schedule 7 power of postal packets. Section 1 of RIPA makes it a criminal offence to intercept communications in the course of their transmission by a public postal service without lawful authority. An amendment is also made to the Postal Services Act 2000 to ensure that the principle of “inviolability of mails” is not breached by use of the Schedule 7 power to open postal packets.

82. The amendment does not result in the expansion of the circumstances in which the authorities can interfere with people's Article 8 rights, by providing for a new power to open post. That power has existed since Schedule 7 was enacted: the definition of "goods" in respect of which the power is exercisable has always been wide enough to include postal packets. The amendment puts beyond doubt that officers have lawful authority under section 3 of RIPA to exercise the power in respect of postal packets. The amendment mirrors the amendment made in 2009 by the Policing and Crime Act 2009, which inserted section 3(3A) into RIPA which provided lawful authority for customs officers to use their customs powers to open postal packets.