

# **THE TERRORISM ACTS IN 2015**

REPORT OF THE INDEPENDENT REVIEWER ON THE  
OPERATION OF THE TERRORISM ACT 2000 AND  
PART 1 OF THE TERRORISM ACT 2006

by

**DAVID ANDERSON Q.C.**

**Independent Reviewer of Terrorism Legislation**

DECEMBER 2016



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**Presented to Parliament  
pursuant to  
Section 36(5) of the  
Terrorism Act 2006**

December 2016

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This publication is available at <http://terrorismlegislationreviewer.independent.gov.uk>

Print ISBN 9781474138871

Web ISBN 9781474138888

ID 14111609          12/16

Printed on paper containing 75% recycled fibre content minimum.

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

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## EXECUTIVE SUMMARY

- **The UK escaped largely unscathed** in 2015 from, by recent standards, a particularly bad year for terrorism in Western Europe. But **the threat remains severe**: attack plots continue to be disrupted, and (in Northern Ireland) to get through (Chapter 2).
- A substantial **increase in cross-Government spending** on counter-terrorism was announced in November 2015 (3.5).
- Though **Brexit** seems likely to end UK leadership in the formulation of EU security policy and laws, there are strong operational reasons for maintaining access to EU mechanisms that others may devise and develop (3.15-3.20).
- The **definition of terrorism** has been trimmed by the Court of Appeal in the *Miranda* case, but remains over-broad (Chapter 4).
- Eight groups have been **proscribed** since the start of 2015. Procedures for deproscription remain inadequate, and the continued proscription of groups that do not satisfy the statutory test is particularly unsatisfactory (Chapter 5).
- The Terrorism Act power to **stop and search** without suspicion was once again not used (Chapter 6).
- Use of police powers to examine people at **ports and airports** declined by two-thirds between 2009/10 and 2015/16, but continues to be productive (Chapter 7).
- Terrorism-related **arrests** in Great Britain were stable (280 in 2015), but at a higher rate than the long-term average. Terrorism Act arrests were below average in Northern Ireland (149 in 2015/16) but remain numerous as a proportion of the population and continue to result in a poor **charging rate** (Chapter 8).
- There were 56 **terrorist trials** in Great Britain in 2015: the principal convictions are analysed, and a development in **sentencing** is noted (Chapter 9).
- There is discussion of the legal treatment of **radicalisers** (9.44-9.52) and of **foreign terrorist fighters** (in a Guest Chapter by Prof Clive Walker: [Annex 2](#)).
- Room for improvement is identified in **21 specific recommendations**: they cover the collection of statistics, ambit of review, definition of terrorism, deproscription, port controls, arrest and detention and criminal offences (Chapter 10).
- But the overall picture is of **appropriately strong laws, responsibly implemented, less intrusive** than six years ago and with a **good recent record** of surviving challenge against European human rights standards (Chapter 11).
- Despite the **broad discretions** that characterise UK counter-terrorism law, I reject the **false narrative** of power-hungry security services, police insensitivity to community concerns, and laws constantly being ratcheted up to new levels of oppression (11.14).
- But **trust needs to be continually earned**. Threats **to our liberties can come at any time**, and **continued vigilance** will be needed in the future (Chapter 11).

# 1. INTRODUCTION

## This report

- 1.1 I am required by section 36 of the Terrorism Act 2006 [TA 2006] to review the operation during each calendar year of the Terrorism Act 2000 [TA 2000] and to report.<sup>1</sup> As in previous years (though no longer tied to an annual report by statute),<sup>2</sup> I report at the same time on Part 1 of TA 2006. I also touch on some matters covered by the Counter-Terrorism Act 2008 [CTA 2008].<sup>3</sup> The report covers the calendar year 2015, but makes frequent reference to events in 2016.<sup>4</sup>
- 1.2 This is my sixth and final annual report on the Terrorism Acts, and the 18th report I have produced in all since taking up appointment as Independent Reviewer in February 2011. I intend to publish or work on two further reports before the expiry of my second term of office in early 2017.<sup>5</sup> My previous reports, together with the Government's responses to them and much other material, are freely downloadable from my website.<sup>6</sup>
- 1.3 The function of the Independent Reviewer, as it was explained when reviews were first placed on an annual basis, is to "*look at the use made of the statutory powers relating to terrorism*", and "*consider whether, for example, any change in the pattern of their use needed to be drawn to the attention of Parliament*".<sup>7</sup> For more than 35 years, successive Independent Reviewers have used their reports to ask whether special powers continue to be necessary for fighting terrorism, and to make recommendations for reform.<sup>8</sup>
- 1.4 The essence of independent review lies in the combination of three concepts not often seen together: complete independence from Government; unrestricted access to classified documents and national security personnel; and a statutory obligation on Government to lay the Independent Reviewer's reports before Parliament on receipt.<sup>9</sup> My reports are based on broad reading and on the widest possible range of interviews

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<sup>1</sup> All acronyms used in this report are explained at [Annex 1](#).

<sup>2</sup> Counter-Terrorism and Security Act 2015 [CTSA 2015] s45, amending TA 2006 s36(4); see D. Anderson, *The Terrorism Acts in 2014*, September 2015, 10.6-10.7.

<sup>3</sup> See 9.24 and 9.29-9.31 below. CTA 2008 was added to the statutory responsibilities of the Independent Reviewer by CTSA 2015.

<sup>4</sup> The bulk of this report was submitted to Government in mid-September 2016, and a final version for security checking on 9 October. I have in a few respects been able to take account of subsequent material.

<sup>5</sup> Into (1) the policy of Deportation with Assurances and (2) the operation of various executive powers (Terrorism Prevention and Investigation Measures [TPIMs], terrorist asset-freezing, Temporary Exclusion Orders and police passport removal powers) which I have authority to oversee. See my letter of 28 January 2016 to the Home Secretary: <https://terrorismlegislationreviewer.independent.gov.uk/work-plan-for-2016/#more-2643>.

<sup>6</sup> <https://terrorismlegislationreviewer.independent.gov.uk>. The most recent is *The Terrorism Acts in 2014* (September 2015). A relatively full introduction to the Terrorism Acts is *The Terrorism Acts in 2012* (July 2013). See further Professor Clive Walker's *Blackstone's Guide to the Counter-Terrorism Legislation* (2014).

<sup>7</sup> Lord Elton, Hansard HL 8 March 1984, vol 449 cols 405-406.

<sup>8</sup> For a short history of independent review, see D. Anderson, "The independent review of terrorism laws" [2014] Public Law 403-420, available from my website.

<sup>9</sup> The then Home Secretary wrote to me in 2013: "*I agree that the reports of the Independent Reviewer should be published and laid before Parliament promptly on receipt of the final draft. I am confident that this is already the case and that it will continue.*": The Government Response to the annual report on the operation of the Terrorism Acts by the Independent Reviewer of Terrorism Legislation, March 2013, Cm 8494.

and contacts, both in the UK and (for comparative purposes) abroad. They aim to inform – so far as is possible within the necessary constraints of secrecy – the parliamentary and public debate over anti-terrorism powers and civil liberties in the UK.

- 1.5 Whilst reviewing and reporting remain my staple functions, I communicate increasingly through speeches, articles and podcasts, media appearances, posts on my website<sup>10</sup> and tweets (@terrorwatchdog).<sup>11</sup> This allows for a quicker reaction to important events, judgments or legislative developments, and often results in valuable dialogue with people whom I have not had the opportunity to meet off-line.
- 1.6 Despite additional claims on my time,<sup>12</sup> I have continued to receive regular briefings, travelled throughout the United Kingdom and done my best to keep abreast of significant developments. Invitations to New Zealand and Canada have deepened my comparative knowledge. I have also, since their security clearance came through in spring 2016, been able to call on a small team of Special Advisers: Emeritus Professor Clive Walker QC (Hon) and the barristers Alyson Kilpatrick and Hashi Mohamed who are based respectively in Belfast and in London.<sup>13</sup> Each has many other pressing claims on their time, but their collective expertise is extensive and diverse. The first fruits of their assistance are evident in this report.<sup>14</sup>

## Legislative change

- 1.7 The Terrorism Acts were amended in a number of respects in 2015:
- a) CTSA 2015 received Royal Assent on 12 February 2015. It made changes to the remit of the Independent Reviewer of Terrorism Legislation, discussed in Chapter 10 of my last annual report.<sup>15</sup> It also empowered the Secretary of State to make regulations establishing a Privacy and Civil Liberties Board [**PCLB**] to provide advice and assistance to the Independent Reviewer (ss 44-46). The Secretary of State decided after the May 2015 General Election not to make such regulations,<sup>16</sup> but

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<sup>10</sup> In 2015, 26,350 users opened 38,748 sessions on the site, with 74,624 page views. 77% of sessions were from the UK and 5% from the USA. Canada, France and Australia each accounted for 500-600 sessions. Germany, the Netherlands, India and New Zealand each accounted for 200-400 sessions. Between the site going live in April 2011 and June 2016, a total of over 132,000 sessions and 250,000 page views were recorded from over 96,000 users. (Source: Home Office Digital Communications)

<sup>11</sup> By early October 2016, @terrorwatchdog had some 6,500 twitter followers in more than 60 countries.

<sup>12</sup> My normal statutory responsibilities were significantly and unexpectedly supplemented by the Bulk Powers Review, which occupied me for almost three months prior to its publication in August 2016. An additional one-off report, into citizenship removal, was published in April 2016.

<sup>13</sup> See <https://terrorismlegislationreviewer.independent.gov.uk/moving-in-moving-on/>. This is in addition to the exceptional support received from Professor Walker since 2011, identifying materials for me to read and giving advice.

<sup>14</sup> I am grateful for the administrative assistance I have received during my period as Independent Reviewer from Kate Trott and Jayne Boulton in Brick Court Chambers, as well as from Ursula Antwi-Boasiako, Deborah Child, Sukina Smith and Simon Holmes at OSCT.

<sup>15</sup> *The Terrorism Acts in 2014*, September 2015, 10.6-10.7

<sup>16</sup> *Ibid.*, 10.12-10.17.



instead to provide an annual budget of £50,000 for further assistance to the Independent Reviewer.

- b) CTSA 2015 also made further changes to the scope of the Schedule 7 power (s43 and Schedule 8), confirmed that it is an offence for insurers to make payments in response to terrorist demands (s42), reformed the law relating to TPIMs (Part 2), and introduced two new powers to provide temporary restrictions on travel (Part 1), which fall outside the ambit of this report but will be reported upon (together with the operation of the TPIM and asset-freezing regimes) in early 2017.<sup>17</sup>
- c) The Criminal Justice and Courts Act 2015 [**CJCA 2015**] also received Royal Assent on 12 February 2015. Sections 1, 3, 6 and Schedule 1, commenced on 13 April 2015, increased the maximum sentences for certain Terrorism Act offences from 10 or 14 years to life imprisonment, and brought them within the dangerous offenders sentencing scheme, thus introducing the possibility of whole life orders.<sup>18</sup>
- d) The Serious Crime Act 2015 [**SCA 2015**] received Royal Assent on 3 March 2015. Section 81 provides for extra-territorial jurisdiction for the offence under TA 2006 s5 (conduct in preparation for terrorism) and extends existing extra-territorial jurisdiction for TA 2006 s6 (training for terrorism). The contemplated effect was to allow for prosecutions of people who had, for example, travelled from the UK to fight in Syria, and in respect of whom there might be evidence from (for example) social media, communications or persons they had encountered abroad. There are early signs that notwithstanding the obvious difficulties of evidence-gathering in Syria, this extension may prove useful in bringing to trial in the UK some of those who have trained or prepared for terrorism abroad.

1.8 There have been no amendments to the Terrorism Acts thus far in 2016. However:

- (a) An amendment to TA 2000 Schedule 8 is currently before Parliament in the Policing and Crime Bill (clause 70). The purpose of the amendment is to allow the DNA and fingerprints of a person arrested under TA 2000 s41 to be retained not only (as at present) if they have a previous conviction within the UK, but also on the basis of an equivalent conviction outside the UK. Similar amendments are being made to the Police and Criminal Evidence Act 1984 [**PACE**]. These amendments are supported by the police and respond to a long-standing recommendation of the Biometrics Commissioner.
- (b) Clauses 68 and 69 of the Policing and Crime Bill will introduce an offence, punishable by up to 12 months' imprisonment, of breaching a "*travel restriction*" imposed as a condition of pre-charge bail on a person who has been arrested

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<sup>17</sup> See J. Blackburn and C. Walker, "Interdiction and Indoctrination: the Counter-Terrorism and Security Act 2015" (2016) 79 MLR 840-870.

<sup>18</sup> See the Explanatory Notes to CJCA 2015 (<http://www.legislation.gov.uk/ukpga/2015/2/notes/contents>) and the Fourteenth Report of the Joint Committee on Human Rights [**JCHR**], HL Paper 189 HC 1293, June 2014, paras 1.8-1.30, to which the Government replied in September 2014 (Cm 8928).

under PACE on suspicion of an offence listed in CTA 2008 s41. A “*travel restriction*” could, for example, require the arrested person not to leave the UK, not to enter any port, to surrender travel documents or not to be in possession of any travel documents. This followed news of the well-publicised absconding while on police bail of Siddhartha Dar, on which I gave evidence to the Home Affairs Select Committee **[HASC]**.<sup>19</sup> My Senior Special Adviser, Clive Walker, made submissions to police and the Home Office on various possible legislative responses.

## Response to my July 2014 report

1.9 The Government responded to my report of September 2015 in a document which I first saw in September 2016 and which was published in November.<sup>20</sup> Its responses to my specific recommendations are referred to in the appropriate parts of this report.

## Statistics

1.10 Statistics on the operation of the Terrorism Acts continue to be found in three principal publications:

- a) The Home Office’s quarterly releases, which report on the operation of police powers under TA 2000 and TA 2006 in Great Britain.<sup>21</sup>
- b) The bulletin produced for the same purpose by the Northern Ireland Office **[NIO]**;<sup>22</sup> and
- c) The Police Recorded Security Situation Statistics, published by the Police Service of Northern Ireland **[PSNI]** on an annual basis, with monthly updates.<sup>23</sup>

1.11 The presentation of those statistics continues to improve. The interested reader is referred to them in their entirety. But disappointingly, the work referred to in my 2013 and 2014 reports in relation to:

- (a) the publication of data regarding the numbers and success rates of warrants for further detention in Great Britain;

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<sup>19</sup> Oral evidence: Countering extremism, HC 428, 19 January 2016, QQ 926-956.

<sup>20</sup> *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, November 2016, Cm 9357.

<sup>21</sup> See, most recently, “Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to June 2016”, 22 September 2016. The accompanying data tables are particularly informative. These were designated as National Statistics by the UK Statistics Authority in May 2016, meaning that they meet the highest standards and are fully compliant with the Code for National Statistics.

<sup>22</sup> See most recently *Northern Ireland Terrorism Legislation: Annual Statistics 2014/15*, 1 October 2015.

<sup>23</sup> *Police Recorded Security Situation Statistics, Annual Report covering the period 1<sup>st</sup> April 2015 – 31<sup>st</sup> March 2016*, 12 May 2016 (and next quarterly edition of 8 July 2016). See also PSNI, *Stop and Search Statistics, financial year 2015/16*, 20 May 2016 (and next quarterly edition of 24 August 2016).

- (b) the number of refusals of access to solicitors in Great Britain, and the length of any delays; and
- (c) the collection of ethnicity data based on the 2011 Census categories

has not yet been translated into results.<sup>24</sup> I am told by the Home Office that the reasons for this are unclear but will be further investigated.

- 1.12 As anticipated,<sup>25</sup> the Home Office succeeded in producing statistics for the calendar year 2015 with unusual speed. They were published in March 2016, more than three months earlier than last year. If this timescale can be maintained, it should be possible (extra commitments permitting) to revert to the previous practice of publishing annual reports in advance of the summer recess.<sup>26</sup>

### Passport powers

- 1.13 November 2015 saw the publication of a Transparency Report, aimed at “*explaining tools the Government and the intelligence and law enforcement agencies use to counter the threat to national security*” and said to be the first in an annual series.<sup>27</sup> It contains little that is new, but is broad in scope: it applies to both investigatory powers of the sort that appear in RIPA 2000 and the Investigatory Powers Bill and to “*disruptive*” powers, including but not limited to those for which I have statutory responsibility.
- 1.14 Significantly and in my view sensibly, the latter category includes executive powers (such as the cancellation of or refusal to issue British passports under the royal prerogative in relation to national security) that are in practice used for a counter-terrorism purpose. The logic of this inclusion recalls my own past suggestion that the Independent Reviewer (like the Reviewer’s Australian counterpart, the Independent National Security Legislation Monitor) should be empowered to review not only laws directed specifically to terrorism but to “*any other law to the extent that it relates to counter-terrorism*”.<sup>28</sup>
- 1.15 As I explained that suggestion at the time:

“More than one person of a suspicious cast of mind has suggested to me that the unreviewed powers (for example, the use of the Royal Prerogative to withdraw passport facilities) are likely to be used for the purposes of doing the Government’s dirty work.”<sup>29</sup>

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<sup>24</sup> *The Terrorism Acts in 2012*, July 2013, 1.28; *The Terrorism Acts in 2013*, July 2014, para 1.9.

<sup>25</sup> *The Terrorism Acts in 2014*, September 2015, 1.17.

<sup>26</sup> Statutory time limits apply: TA 2006 s36(4).

<sup>27</sup> *HM Government Transparency Report 2015: Disruptive and Investigatory Powers*, Cm 9151, November 2015.

<sup>28</sup> *The Terrorism Acts in 2013*, July 2014, 11.30. The Guest Chapter to this report ([Annex 2](#)) shows that a thematic treatment of responses to a terrorism-related problem is likely to require reference to a range of different powers, not all of which fall within the remit of the Independent Reviewer.

<sup>29</sup> *Ibid.*, 11.23. For background to the (revised) use of the royal prerogative for this purpose, see *R (XH and AI) v SSHD* [2016] EWHC 1898 Admin, paras 23-26.

Review of the Royal Prerogative power would have the potential to allay such suspicions (if there is cause to do so) and to make recommendations for the future operation of a power which, according to the Transparency Report, was used six times in 2013, 24 times in 2014 and 23 times in 2015.<sup>30</sup>

- 1.16 That suggestion was not taken up in CTSA 2015 (which did however give the Independent Reviewer power to review the lesser power vested by CTSA 2015 s1 in the police temporarily to remove the passport from an intending outbound traveller). It might usefully be looked at once again when the remit of the Independent Reviewer is next considered by Parliament. See further 10.4 below.

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<sup>30</sup> The indefinite withdrawal of passport facilities may be used for similar reasons to TPIMs and terrorist asset freezes, and as I have heard from one person affected, can have a marked effect on both personal and professional life.

## 2. THREAT PICTURE

### The global picture

- 2.1 According to data prepared for the US State Department, in the calendar year 2015:
- a) There were some 11,800 terrorist attacks in 92 countries, 28,300 deaths, 35,300 injuries and 12,100 persons taken hostage or kidnapped across the world. 24% of those killed (more than 6,900) were perpetrators of attacks.
  - b) The numbers of terrorist attacks and deaths were 13% and 14% lower than in 2014, reflecting declines in Iraq, Pakistan and Nigeria. But the number of injuries rose slightly, and the hostage/kidnap figure rose by 29%. There were large increases in numbers of attacks in Turkey, Bangladesh, Egypt and Syria.
  - c) More than 50% of all attacks took place in five countries (Iraq, Pakistan, Afghanistan, India and Nigeria). 74% of deaths were in five countries (Iraq, Afghanistan, Nigeria, Syria and Pakistan).
  - d) There were 14 attacks killing more than 100 people each, and 24 attacks in which more than 100 victims were kidnapped or taken hostage.
  - e) There were 726 suicide attacks, a rise of 26%. Suicide attacks are far more lethal than non-suicide attacks: they killed on average nine people including the perpetrators.
  - f) The most commonly used terrorist tactic involved explosives (52%), followed by armed assaults, almost always with firearms (23%).<sup>31</sup>
- 2.2 The three principal perpetrator groups, each responsible for between 4,500 and 6,050 deaths, were Daesh (otherwise referred to as ISIS, ISIL and Islamic State), the Taliban and Boko Haram.
- 2.3 These figures serve as a reminder that most terrorism victims (like most terrorists) are from Muslim-majority countries, and that even in 2015, a year bookended by bloody attacks in Paris, the deaths sustained in western countries represent only a minute proportion of the whole. In Iraq, the worst affected country, there were no fewer than 47 days in 2015 on which 50 or more people lost their lives from terrorist attacks.
- 2.4 2015 was nonetheless a horrible year for terrorism in Europe, and not only because of the 147 killed in Paris. Petter Nesser of the Norwegian Defence Research Establishment (FFI) identifies 16 plots planned or launched in 2015, the highest figure of the century

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<sup>31</sup> All figures in this section are taken from the National Consortium for the Study of Terrorism and Responses to Terrorism [START] country reports on terrorism 2015, June 2016, Annex of statistical information. Violent acts targeted at combatants (and so governed by international humanitarian law) are excluded from the figures.

so far, with 2016 occupying second place even after only eight months of the year. Armed assaults, hostage takings, increased targeting of religious and sexual minorities and live-streaming of attacks were identified as possible future trends in European terrorism.<sup>32</sup>

## The threat to the UK from Islamist terrorism

2.5 The current terrorist threat was summarised in the recent annual report on the Government's counter-terrorism strategy, CONTEST.<sup>33</sup> In brief:

- a) The UK threat level has been at "severe" since August 2014 (as it was for most of the period 2006-2011),<sup>34</sup> meaning that an attack is highly likely.
- b) The threat to the UK and its interests was said to be "*driven largely by the situation in Syria and Iraq, and in particular by Daesh*".
- c) Of the approximately 850 persons of national security concern said to have travelled from the UK to areas of Syria and Iraq held by Islamist extremist groups, often encouraged by propaganda, "*just under half*" have returned.<sup>35</sup>
- d) Other groups aspire to attack western interests, including the al-Qaeda grouping in Afghanistan and Pakistan and affiliate groups elsewhere such as al-Qaeda in the Arabian Peninsula **[AQAP]** in Yemen.

2.6 There were however no deaths or injuries from terrorism in Great Britain during 2015, unless one counts the injuries sustained by Lyle Zimmerman at Leytonstone tube station in London in December.<sup>36</sup> Indeed outside Northern Ireland, there have been only two deaths in the UK from terrorist incidents since 56 people (including four British suicide bombers) were killed in the 7/7 London attacks of 2005.<sup>37</sup> The continuation of that record is impressive, given:

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<sup>32</sup> FFI Conference, Oslo, 1 September 2016.

<sup>33</sup> CONTEST, *the United Kingdom's strategy for countering terrorism: Annual Report for 2015*, Cm 9310 (July 2016), Foreword and chapter 1.

<sup>34</sup> The threat level for so-called "*international terrorism*" (in practice, Islamist terrorism whether generated at home or abroad) is set by the Joint Terrorism Analysis Centre **[JTAC]**. A table charting the evolution of the threat level since its introduction in 2006 is in *The Terrorism Acts in 2012*, July 2013, 2.55.

<sup>35</sup> Though in recent months, cases of travel both to and from Syria have been very substantially reduced.

<sup>36</sup> Muhiddin Mire was convicted of attempted murder and sentenced to life imprisonment. The judge accepted that he was suffering from paranoid schizophrenia at the time of the offence, adding that he had also been motivated by events in Syria. Muhiddin Mire began his sentence in Broadmoor secure mental hospital.

<sup>37</sup> These were the well-publicised killings of Mohammed Saleem and Lee Rigby, both in the spring of 2013. During the same period, 29 lives have been lost as a consequence of the security situation in Northern Ireland: PSNI, *Police Recorded Security Situation Statistics*, 2015/16, 12 May 2016, Annex 1.

- (a) the reputation of London as “heart of the jihadi sub-culture in Europe”,<sup>38</sup> earned by the former presence there of proselytisers such as Abu Hamza, Abu Qatada and Omar Bakri Mohammed and by the continuing influence of their successors;
- (b) the recent terrorist atrocities in nearby countries such as France, Denmark, Belgium and Germany;
- (c) the deaths of 34 UK citizens in terrorist attacks abroad during 2015;<sup>39</sup> and
- (d) the continued attractiveness of the UK as a target, evidenced by the fact that (as stated publicly by the Government and verified to me) six British plots were successfully disrupted during 2015.<sup>40</sup>

2.7 Experienced MI5 hands describe the pace of hostile activity in England is as high as it has been at any time since 9/11. Over the course of 2016 there have been two disrupted attack plots in Great Britain. Most recent UK attack plans are believed to have been inspired by Islamist extremist groups rather than directed by them, though experience shows that the dividing line is not always a clear one.<sup>41</sup> There has been nothing recently in the UK on the grand scale of the 2006 liquid airline bomb plot, a well-advanced and credible plan to bring down several transatlantic airliners. But:

- (a) The Paris attacks of November 2015 and the Brussels bombings of March 2016 demonstrate that former Daesh fighters have formed organised cells, infiltrated Europe and have the capacity – even as Daesh loses territory in its Iraqi and Syrian heartlands – to wreak havoc and destruction in our continent.
- (b) The Paris attacks of January 2015, for which responsibility was claimed by Al Qaeda’s affiliate in Yemen, are a reminder that the defeat of Daesh will not mean the end of the militant Islamic threat to western targets, and that al-Qaeda and its various proxies and affiliates are by no means finished as a network.

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<sup>38</sup> The phrase comes from Petter Nesser, *Islamist Terrorism in Europe* (OUP 2016). The book is recommended as a comprehensive account of jihadism in Europe, as well as for its understanding of different types of terrorist (described as entrepreneurs, protégés, misfits and drifters) and their networks of influence. Other informative books published in 2016 include S. Maher, *Salafi-Jihadism: The History of an Idea*; S. Khan and T. McMahon, *The Battle for British Islam: Reclaiming Muslim Identity from Extremism* and P. Neumann, *Radicalised: New Jihadists and the Threat to the West*.

<sup>39</sup> 30 were killed in the beach resort of Sousse, Tunisia, in June 2015: this was the largest single loss of British lives to terrorism since 7/7. The other four were killed in the Tunis Bardo Museum attack of March 2015, in Afghanistan and in France. Previous British deaths from terrorism abroad since 2005 are detailed in *The Terrorism Acts in 2013* (July 2014) at 2.18 and in *The Terrorism Acts in 2014* (September 2015) at 2.13(c). Compensation may be paid to the victims of overseas terrorism: for details of incidents certified for this purpose (including Tunis, Sousse and Paris in 2015) and of payments made see Home Office, *Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Crime and Security Act 2010* (Cm 9185, 2015).

<sup>40</sup> *CONTEST, the United Kingdom’s strategy for countering terrorism: Annual Report for 2015*, Cm 9310 (July 2016), Foreword. Not all of those plots were particularly sophisticated, though the simplest plans can be the hardest to detect.

<sup>41</sup> T. Joscelyn, “Terror plots in Germany, France were ‘remote controlled’ by Islamic State operatives”, *The Long War Journal*, 24 September 2016.

(c) Terrorists have not abandoned their ambitions to bring down airliners, as was seen in the case of flights leaving Sharm al-Sheikh in October 2015 and Mogadishu in February 2016.

- 2.8 The UK is assisted by its sea borders and by the relative difficulty in obtaining firearms: bladed instruments remain the commonest terrorist weapon.<sup>42</sup> But credible bomb and firearm attacks continue to be thwarted. The absence of recent fatal incidents in the UK reflects well on the security and intelligence agencies, on counter-terrorism policing, and on a criminal justice system which has shown itself equal to the task of prosecuting terrorists.<sup>43</sup> It deserves to be well-publicised, if only as an antidote to the fear and division which it is the terrorist's principal aim to provoke.
- 2.9 Unfortunately, continued success cannot be assured. Some attackers or would-be attackers leave only a very limited intelligence trace, particularly if their radicalisation has been swift. Others come to the attention of the authorities but are not given the priority that their subsequent actions show them to have merited, often for understandable reasons. And as was demonstrated recently in Nice, even such an everyday object as a large motor vehicle can exact a horrible toll on the innocent when used by a person heedless of the consequences for his own life.<sup>44</sup>
- 2.10 The use by terrorist sympathisers of internet-based communications, including social media, is presenting major challenges for intelligence and law enforcement. Processes of grooming or radicalisation that used to take months can now happen within days as aspiring terrorists (in much the same way as paedophiles) find online networks of like-minded people who can offer encouragement and cause extreme views to seem normal. To penetrate a suspect's online life can offer ever-greater insight into their activities; but the spread of encryption, a long-standing trend accelerated since 2013 in reaction to Edward Snowden, means that access is often patchy.<sup>45</sup> Internet companies which may once have seen themselves as neutral carriers of content are coming to understand that it is incumbent on them also to edit that content: but it is a role with which not all are comfortable, and the process is fraught with difficulty.<sup>46</sup>

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<sup>42</sup> Contrast the United States, which saw 14 killed in the San Bernardino shootings of December 2015 and 49 in an Orlando nightclub in June 2016. Firearms are also more readily available in continental Europe: the heavily-armed gunman on an Amsterdam-Paris Thalys train in August 2015 could have inflicted mass slaughter had he not been tackled by fellow-passengers.

<sup>43</sup> The Counter-Terrorism Division of the CPS had a 92% conviction rate in 2015, with 47 of the 51 persons proceeded against convicted: see "Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, financial year ending 31<sup>st</sup> March 2016", 30 June 2016, figure 4.1.

<sup>44</sup> 86 people were killed and 434 injured on 14 July 2016, when a 19-tonne lorry driven along the Promenade des Anglais by Mohamed Lahouaiej-Bouhel, a Tunisian resident in France, was used to crush people celebrating Bastille Day.

<sup>45</sup> Equipment interference, including the hacking of devices and networks by state agencies, is growing rapidly as a reaction to encryption. For an account of how digital surveillance is used against terrorism, and of the "going dark" problem as it is perceived by the authorities and by others, see my reports *A Question of Trust* (June 2015) and *Report of the Bulk Powers Review* (August 2016).

<sup>46</sup> *Ibid.* For a recent parliamentary critique and statistics relating to the UK's Counter-Terrorism Internet Referral Unit [CTIRU], see the 8<sup>th</sup> report of the HASc, 2016-17: *Radicalisation: the counter-narrative and identifying the tipping-point* (HC 135, August 2016), paras 20-40. The EU's newly-established version of CTIRU is also making useful progress: Europol, EU Internet Referral Unit, Year One Highlights (2016).



- 2.11 Two legal issues related to the threat which appear particularly acute, and topical, are:
- (a) the treatment of those who have been instrumental in “*radicalising*” the young, without expressly encouraging or inciting acts of terrorism; and
  - (b) the treatment of those who have travelled from the UK to fight for terrorist organisations abroad.
- 2.12 Those issues are specifically addressed, respectively, at 9.43-9.51 below and in the guest chapter (“*Foreign Terrorist Fighters and UK Counter Terrorism Laws*”) written by my Senior Special Adviser and included as Annex 2 to this report.

### **The threat from Northern Ireland-related terrorism**

- 2.13 The threat from Northern Ireland-related terrorism in Northern Ireland remains at “*severe*” (meaning that an attack is highly likely). Nobody could describe this as an exaggerated assessment, as the following statistics demonstrate:
- a) In the year to 31 March 2016 there were three security-related deaths. These include the murder of Adrian Ismay, a serving Prison Officer who died as a result of injuries sustained after an under-vehicle improvised explosive device [UVIED] exploded under his vehicle. There were 36 shooting incidents (the lowest number in recent memory) and 52 bombing incidents, together with 14 casualties from paramilitary-style shootings (mostly Republican) and 58 casualties from paramilitary-style assaults (mostly Loyalist).<sup>47</sup>
  - b) There were 16 dissident republican attacks on national security targets during 2015, using methods ranging from letter bombs to UVIEDs, command wire IEDs, radio-controlled IEDs, grenades, incendiaries and firearms. I have been briefed in detail on some of these attacks. There were no fatalities, though in some cases these were very narrowly avoided. Police officers, prison officers and armed forces were the principal targets, though civilians are also endangered by the tactics used. For every attack that was launched, others were disrupted by police and security services.<sup>48</sup>
  - c) Dissident Republican groups retain access to a range of firearms and explosive materials. Despite good cooperation between the PSNI and An Garda Síochána, terrorists (who often engage in other illegal activity such as smuggling) can move with relative freedom over the border with the Republic of Ireland. As Europol reported in 2016, the Republic is used for fundraising, training, engineering,

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<sup>47</sup> PSNI, *Police Recorded Security Situation Statistics*, 12 May 2016. Paramilitary shootings and assaults classically take the form of “*kneecappings*” and are used to exert control.

<sup>48</sup> The Director General of MI5 stated in relation to the 22 attacks on national security targets in 2014 that “*for every one of those attacks we and our colleagues in the police have stopped three or four others coming to fruition*”: Andrew Parker, address of 8 January 2015 to RUSI, available from [www.mi5.gov.uk](http://www.mi5.gov.uk), paras 28-29.

procurement, storage and, occasionally, as a preparatory base for attacks in Northern Ireland.<sup>49</sup>

- 2.14 In her statement to Parliament of December 2015, the then Secretary of State for Northern Ireland summarised some of the worst of the year's terrorist violence in Northern Ireland as follows:

"In May and July two radio-controlled explosive devices were deployed in Belfast and Lurgan in an attempt to target security force personnel and, in June, an under-vehicle improvised explosive device was deployed against two off-duty PSNI officers at their home address in County Londonderry. Fatalities or serious casualties were avoided in these attacks by narrow margins.

In August a device initiated inside a postal van while it was parked in Palace barracks in County Down. No one was injured but there was considerable damage caused by the fire that followed to the vehicle and others nearby. In October a viable improvised explosive device was recovered from the grounds of a Londonderry hotel due to host a PSNI recruitment event, and several days later an under-vehicle device was planted in Belfast. It is fortunate that both devices were discovered before they exploded. The following day a military hand grenade was thrown at PSNI officers responding to reports of anti-social behaviour in Belfast; the grenade landed by the officers' feet but thankfully did not explode. In November two police officers in their patrol vehicle in Belfast were extremely fortunate to escape uninjured when they were targeted with an automatic rifle."<sup>50</sup>

She added that "*the SEVERE level of threat we face from violent dissident republicans is likely to continue*" and that "*a number of the many attacks planned will continue to materialise*".

- 2.15 Further incidents from 2015 on which he (and in some cases I) had been briefed were described by David Seymour CB, Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 [JS(NI)A 2007], in his latest annual report. Mr Seymour commented that:

"The worrying new trends are the increasing sophistication of IEDs and the reckless selection of targets where there is a real risk of harm to the public, for example, the use of a device disguised in the advertising hoarding of a betting shop in the Ardoyne and attacks on two hotels that were hosting PSNI events."<sup>51</sup>

- 2.16 The present scale of terrorist and paramilitary violence in Northern Ireland, though seldom fully appreciated in other parts of the United Kingdom, is:

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<sup>49</sup> Europol, *TE-SAT Terrorism situation and trend report* 2016, 3.1.

<sup>50</sup> Rt. Hon. Theresa Villiers MP, Written Ministerial Statement to Parliament on the Security Situation in Northern Ireland, 15 December 2015.

<sup>51</sup> David Seymour CB, Eighth Report of the Independent Reviewer (Justice and Security (Northern Ireland) Act 2007, February 2016, 4.5-4.6.

(a) of a lesser order of magnitude than during the 30-year Troubles which ended with the Good Friday Agreement of 1998,<sup>52</sup> and

(b) well down even on the levels that prevailed between 1998 and the announcement by the IRA in 2005 of the end to its armed campaign.<sup>53</sup>

In December 2015, as part of the Fresh Start agreement, the Northern Ireland Executive commissioned a distinguished Panel to make recommendations for a strategy to disband paramilitary groups.<sup>54</sup>

2.17 But the journey towards normalisation is a halting one. The 103 security incidents reported by the UK to Europol in 2015 (of which 16 were attacks on national security targets) were all in Northern Ireland.<sup>55</sup> Nor has the level of security-related incidents appreciably declined in recent years: the PSNI describes it, accurately, as having “*remained relatively consistent over the past 10 years*”.<sup>56</sup>

2.18 The PSNI, like all institutions, is certainly fallible:<sup>57</sup> but confidence in it remains high.<sup>58</sup> I pay tribute to the police and prison officers of Northern Ireland, many of whom I have had the privilege of meeting over the past six years, who endure with courage and good humour the threat of violence against them from individuals and groups lacking any political support or justification for their acts.

2.19 The mismatch between the high number of Terrorism Act arrests in Northern Ireland and the relatively small number of charges, prosecutions and convictions is however a continuing concern.<sup>59</sup> There is also strong anecdotal evidence that sentencing for terrorism offences in Northern Ireland is at a lower level than in England.<sup>60</sup>

2.20 The threat to Great Britain from Northern Ireland-related terrorism was at “*moderate*” throughout 2015 (meaning that an attack is possible but not likely), but was raised to

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<sup>52</sup> More than 3,500 people were killed in that conflict, of which 52% have been said to be civilians, 32% members of the British security services and 16% paramilitaries: CAIN Web Service, University of Ulster.

<sup>53</sup> As clearly demonstrated by the tables in the PSNI’s *Police Recorded Security Situation Statistics*, 12 May 2016, Annex 1.

<sup>54</sup> Lord Alderdice, John Burney and Prof Monica McWilliams, *The Fresh Start Panel Report on the Disbandment of Paramilitary Groups in Northern Ireland*, May 2016.

<sup>55</sup> Europol, *TE-SAT Terrorism situation and trend report 2015*, Annex 1. Described in the Annex as “*terrorist attacks*”, those incidents include paramilitary punishment shootings. The other 27 Member States in total accounted for 108 “*terrorist attacks*”, according to the Annex, the majority of them separatist and jihadist attacks in France.

<sup>56</sup> PSNI, *Police Recorded Security Situation Statistics*, 12 May 2016, p.2.

<sup>57</sup> For example, I note that a 2015 Ombudsman’s report recommended disciplinary sanctions on four police officers who had failed to show due diligence and to share information with detectives investigating the attempted murder of a police officer by under-vehicle IED in 2010: Public statement by the Police Ombudsman under Police (Northern Ireland) Act 1988 s62, *A summary of the investigation and findings regarding information passed to the police prior to the bomb attack on Constable Peadar Heffron 08 January 2010*, December 2015.

<sup>58</sup> In 2015, the PSNI enjoyed an overall confidence rating of 80.9% with 81.5% considering that it treated Catholics and Protestants equally in Northern Ireland as a whole: NI Department of Justice, *Perceptions of policing, justice and anti-social behaviour: quarterly update to 31 December 2015*, May 2016, Table 1. Confidence in the criminal justice system was far lower, with 60.1% believing it to be fair and only 43.3% considering it to be effective: *ibid.*, Table 4.

<sup>59</sup> See 8.20 and 9.17 below.

<sup>60</sup> *The Terrorism Acts in 2014*, September 2015, 8.22.

“*substantial*” in May 2016 (meaning that an attack is a strong possibility). There have been no recent attacks.

## The threat from other terrorism

2.21 Xenophobic offences have risen sharply in parts of Europe, and become more violent, as the extreme right wing **[XRW]** has sought to exploit the migration crisis and the Islamist attacks in France, Belgium and Germany. Attacks for example on German refugee shelters numbered more than 800 in 2015, four times the number in 2014. Some xenophobic attacks – for example on six French mosques and a restaurant, in the wake of the Charlie Hebdo and Jewish supermarket attacks of January 2015, were classed as terrorism.<sup>61</sup>

2.22 Xenophobic attacks are also widely reported in the UK, with race hate crime far outnumbering other categories including disability, religion and sexual orientation hate crime.<sup>62</sup> The most serious incident to find its way to the courts in 2015 – which however did not have all the ingredients of terrorism – was the trial of Zackary Davis in September 2015 for attempted murder, following an unprovoked and racially aggravated attack against an Asian male that resulted in life-changing injuries. He was convicted and sentenced to life imprisonment.

2.23 As this report was going to press Thomas Mair, the Nazi sympathiser who killed Jo Cox MP in June 2016, was convicted of murder and given the longest available sentence of whole-life imprisonment. In a statement after his conviction, the CPS stated:

“Mair has offered no explanation for his actions but the prosecution was able to demonstrate that, motivated by hate, his pre-meditated crimes were nothing less than acts of terrorism designed to advance his twisted ideology.”<sup>63</sup>

It should be noted that the charge of murder (which is the most serious available) is routinely used against terrorist killers, regardless of the ideology that motivates them. Suggestions on social media that the criminal justice system took the case of Thomas Mair any less seriously than those of Islamist terrorists, such as the killers of Drummer Lee Rigby, are completely unfounded.

2.24 The organised XRW threat in the United Kingdom is however perceived by the authorities to be fragmented, with no unifying ideology or set of principles. In a document provided to me by the National Counter-Terrorism Policing Operations Centre **[NCTPOC]** in July 2016, the threat of organised XRW groups was described as follows:

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<sup>61</sup> Europol, *TE-SAT Terrorism situation and trend report 2015*, 5.1.

<sup>62</sup> Of the 52,528 hate crimes recorded by the police in 2014-15, 82% were race hate crimes and 6% religion hate crimes. The latter category recorded the largest increase (43% up on 2013-14). Source: *Hate Crime, England and Wales, 2014/15*, Home Office Statistical Bulletin 05/15, 13 October 2015.

<sup>63</sup> [http://www.cps.gov.uk/news/latest\\_news/thomas\\_mair\\_convicted\\_of\\_the\\_murder\\_of\\_jo\\_cox\\_mp/](http://www.cps.gov.uk/news/latest_news/thomas_mair_convicted_of_the_murder_of_jo_cox_mp/), 23 November 2016. The sentencing remarks of Wilkie J are here: <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/sentencing-remarks-r-v-thomas-mair.pdf>.

“The threat from extreme XRW groups remains limited to low level protest and heated online debate. As a result of this continuing trend, it has been assessed that the XRW threat in the UK has remained steady over the past year. Associations between UK XRW groups and individuals and their counterparts abroad continue to take place, however there is nothing to indicate that international associations are leading to more extreme activity.

...

The established XRW groups in the UK remained secretive and insular. They tend to be led by long-established individuals and adhere to conventional National Socialism and/or white power ideologies. The established groups remained disparate; discrepancies over ideology and direction continue to lead to friction within the movement.”

In the Government’s July 2016 review of the CONTEST strategy, XRW terrorism was given only a single sentence, to the effect that it poses a threat but “*a lower one by comparison*”. Though briefly stated, that judgement was based on detailed assessments from the Extremism Analysis Unit, which I have read.

2.25 A number of groups (notably Britain First) have a substantial online presence, and their activities are widely reported in the media. Their members are capable of intimidation, particularly of Muslims, but are not at the ideologically extreme end of the spectrum, and are not generally associated with violence. In June 2015, Bedfordshire police sought and obtained an interim injunction against the leader and deputy leader of Britain First under ASBCPA 2014, citing “*provocative, threatening and offensive remarks or gestures*” and “*provocative entry to mosques and Islamic Cultural Centres*”. The injunction restrained them from entering any mosque without invitation and “*publishing, distributing or displaying .. words or images .. which having regard to all the circumstances are likely to stir up religious and/or racial hatred.*”<sup>64</sup>

2.26 In contrast to other parts of Europe, XRW groups were unable substantially to increase their popularity in 2015 by capitalising on events such as the terrorist attacks on Paris and the migrant crisis. Some smaller groups subscribe to neo-Nazi ideologies: but any violent intent tends not to be matched by capability. The XRW has nothing close to the international terrorist networks, the sophisticated plotting or the technical expertise that have in the past characterised the terrorism associated with al-Qaeda. But the killing of 77 people in Norway by Anders Breivik in July 2011 is a reminder that XRW ideology can be just as murderous as its Islamist equivalent; and that a sophisticated network is not a prerequisite for mass terrorist slaughter.

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<sup>64</sup> *Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen* [2015] EWHC 1875 (QB). The judge (Knowles J) refused to grant a further interim injunction that would have restrained the defendants from entering the town of Luton, commenting that “*Britain First comes across as obviously and fundamentally wrong, and even extremist itself, when it focuses on Muslims*” but citing “*the freedom to express views, the freedom to demonstrate and the freedom to organise politically*”: *ibid.*, paras 36-37.

- 2.27 There is a widespread belief among Muslims that violent acts are given more press coverage if perpetrated by Muslims than by others. Examples of headlines, articles and cartoons displaying casual prejudice are easy to find<sup>65</sup> - though not in Northern Ireland, where the press displays a more mature appreciation of the consequences of such irresponsible use of press freedoms. But there is no evidence that prosecutors or courts treat XRW terrorism less seriously than its Islamist counterpart, and considerable evidence to the contrary.<sup>66</sup> I have found Ministers and police generally eager to emphasise that the law can and does treat XRW violence as terrorism, so as to dispel any idea that counter-terrorism law and policy is targeted on Muslims.<sup>67</sup>
- 2.28 That said, it is important to recognise, and to compensate for, the human tendency to treat extremism as more sinister when it is identified in communities other than our own.<sup>68</sup> It goes without saying that where signs of XRW terrorism-related activity are observed, they need to be treated with precisely the same seriousness as the Islamist variety.

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<sup>65</sup> See my report *Operation Gird: report following review*, May 2011, paras 86-88, and the European Commission against Racism and Intolerance [ECRI] Report on the United Kingdom (fifth monitoring cycle), 4 October 2016, paras 40-42.

<sup>66</sup> *The Terrorism Acts in 2013*, July 2014, 9.18-9.24; *The Terrorism Acts in 2014*, September 2015, 8.22-8.24; and see further 2.23 above. The comparison of isolated incidents for the purposes of establishing “discrimination” tends to be unhelpful, since each case turns on its own particular circumstances.

<sup>67</sup> Notably, in their reactions to the West Midlands mosque bombings and killing of Mohammed Saleem in 2013: *The Terrorism Acts in 2013*, July 2014, 2.39.

<sup>68</sup> *The Terrorism Acts in 2014*, September 2015, 9.15-9.16.

### 3. THE COUNTER-TERRORISM MACHINE

#### Introduction

- 3.1 The Government's counter-terrorism strategy (CONTEST) was described in my 2013 report, as was the organisation of the intelligence agencies and counter-terrorism policing.<sup>69</sup>
- 3.2 There were once again few changes to either policy or organisation in the period under review. In particular, no steps were taken (or have since been taken) to give the National Crime Agency **[NCA]** a counter-terrorism role.<sup>70</sup>
- 3.3 With effect from 1 April 2015, the National Police Chiefs' Council **[NPCC]** took over from the Association of Chief Police Officers **[ACPO]**. Hosted by the Metropolitan Police Service **[MPS]** but independent of it, the functions of the NPCC include the command of counter-terrorism operations and the delivery of counter-terrorism policing through the national CT Network. A counter-terrorism coordination committee has responsibility for devising and driving national Counter Terrorism and Domestic Extremism strategic policy through the National Counter Terrorism Policing Headquarters **[NCTP HQ]** and reports to the NPCC and the Government.<sup>71</sup>

#### Personnel and resources

- 3.4 In the July 2015 Budget, the then Chancellor committed to the real-terms protection of direct counter-terrorism spend across government, to the tune of £2.2 billion.
- 3.5 At the autumn Spending Review of November 2015, the Government announced that cross-government spending on counter-terrorism would be increased by 30%, from the £11.7 billion over five years protected by the Chancellor in the summer budget to £15.1 billion over the same period.
- 3.6 The Cabinet Office led the Strategic Defence and Security Review **[SDSR]**, and the Comprehensive Spending Review determined allocations for counter-terrorism funding for the Spending Review period.
- 3.7 The uplift announced by the Chancellor includes:
- (a) an additional £2 billion investment in Special Forces;

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<sup>69</sup> *The Terrorism Acts in 2012*, July 2013, Chapter 3.

<sup>70</sup> The HASC recommended (by a majority) that the NCA should take over responsibility for counter-terrorism: *Counter-Terrorism*, 17<sup>th</sup> report of 2013/14, April 2014, paras 136-141 and vote at p. 104. There have been reports of a growing "crime-terror nexus": International Centre for the Study of Radicalisation, *Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus*, October 2016. But whatever the logic of the proposal, it is understandable that counter-terrorism has not thus far been entrusted to the fledgling NCA at a time of heightened threat with which the existing CT network is perceived to be dealing in a generally satisfactory way.

<sup>71</sup> <http://www.npcc.police.uk/NPCCBusinessAreas/TerrorismAndAlliedMatters.aspx>.

- (b) new investment in increasing the counter-terrorism capability of the security and intelligence agencies; and
  - (c) additional investment of £500 million over five years for the Home Office counter-terrorism effort.
- 3.8 These figures do not include the cost of supporting capabilities such as border security, which serve a range of functions beyond counter-terrorism.
- 3.9 CT funding for the Office for Security and Counter-Terrorism [**OSCT**], the lead directorate for CONTEST in the Home Office, was £711 million for 2015/16 including £594 million support for counter-terrorism policing. The police funding is provided as a ring-fenced grant.
- 3.10 So far as **policing** is concerned:
- a) Following the conclusion of the SDSR and Spending Review, overall counter-terrorism policing spending will continue to be protected until 2020/21. As announced in the policing settlement on 17 December 2015, resource and capital counter-terrorism policing grant funding has increased in real terms (from £594 million in 2015/16 to over £670 million in 2016/17). Additionally, armed policing will benefit from an uplift of up to £34 million of transformation funding (from the main police funding settlement) in 2016/17 to be distributed via the counter-terrorism policing grant.
  - b) At the end of March 2016 there was a budgeted strength of some 8,500 personnel within the CT network, composed of 6,300 police officers and 2,200 civilian members of staff. These numbers are higher than in 2014/15 and will increase again in 2016/17 as a result of investment agreed through the SDSR and the Spending Review. In addition, as last year, some 850 locally-funded Special Branch personnel assist in protecting national security and are in some areas managed and tasked by the regional Counter-Terrorism Unit [**CTU**].
- 3.11 Regular police officers in Northern Ireland numbered some 6,800 (including 182 student officers) in September 2016, compared to 7,530 (plus 2,449 full-time reserves, which have no equivalent today) when the PSNI was founded in 2001. As the Secretary of State for Northern Ireland informed Parliament in December 2015, the Chancellor in the Spending Review and Autumn Statement made available to the PSNI £160 million in Additional Security Funding over five years to assist their efforts to tackle terrorism.<sup>72</sup> This compares to the £231 million made available over the period 2011-2016. My counterpart under the JS(NI)A 2007, David Seymour CB, observed in February 2016,

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<sup>72</sup> Rt. Hon. Theresa Villiers MP, MP, Written Ministerial Statement to Parliament on the Security Situation in Northern Ireland, 15 December 2015.



though not in the specific context of counter-terrorism, “a general concern expressed by all sections of the community that the PSNI lack the resources they need”.

3.12 So far as the **security and intelligence agencies** are concerned (MI5, MI6 and GCHQ):

- a) Total departmental resource spending in 2015/16 was £2.469 billion: the division of that budget between agencies is not public information.<sup>73</sup>
- b) MI5 allocated 64% of its resources to “*International Counter-Terrorism*” [ICT] during 2015/16; a further 18% was allocated to Northern Ireland.<sup>74</sup> These figures have been stable in recent years.
- c) Full-time equivalent staff numbers were 13,003 in 2015/16.<sup>75</sup> As of 31 March 2015, when the total number stood at 12,080, 4,037 were employed by MI5, 2,479 by MI6 and 5,564 by GCHQ.<sup>76</sup>

3.13 Compared with five years earlier (2010/11):

- d) full-time equivalent staff numbers in 2015/16 were up by 7.1%; and
- e) total departmental resource pending rose by 25.4%, without adjustment for inflation.

3.14 Looking four years ahead, the total resources budget for the security and intelligence agencies was scheduled in July 2016 to rise to £2.624 billion in 2019/20 (a modest 6.3% rise on the 2015/16 outturn, without adjustment for inflation). Full-time equivalent staff numbers were scheduled to rise to 14,183, an increase of 9.1% over the four years.<sup>77</sup>

### Co-operation in Europe

3.15 I have emphasised in previous years the increasing operational advantages that have derived from UK participation in EU mechanisms such as the European Arrest Warrant, the Second Generation Schengen Information System (SIS II), Europol and Eurojust.<sup>78</sup>

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<sup>73</sup> Security and intelligence agencies financial statement 2015-16, July 2016, Table 1.

<sup>74</sup> Intelligence and Security Committee annual report 2015/16, July 2016, Annex.

<sup>75</sup> Security and intelligence agencies financial statement 2015-16, July 2016, Table 4.

<sup>76</sup> Intelligence and Security Committee annual report 2015/16, July 2016, Annex.

<sup>77</sup> *Ibid.*, Tables 1 and 4.

<sup>78</sup> See, e.g., *The Terrorism Acts in 2012*, July 2013, 3.17-3.23. During 2016 I wrote and spoke on the subject in a number of fora: <https://terrorismlegislationreviewer.independent.gov.uk/countering-terrorism-in-europe-the-ins-and-outs/>. See, more recently, House of Commons Library Briefing Paper 07213, 26 August 2016, *Brexit: impact across policy areas*, ch 11 (Justice and Home Affairs).

- 3.16 The UK has benefited not only from its participation but from its leadership. At the legislative level, a number of important EU initiatives (most recently, the Passenger Name Record Directive of 2016),<sup>79</sup> have been driven or strongly influenced by the UK Government in the Council and by UK MEPs in the European Parliament. Rob Wainwright, formerly in charge of international operations for the UK's Serious and Organised Crime Agency, has been an influential Director of Europol.
- 3.17 The UK's ability to lead European policy and promote European laws in the counter-terrorism field (as in other areas) will presumably diminish or disappear should Brexit become a reality. But there are strong operational reasons for maintaining access to EU mechanisms that others may devise. Brexit will not alter the fact that as crime (including terrorist crime) crosses borders with increasing ease, the same must be true of the information and resources that are needed by those who fight it.
- 3.18 Where data is shared, there must be rules governing its use. The tendency of EU jurisprudence (and to a lesser extent, that of the ECtHR) to impose strong privacy-based limits on the use of data has been seen by UK courts as overkill, especially where public security is in issue. As I noted in June 2015:

“It is hard to think of any other area of human rights law that is characterised by such marked and consistent differences of opinion between the European courts and the British judges who in most respects rank among their most loyal and conscientious followers. To the extent that the law permits, it seems to me that there would be wisdom in acknowledging and seeking to accommodate such differences, which owe something at least to varying perceptions of police and security forces and different (but equally legitimate) conclusions that are drawn from 20th century history in different parts of Europe.”<sup>80</sup>

- 3.19 In relation to recent judgments of the Court of Justice of the EU [CJEU], including that which annulled the Data Retention Directive of 2006,<sup>81</sup> I commented in November 2015 that:

“Some view these EU judgments as a shot in the arm for liberties too long neglected at home. Others see a court with limited practical understanding, imposing needless curbs on vital powers.”<sup>82</sup>

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<sup>79</sup> Directive (EU) 2016/691 on the use of passenger name record (PNR) data for the prevention, investigation, detection and prosecution of terrorist offences and serious crime.

<sup>80</sup> D. Anderson, *A Question of Trust* (June 2015), 2.24.

<sup>81</sup> Case C-293/12 *Digital Rights Ireland* ECLI:EU:C:2014:238.

<sup>82</sup> D. Anderson, “Europe has the clout in struggle between privacy and safety”, *The Times*, 28 October 2015: <https://terrorismlegislationreviewer.independent.gov.uk/will-europe-call-the-shots/>. The requirements of the European Court of Human Rights to date are less extensive than those of the CJEU (*A Question of Trust*, June 2015, 5.12-5.53; *Report of Bulk Powers Review*, August 2016, 3.78-3.80), though cases on bulk data collection brought by various NGOs, including Big Brother Watch and Liberty, are pending before it.

The English Court of Appeal hinted at the latter view in its judgment of November 2015 in the challenge brought by two MPs to the Data Retention and Investigatory Powers Act 2014 **[DRIPA 2014]**.<sup>83</sup>

- 3.20 It should not be assumed that Brexit will relieve the UK from the need for compliance with standards of privacy and data protection set out in EU legislation (including the General Data Protection Regulation that will apply from May 2018) or by the CJEU. As recent cases have shown, the continued ability even of third countries to share data from within the EU will impose commensurate obligations upon them to treat those data in a manner that conforms in many respects with EU privacy norms.<sup>84</sup>

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<sup>83</sup> *Secretary of State for the Home Department ex p David Davis MP, Tom Watson MP and others* [2015] EWCA Civ 1185: see <https://terrorismlegislationreviewer.independent.gov.uk/daviswatson-appeal/>. David Davis MP, the first claimant, dropped out of the case on his appointment to Government in July 2016.

<sup>84</sup> Case C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650; *Request for an Opinion 1/15* (EU-Canada PNR) ECLI:EU:C:2016:656.

## 4. DEFINITION OF TERRORISM

4.1 Two of my previous reports have touched on the subject of how terrorism – notoriously undefined in international law – should be defined in the UK. I have counselled against excessive breadth, suggesting that:

“To afford over-broad discretions to Ministers, prosecutors and police is undesirable in itself. As the Supreme Court maintained in *R Gul*,<sup>85</sup> it leaves citizens in the dark and risks undermining the rule of law.

To render people subject to the terrorism laws whom no sensible person would think of as terrorists risks destroying the trust upon which these special powers depend for their acceptance by the public.

To bring activities such as journalism and blogging within the ambit of “*terrorism*” (even if only when they are practiced irresponsibly) encourages the “*chilling effect*” that can deter even legitimate enquiry and expression in related fields.”<sup>86</sup>

4.2 My prescriptions were scarcely radical. But I drew attention to some of the apparent absurdities in its breadth of the TA 2000 definition, and (having consulted on them the previous year) made three specific recommendations:

(a) that the phrase “*designed to influence the government or an international organisation*” in TA 2000 s1(1)(b) be replaced by the phrase “*designed to compel, coerce or undermine the government or an international organisation*”;

(b) that TA 2000 s1(3) (which provides for a different test to be applied to shootings and bombings than to other types of terrorist activity) should be repealed; and

(c) that the “*penumbra of terrorism*”, exemplified by the very broad definitions of “*terrorist activity*” and “*terrorism-related activity*” in TFA 2010 and TPIMA 2011, be revisited with a view to narrowing it.”<sup>87</sup>

4.3 Some progress has been made. In 2015, the third of the above recommendations was given effect, in part, by a statutory amendment to TPIMA 2011 which has removed from the scope of restrictive measures under that Act those whose supposed connection with terrorism is at two removes.<sup>88</sup>

4.4 Early in 2016, the Court of Appeal gave judgment in the case brought by David Miranda<sup>89</sup> after he was stopped at Heathrow Airport under TA 2000 Schedule 7 while in possession

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<sup>85</sup> [2013] UKSC 64.

<sup>86</sup> *The Terrorism Acts in 2013*, July 2014, 4.22.

<sup>87</sup> *The Terrorism Acts in 2013*, July 2014, chapters 4 and 10; see also *The Terrorism Acts in 2012*, July 2013, chapter 4.

<sup>88</sup> CTSA 2015 s20(2); *Terrorism Prevention and Investigation Measures in 2014*, March 2015, 3.8(a).

<sup>89</sup> *R (Miranda) v Secretary of State for the Home Department and Commissioner for the Metropolitan Police* [2016] EWCA 6; [2016] 1 WLR 1505, paras 38-56. The first-instance decision ([2014] EWHC 2455 (Admin)) was discussed in *The Terrorism Acts in 2013*, 4.11-4.23. The Court of Appeal decision was not appealed to the Supreme Court.

of material taken from the NSA by Edward Snowden for publication. Like the first-instance court, the Court of Appeal held that the power had been used for a lawful purpose. But it re-interpreted the definition of terrorism so as to remove some of its more absurd consequences: in particular, its potential application to politically and religiously motivated journalists or campaigners on issues (such as vaccination), on which the expression of sincere but wrong-headed views has the potential to endanger life or simply to damage public health.<sup>90</sup> The effect of the Court of Appeal's judgment was to trim the scope of the definition, which, as the Court said, on its literal interpretation "involves according to the word 'terrorism' a meaning which is far removed from its ordinary meaning", and "potentially gives rise to unpalatable consequences".<sup>91</sup>

4.5 Though welcome, the effect of the Court of Appeal's interpretation was limited. It is still the case that campaigning journalism with a religious, political or ideological purpose may class as terrorism, with all the ancillary consequences that this could imply.<sup>92</sup> But as a consequence of the judgment, that can be so only when the journalist is at least reckless as to the consequence of what is written for human life or for the health and safety of the population. As summarised by the Court itself :

"It does not follow that publication of material cannot amount to an act of terrorism. If (i) the material that is published endangers a person's life (other than that of the person committing the action) or creates a serious risk to the health or safety of the public or a section of the public, and (ii) the person publishing the material intends it to have that effect (or is reckless as to whether or not it has that effect), then the publication is an act of terrorism, provided, of course, that the conditions set out in section 1(1)(b) and (c) are satisfied."<sup>93</sup>

4.6 Both the amendment to TPIMA 2011 and the judgment of the Court of Appeal in *Miranda* are welcome steps towards reducing the over-broad definition of terrorism and what I have called the penumbra of terrorism (e.g. "*terrorism-related activity*").

4.7 Neither development however addresses the two recommendations summarised at 4.2(a) and (b) above.<sup>94</sup> The first of them would bring the UK into line with international comparators, and was made also by my predecessor Lord Carlile QC, as long ago as 2007. The second would remove an anomaly which so far as I am aware has no international parallel. Both recommendations were intended to address the over-breadth of the definition, without jeopardising national security.

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<sup>90</sup> *The Terrorism Acts in 2013*, July 2014, 4.16-4.23.

<sup>91</sup> *R (Miranda) v Secretary of State for the Home Department and Commissioner for the Metropolitan Police* [2016] EWCA 6; [2016] 1 WLR 1505, para 51. The "*unpalatable consequences*" were summarised at para 47 by reference to those which I had identified in *The Terrorism Acts in 2013*, July 2014, 4.19-4.21.

<sup>92</sup> See, generally, C. Walker, "Investigative Journalism and Counter Terrorism Laws" (2016) *Notre Dame Journal of Law, Ethics and Public Policy*, forthcoming.

<sup>93</sup> *Ibid.*, para 55.

<sup>94</sup> *The Terrorism Acts in 2013*, July 2014, 10.33-10.50.

4.8 As to those recommendations, the Home Secretary responded in October 2016 as follows:

“Having given this matter consideration in the light of developments over the last year, and of the judgment handed down by the Court of Appeal on 19 January 2016 in *Miranda*, I maintain the view that it would not be appropriate to make changes to the statutory definition at this stage. The complexity and fluidity of the terrorist threat, and its ability to evolve and diversify at great speed, demonstrate the importance of having a flexible statutory framework – with appropriate safeguards – to ensure that the law enforcement and intelligence agencies can continue to protect the public.”<sup>95</sup>

4.9 That formulation does not address the detailed reasoning with which I proposed my recommendations. But as a statement of a political position, it is clear and must be taken to represent the settled position of the Government. My recommendations are maintained, not in the expectation of immediate adoption but in case they should find favour in the future.

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<sup>95</sup> *The Government Response to the Annual Report on the Operation of the Terrorism Acts 2014 by the Independent Reviewer of Terrorism Legislation*, Cm 9357, November 2016.

## 5. PROSCRIBED ORGANISATIONS

5.1 Part II of TA 2000 gives the Home Secretary power to proscribe organisations that she believes to be “*concerned in terrorism*”. A full account of that process, and assessments of its utility, are given in previous reports.<sup>96</sup> Further detail is given by the Home Office in a helpful guide, available from the Government’s website and recently updated.<sup>97</sup>

### Proscription orders in 2015 and 2016

5.2 Three proscription orders have been made since the start of 2015, covering a total of eight groups. They were:

- a) SI 2015/55, in force from 23 January 2015 and covering Jund al Aqsa (JAA) and Jund al Khalifa-Algeria (JaK-A).<sup>98</sup>
- b) SI 2015/959, in force from 27 March 2015 and covering Haqqani Network (HQN) and Jamaat ul-Arar (JuA).<sup>99</sup>
- c) SI 2016/770, the 19<sup>th</sup> proscription order to be made under TA 2000, in force from 15 July 2016 and covering:
  - Global Islamic Media Front (GIMF) including GIMF Bangla Team (also known as Ansarullah Bangla Team (ABT) and Ansar-al Islam);
  - Turkestan Islamic Party (TIP), also known as East Turkestan Islamic Party (ETIP), East Turkestan Islamic Movement (ETIM), East Turkestan Jihadist Movement (ETJM) and Hizb al-Islami al-Turkistani (HAAT);
  - Mujahidin Indonesia Timur (MIT); and
  - Jamaah Anshorut Daulah (JAD).<sup>100</sup>

The parliamentary debates on these orders were largely perfunctory and, as has always been the case, their making was not opposed. I have previously suggested that a way might usefully be found of giving some parliamentarians (perhaps members of the Intelligence and Security Committee) access to the secret information that is not capable of being disclosed to Parliament as a whole.<sup>101</sup>

5.3 There were references in a number of the proscription debates to the Muslim Brotherhood, which is not a proscribed organisation. In April 2014 the Prime Minister commissioned an internal review into the Muslim Brotherhood from Sir John Jenkins,

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<sup>96</sup> See in particular *The Terrorism Acts in 2011*, June 2012, Chapter 4.

<sup>97</sup> *Proscribed terror groups or organisations*, updated July 2016.

<sup>98</sup> Hansard HC 21 January 2015 vol 591 col 329 and HL 22 January 2015 vol 758 col 1496.

<sup>99</sup> Hansard HC 25 March 2015 vol 594 col 1537 and HL 26 March 2015 vol 760 col 1550.

<sup>100</sup> Hansard HC 13 July 2016 vol 613 col 306 and HL 14 July 2016 vol 774 col 416.

<sup>101</sup> *The Terrorism Acts in 2011*, June 2012, para 4.52.

former Ambassador to Riyadh, and Charles Farr, then Director of OSCT.<sup>102</sup> The review was completed in July 2014 and a summary of its conclusions was published in December 2015.<sup>103</sup> The review concluded, among other things, that:

- (a) “*aspects of Muslim Brotherhood ideology and tactics, in this country and overseas, are contrary to our values and have been contrary to our national interests and our national security*”;
- (b) international branches of the Muslim Brotherhood had “*deliberately, wittingly and openly incubated and sustained an organisation - Hamas - whose military wing has been proscribed in the UK as a terrorist organisation*”; but that
- (c) “*the Muslim Brotherhood has not been linked to terrorist related activity in and against the UK*”; and that
- (d) “[t]he Muslim Brotherhood in the UK .. has often condemned terrorist related activity in the UK associated with al Qai'da”.<sup>104</sup>

5.4 The total number of proscribed organisations listed in TA 2000 Schedule 2 was 84 in July 2016, including 14 Northern Irish organisations.<sup>105</sup> This compares to 62 (including the same 14 Northern Irish organisations) when I first reported in July 2011. In July 2016 there were said to be 60 Foreign Terrorist Organisations listed in the US, 54 in Canada and 20 in Australia, 13 groups being proscribed in all four countries.<sup>106</sup>

5.5 I do not suggest that evidence for the new proscriptions over this period has been lacking. It is hard to resist the comment of Diana Johnson, shadow Security Minister, that “*The increasing rate of proscription orders reflects the increasing terror threat in recent years and the emergence of terror groups across the world*”.<sup>107</sup> Harder to defend is the maintenance in force of proscription orders on some organisations that appear no longer to be concerned in terrorism: 5.13-5.25 below.

### **Name change orders in 2014**

5.6 There have been no name-change orders since those of 2014, described in my last year’s report.<sup>108</sup>

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<sup>102</sup> Charles Farr was replaced in this role by Tom Hurd in early 2016.  
<sup>103</sup> *Muslim Brotherhood Review: Main Findings*, 17 December 2015, HC 679.

<sup>104</sup> *Ibid.*, paras 17, 39.

<sup>105</sup> <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2>. The Briefing paper received in July 2016 from Dr Lee Jarvis of the University of East Anglia. See further Legrand, T. & Jarvis, L. (2014) “Enemies of the State: Proscription Powers and their Use in the United Kingdom” 2, *British Politics* 9(4): 450-471; Jarvis, L. & Legrand, T. (2016) “Legislating for Otherness: Proscription Powers and Parliamentary Discourse”, *Review of International Studies* 42(3): 558-574.

<sup>107</sup> Hansard HC 25 March vol 594 col 1538.

<sup>108</sup> *The Terrorism Acts in 2014*, September 2015, 4.4.



## Proscription offences

- 5.7 The proscription of a group is a trigger for membership, support and uniform offences under TA 2000 ss 11-13. Prosecutors value those offences in TA 2000 because it is easier to present a case to a jury when there is a link to a named, proscribed organisation than it is to prove a link to terrorism from first principles. The proscription offences have been used particularly in Northern Ireland, with 140 persons charged (109 of them for membership) between February 2001 and March 2015.<sup>109</sup>
- 5.8 In Great Britain, between September 2001 and March 2016 there were 48 charges for proscription offences as the principal count on the indictment (including 8 in 2015), and 21 convictions for proscription offences as the principal count proved. July 2016 saw the high-profile convictions of Anjem Choudary and Mohammed Rahman for inviting support for the proscribed organisation Daesh, contrary to TA 2000 s12.
- 5.9 At 9.50 below I raise the question of whether, despite this success, there are obstacles to convictions under s12 in particular that Parliament might be able to remove.

## Links to other disruption regimes

- 5.10 Previous reports have emphasised the need for joined-up thinking where the various disruption regimes are concerned. I noted for example in one report that none of the organisations proscribed since 2001 has also been designated under TAFSA 2010, adding that while UK proscription can act as a trigger for an EU-wide asset freeze, *“there may be cases in which unilateral UK designation of the entity in question, or of persons associated with it, could at least be worth considering”*.<sup>110</sup>
- 5.11 I recorded last year that once a proscription order or name change order has been made, the Proscription Review Group Secretariat informs other partners of the action taken, including:
- a) the Special Cases Unit, which deals with deprivation, exclusion and other immigration disruptions;
  - b) members of the Asset Freeze Working Group;
  - c) the Counter-Terrorism Internet Referral Unit, via its sponsor unit in Prevent; and
  - d) selected foreign governments.

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<sup>109</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2014-2015*, October 2015, Table 11a.

<sup>110</sup> *Third report on the operation of the Terrorist Asset-Freezing Etc. Act 2010*, December 2013, 2.25 and Recommendation 12.

I am told that it is the practice also to ask the Foreign Office to consider groups for EU and UN sanctions.

- 5.12 There would be value in a report which examines the operation of the various executive orders, including asset-freezing orders and TPIMs, and looks further at the interrelationship of those orders with proscription orders as part of that exercise. Such a report might usefully be prepared in 2017, either by myself or by my successor.

### **Deproscription applications**

- 5.13 The unsatisfactory nature of the deproscription process has been a theme of my annual reports ever since I assumed the duties of Independent Reviewer in 2011.<sup>111</sup> The continued proscription of groups which do not satisfy the statutory requirement is contrary to the rule of law. It can also have a detrimental effect on:

- (a) innocent UK residents with the same ethnicity or affiliation as those from which proscribed nationalist or separatist groups draw their membership;<sup>112</sup> and
- (b) aid and conflict resolution organisations whose activities at home and/or abroad may be hampered by the proscribed status of organisations with which they would wish to deal.<sup>113</sup>

My observations on the first of those phenomena were confirmed in a recent parliamentary debate by MPs who have had opportunities to observe it in their own constituencies.<sup>114</sup>

- 5.14 My principal recommendation has been that proscription orders should lapse after a period of time, and be renewed only if there is sufficient evidence to do so. That system works well in the allied field of terrorist asset-freezing, where yearly orders imposed on groups or individuals in respect of which the necessary evidence is not present are allowed to lapse without litigation or fuss. Alternatively, if that approach is considered unsatisfactory, I have suggested that the statutory test of being (currently) concerned in terrorism be altered so as to bring it closer into line with the test for other executive orders such as TPIMs and asset-freezing. This would allow organisations which have been involved in terrorism to remain lawfully proscribed, even if their involvement is no longer current, so long as the Secretary of State reasonably considers that this is necessary to protect the public.<sup>115</sup>

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<sup>111</sup> The relevant parts of my reports are summarised in *The Terrorism Acts in 2014*, September 2015, 4.11-4.13.

<sup>112</sup> *The Terrorism Acts in 2011*, June 2012, 4.41-4.47.

<sup>113</sup> *The Terrorism Acts in 2013*, July 2014, 9.25-9.33.

<sup>114</sup> See, e.g., the comments of Keith Vaz MP, then Chair of the Home Affairs Select Committee, citing evidence from Ealing, Wolverhampton, West Ham, Scotland and Northern Ireland in the ISYF deproscription debate (Hansard HC 15 March 2016, vol 607 col 916); and the further comments of Andy Burnham MP and Keith Vaz MP in the most recent proscription debate: Hansard HC 13 July 2016 vol 613 col 310.

<sup>115</sup> These recommendations were initially made in *The Terrorism Acts in 2011*, June 2012, 4.52-4.61 and 4.66-4.67.

- 5.15 I had hoped that the Government would have resolved the situation by now, ideally by adopting my recommendations. The Home Office has after all provisionally acknowledged, as I recorded in 2013, that up to 14 proscribed organisations did not meet the statutory requirement for proscription and were thus wrongly proscribed.<sup>116</sup> That is without considering the situation of the 14 organisations in Northern Ireland that have been proscribed since at least 2000.
- 5.16 Instead, the problem was made harder by the abandonment in 2013/14 of the annual review of proscription orders. The process must have become embarrassing, since it never resulted in deproscription despite the fact that for some groups there was no up-to-date evidence of involvement in terrorism. But it was precisely because these reviews forced the Government to confront up-to-date evidence that the Proscribed Organisation Appeals Commission **[POAC]**, chaired by a High Court Judge, described them as “*certainly a practice that the Secretary of State should continue to adopt*” and “*a proper reflection of the Secretary of State’s statutory duty*”.<sup>117</sup>
- 5.17 My recommendations have been supported by the Home Affairs Select Committee<sup>118</sup> and by the Opposition,<sup>119</sup> but the Home Office has declined to accept them, as it is entitled to do.<sup>120</sup> In defence of that position, the Home Secretary correctly states that “*any person affected by an organisation’s proscription can submit an application to me for the deproscription of that organisation in accordance with the Terrorism Act 2000*”.<sup>121</sup> The Northern Ireland Office, which did not have annual reviews even prior to 2013, has recently confirmed to me that it takes the same position. But it remains the case that all 14 deproscription applications brought to date have been refused, and that the only means by which deproscription has ever been obtained has been by appeal from those refusals to POAC.
- 5.18 My past recommendations in this area having now been definitively rejected, it is all the more important that:
- (a) Applications for deproscription are promptly handled, and statutory time limits respected.

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<sup>116</sup> *The Terrorism Acts in 2012*, July 2013, 5.36(b). The Home Office’s brief resolve to deproscribe those organisations, in accordance with my recommendations, foundered in the end for lack of political will: *The Terrorism Acts in 2013*, July 2014, 5.8.

<sup>117</sup> PC/02/2006 *Lord Alton of Liverpool and others* (PMOI), 30 November 2007, para 73, cited in *The Terrorism Acts in 2013*, July 2014, 5.10.

<sup>118</sup> HASC, *Roots of violent radicalisation*, HC 1446, February 2012, para 87.

<sup>119</sup> E.g. by Lyn Brown MP, Shadow Home Office Minister, in the ISYF deproscription debate: “*I want to highlight the argument made by the independent reviewer, David Anderson, QC, that annual reviews of proscription orders should mirror the requirements of the Terrorist Asset-Freezing etc. Act 2010—to review annually the necessity of continued asset freezes, which leads to the delisting of individuals on the initiative of the Treasury.*”. Hansard HC 15 March 2016, vol 607 col 914.

<sup>120</sup> John Hayes MP, Security Minister, Hansard HC 13 July 2016, vol 613 col 313.

<sup>121</sup> *The Government’s Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, October 2016.

- (b) Deproscription must follow automatically, without regard for discretionary factors, if the statutory test (“*is concerned in terrorism*”) is not met.
- (c) When an application for deproscription is refused by the Secretary of State, the fullest possible reasons are given so that the organisation in question can properly assess the prospects of appeal.<sup>122</sup>
- (d) Persons should not be put to the expense and uncertainty of resorting to POAC unless the Government is prepared to defend its judgement and has the evidence confidently to do so.

5.19 None of these standards appears to have been met in the case of the application made on behalf of the International Sikh Youth Federation [**ISYF**] in February 2015 and refused on 31 July 2015. ISYF was deproscribed with effect from 18 March 2016, after it had appealed to POAC.<sup>123</sup> But as I reported last year:

- (a) That application was not determined, through administrative error, until almost three months after the expiry of the statutory time limit.
- (b) The decision letter refusing the application for deproscription gave no detailed reasons, and none were provided on further request.

5.20 Furthermore, and remarkably, the Government presented no evidence to POAC in favour of its own position. Indeed it elected not to defend the case in December 2015, on the final day appointed by POAC for the submission of such evidence. Given the opportunity to state in Parliament whether new evidence had come to light by December 2015 which could have cast doubt on evidence relied upon in July 2015, the Government declined to do so on the basis that “*it is not our habit to give a running commentary on such matters*”.<sup>124</sup>

5.21 Without resort to legal action, the ISYF would remain a proscribed organisation today – notwithstanding what is now admitted by the Home Office to be the absence of sufficient evidence to sustain the proscription. The ISYF was fortunate to have both the resources to take the case to POAC, and sympathisers willing to put their head above the parapet. This will not necessarily be true of other organisations, including some of the 14 proscribed organisations in respect of which the Home Office itself appears to have accepted, in 2013, that the statutory test for proscription was not satisfied (5.15 above).<sup>125</sup>

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<sup>122</sup> While it is always possible that some evidence might need to be presented in closed session, one would normally expect there to be at least some evidence that could safely be disclosed to the application for deproscription. That is indeed demonstrated by the proscription debates, in which Parliament and thus the public are routinely informed of at least the gist of the evidence justifying proscription.

<sup>123</sup> SI 2016/391. The deproscription debates are to be found in Hansard HC 15 March 2016 vol 607 col 909 and HL 17 March 2016 vol 769 col 1984.

<sup>124</sup> John Hayes MP, Security Minister, Hansard HC 15 March 2016 vol 607 col 921.

<sup>125</sup> The ISYF was not one of the 14: Lord Bates, Hansard HL 17 March, col 769 col 1987. It is not known how many, if any, of the 14 proscribed Northern Ireland-related organisations are in the same position.

5.22 Though in other contexts I have been made privy to legally privileged advice, I have not asked to see the legal advice which presumably informed the Government's decisions. It must however be clearly understood that if the statutory requirements for proscription are not supported by evidence, the continued proscription of an organisation cannot be defended and the authorities should act accordingly.

5.23 The Home Secretary wrote, in response to my last annual report, that:

"I consider it appropriate to continue to take a cautious approach when considering removing groups from the list of proscribed organisations."<sup>126</sup>

Few would quarrel with a cautious approach to the exercise of discretions in the national security field. But the initial statutory test – whether the organisation in question is concerned in terrorism – is a question not of discretion but of simple fact. A negative answer to it must automatically be followed by deproscription. Discretionary factors – including the anticipated negative reaction of a foreign government – come into play if the organisation *is* concerned in terrorism. But where it is not, such factors are of no relevance to the decision at issue.

5.24 Whatever the rights and wrongs of the ISYF case, the fact that there have been since at least 2013 some 14 proscribed organisations in respect of which the statutory test for proscription is not satisfied<sup>127</sup> is an affront to the rule of law.

5.25 As long ago as 2008, the Court of Appeal (in the only proscription case so far to have reached it) stated that:

It is a matter for comment and for regret that the decision-making process in this case has signally fallen short of the standards which our public law sets and which those affected by public decisions have come to expect.<sup>128</sup>

It is not for me to pass comment on the conduct of the Home Office in any particular case. But in the event that the requirements summarised at 5.18 above are not complied with in future cases, the criticisms made by those very senior judges will remain valid.

5.26 More generally, the Home Office ignores the measured criticism of senior judges at its peril.<sup>129</sup> I return to this theme at 11.7-11.9 below.

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<sup>126</sup> *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, November 2016, Cm 9357.

<sup>127</sup> Assuming that no evidence has emerged since then to justify a claim that they are concerned in terrorism.

<sup>128</sup> *Lord Alton of Liverpool and others v Secretary of State for Home Department* [2008] EWCA Civ 443, [2008] 1 WLR 2341 (Lord Phillips CJ, Laws and Arden LJJ).

<sup>129</sup> On (restrained) extra-judicial comments, see Anisa Kassamali, *Judges Keep Out: off-the-bench influences on the UK's anti-terror regime* (UCL Constitution Unit, 2016).

## 6. STOP AND SEARCH

### Summary

6.1 The stop and search powers under TA 2000 remained unaltered during the year under review. They are, in summary:

- (a) TA 2000 s43, a power to stop a person reasonably suspected to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist;
- (b) TA 2000 s43A, a power to stop and search a vehicle which it is reasonably suspected is being used for terrorism, for evidence that it is being used for such purposes.
- (c) TA 2000 s47A, a no-suspicion power that can only be used in the extremely limited circumstances outlined at 6.7 below.

### Section 43/43A

6.2 As in previous years, figures for the use of s43 are published in Great Britain only for the MPS area.<sup>130</sup> To my recommendation that other forces publish figures as well, the Home Secretary has responded positively:

“I agree that it would be helpful if statistics for the use of these powers could be published in relation to forces outside London and Northern Ireland, and the Home Office is working with the police to investigate whether this information can be collected and published at a national level as you recommend.”<sup>131</sup>

I look forward to hearing the outcome of that investigation. In the meantime, one of my Special Advisers has made use of the freedom of information legislation: 6.6 below.

### London

6.3 Usage by the MPS in 2015 was close to the average for recent years, lifted by an exceptionally high number of stops in Q4 2015,<sup>132</sup> but the arrest rate at 11% showed a marked and welcome improvement.

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<sup>130</sup> Source: Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, table S.01, and equivalent tables from previous years, corrected following private correspondence from the Home Office. Figures for MPS use of s43A are not published.

<sup>131</sup> *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, Cm 9357, November 2016.

<sup>132</sup> 203 of the stops were in Oct-Dec 2015: Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, June 2016, 6.2.

Year	Searches (MPS)	Arrests
2010	999	n/a
2011	1051	32 (3%)
2012	614	35 (6%)
2013	491	34 (7%)
2014	394	25 (6%)
2015	520	57 (11%)

6.4 The self-defined ethnicity of those stopped under s43 in London since 2010 is as follows:<sup>133</sup>

Year	White	Asian	Black	Chinese/Other	Mixed/not stated	Total
2010	43%	30%	11%	7%	9%	999
2011	35%	37%	9%	8%	11%	1051
2012	39%	31%	12%	7%	11%	614
2013	34%	32%	14%	9%	10%	491
2014	41%	22%	12%	9%	16%	394
2015	30%	27%	13%	10%	20%	520

The most noteworthy feature of 2015 was the continued rise in persons stopped who refused to state their ethnicity: this applied to 7% of those stopped in 2013, 13% of those stopped in 2014 and 17% in 2015. This phenomenon would bear further investigation.

### ***Northern Ireland***

6.5 In Northern Ireland in 2015/16:

- (a) 101 people were stopped and searched under s43 in 2015/16, the same number as in 2012/13.
- (b) A further 12 were stopped under s43A.
- (c) 100 were stopped under ss 43 and 43A (up from 27 in 2014/15), and two under ss 43 and/or 43A in combination with JSA(NI) 2007 s21.<sup>134</sup>

<sup>133</sup> Source: Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, table S.02, and equivalent tables from previous years, corrected following private correspondence from the Home Office. As I have previously noted, there is no subcategory specifically referable to persons of non-black North African or Middle Eastern ethnicity: *The Terrorism Acts in 2012*, July 2013, 1.26(d).

<sup>134</sup> PSNI, *Stop and Search Statistics, Financial year 2015/16*, May 2016.

## Other forces

- 6.6 In the absence of published statistics, my Senior Special Adviser, Clive Walker, conducted a survey of the largest police forces, using the Freedom of Information Act.<sup>135</sup> Where available, the figures for both searches and arrests were very low:<sup>136</sup>

	2012	2013	2014	2015
<b>British Transport</b>	9 / 2	13 / 0	4 / 0	16 / 3
<b>Greater Manchester</b>	12 / 4	24 / 3	19 / 1	15 / 0
<b>South Yorkshire</b>	2 / 0	3 / 0	n/a	2 / 0
<b>West Midlands</b>	n/a	n/a	14 / 1	24 / 3
<b>West Yorkshire</b>	6 / 0	0 / 0	0 / 0	7 / 0

Key: 9 / 2 = 9 searches, 2 arrests

## Section 47A

- 6.7 Authorisations for use of the stop and search power under TA 2000 s47A can only be issued in very particular circumstances: when a senior police officer “*reasonably suspects that an act of terrorism will take place*”, and reasonably considers that the authorisation “*is necessary to prevent such an act*”. The authorisation can last no longer and cover no greater an area than is reasonably considered necessary to prevent such an act. If an authorisation is in place, no suspicion is required for a stop and search to take place.
- 6.8 That power has been in place since March 2011. It replaced the former TA 2000 s44, which though very widely used in the latter part of the last decade, was repealed after the European Court of Human Rights [ECtHR] described it as “*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*”.<sup>137</sup> The Home Secretary has acknowledged to Parliament that the replacement of s44 has had “*no effect on public safety*”,<sup>138</sup> and the police have not suggested to me that any enhancement of existing stop and search powers is required.<sup>139</sup>

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<sup>135</sup> I am grateful for a communication sent to me by Marion Fitzgerald, Visiting Professor in Criminology at the University of Kent, suggesting some further avenues for exploration.

<sup>136</sup> Merseyside refused the request on cost grounds, but had 50 stop and search records relating to terrorism from 2008 to 2015. Northumbria refused the request on cost grounds.

<sup>137</sup> *Gillan and Quinton v UK*, judgment of 12 January 2010, para 82. The complex circumstances of the replacement of s44 by s47A are set out in *The Terrorism Acts in 2011*, June 2012, 8.8-8.19.

<sup>138</sup> Hansard HC 2 July 2013, col 774.

<sup>139</sup> Though it should be noted that in Northern Ireland, alternative no-suspicion powers to stop, question and search exist under the Justice and Security (Northern Ireland) Act 2007. These are reported upon by the Independent Reviewer under that Act. The eighth report of the Independent Reviewer, which is the second prepared by the current Reviewer, David Seymour CB, was published in February 2016 and is available online.



6.9 There has to date been only a single authorisation under s47A, in the unusual circumstances in Northern Ireland which I have previously described.<sup>140</sup> During the year under review, no authorisations were issued anywhere in the United Kingdom for use of the no-suspicion stop and search power under TA 2000 s 47A.

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<sup>140</sup> *The Terrorism Acts in 2013*, July 2014, 6.9.

## 7. PORT AND BORDER CONTROLS

### Introduction

- 7.1 TA 2000 Schedule 7 empowers ports officers to question and detain travellers at ports (including airports and international rail terminals) for the purpose of determining whether they appear to be concerned in the commission, preparation or instigation of acts of terrorism.<sup>141</sup> There is an obligation to answer questions directed to that end; and ancillary powers that may be used include the taking of biometric data and the removal and downloading of the contents of mobile phones.
- 7.2 Schedule 7 has been a centrepiece of each of my five previous reports on the operation of the Terrorism Acts. The Supreme Court recently remarked on the utility of those reports.<sup>142</sup> The capacities of my office as currently constituted do not stretch to thorough, port-by-port monitoring.<sup>143</sup> But I have published statistics obtained from Home Office tables and from the police (though for national security reasons I have not been able to publish port-by-port figures); observed the operation of the power in many ports and airports; spoken to ports officers from all over the country, and reported on matters including:
- (a) the utility of the power,<sup>144</sup>
  - (b) the manner of its exercise,<sup>145</sup>
  - (c) resentment caused particularly among Muslims,<sup>146</sup>
  - (d) the consistently low number of complaints;<sup>147</sup>
  - (e) allegations of discrimination on grounds of ethnicity,<sup>148</sup> and
  - (f) the reasons not to require suspicion as a condition for the initial decision to question.<sup>149</sup>

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<sup>141</sup> TA 2000 section 40(1)(b) and Schedule 7 para 2(1); see in particular *The Terrorism Acts in 2011*, June 2012, Chapter 9.

<sup>142</sup> *DPP v Beghal* [2015] UKSC 49, para 43(x), per Lord Hughes and Lord Hodge.

<sup>143</sup> *The Terrorism Acts in 2014*, September 2015, 10.16.

<sup>144</sup> *The Terrorism Acts in 2011*, June 2012, 9.43-9.53; *The Terrorism Acts in 2014*, September 2015, 6.6-6.9. See further 7.14-7.16 below

<sup>145</sup> *The Terrorism Acts in 2011*, June 2012,, 9.54-9.62.

<sup>146</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 9.22-9.23; *The Terrorism Acts in 2011*, June 2012, 9.12 and 9.28-9.34.

<sup>147</sup> *The Terrorism Acts in 2014*, September 2015, 6.14-6.1.

<sup>148</sup> *Ibid.*, 9.14-9.21; *The Terrorism Acts in 2012*, July 2013, 10.11-10.17; *The Terrorism Acts in 2013*, July 2014, 7.7-7.15.

<sup>149</sup> *The Terrorism Acts in 2012, July 2013*, 10.50-10.62.

7.3 In my first report I recommended a wide-ranging consultation and review of Schedule 7.<sup>150</sup> Recent reports have:

- (a) evaluated the outcome of the reviews that eventually took place, including the liberalising reforms enacted in 2014 and the more technical ones enacted in 2015;<sup>151</sup>
- (b) assessed the abundant Schedule 7-related litigation of the past few years;<sup>152</sup> and
- (c) drawn attention to the much reduced use of the power and to its increasing use for safeguarding purposes on outbound flights.<sup>153</sup>

7.4 My last two reports have also identified and monitored progress on what I (along with two parliamentary committees, the HASC and JCHR) have treated as unfinished business:

- (a) the absence of a suspicion threshold for some of the more intrusive powers under Schedule 7;
- (b) safeguards in relation to sensitive material;
- (c) the need for clear and proportionate rules governing the data taken from electronic devices; and
- (d) the fact that answers given under compulsion are not specifically excluded from admissibility in criminal proceedings.<sup>154</sup>

The state of play on these issues is summarised at 7.22-7.31 below.

7.5 The evolution of Schedule 7 over the past few years provides an interesting case study in how change can be driven by NGOs, Parliament and the courts, and in the potential role of the Independent Reviewer as catalyst and enabler for such change. As this history demonstrates, it would be unduly simplistic to attribute change to any given agency. Rather, as I have tried to describe the process, “*streams of influence run through a variety of channels, intersecting and reinforcing one another*”.<sup>155</sup> Nonetheless, looking back at the 14 elements of Schedule 7 that I recommended in 2011 should be subject to consultation and review,<sup>156</sup> it is striking to observe that change has been

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<sup>150</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 9.32-9.33.

<sup>151</sup> *The Terrorism Acts in 2013*, July 2014, 7.16-7.24; *The Terrorism Acts in 2014*, September 2015, 6.17-6.28.

<sup>152</sup> *The Terrorism Acts in 2013*, July 2014, 7.37-7.40; *The Terrorism Acts in 2014*, September 2015, 6.32-6.39.

<sup>153</sup> *The Terrorism Acts in 2013*, July 2014, 7.4-7.6; *The Terrorism Acts in 2014*, September 2015, 6.3-6.6.

<sup>154</sup> *The Terrorism Acts in 2013*, July 2014; 7.25-7.34. *The Terrorism Acts in 2014*, September 2015, 6.29-6.30; 6.34-6.40.

<sup>155</sup> “The Independent Review of Terrorism Laws” [2014] Public Law 403-420; “The Independent Review of UK Terrorism Law” (2014) 5 NJECL 432-446: both freely available through my website by kind permission of the publishers. Schedule 7 is used as a case study for observing the interaction between different agents of change.

<sup>156</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 12.11.

effected over the intervening period in relation to all but the first (and most general) of them.

7.6 In the period covered by my sixth and final report, the pace of change may finally have begun to slacken. Thus:

(a) The statutory amendments from 2014 and 2015 are now bedding down.<sup>157</sup>

(b) The major test cases (the Supreme Court in *Beghal*<sup>158</sup> and of the Court of Appeal in *Miranda*)<sup>159</sup> left most of the Schedule 7 system intact. The long-awaited verdict of the ECtHR in *Malik v UK* will not now be reached at all, since the case was withdrawn in June 2016 after a dispute over the facts of the alleged incident.<sup>160</sup>

7.7 My own port visits have been less numerous than usual, owing to competing claims on my time. I have focussed in 2015/16 on major seaports in Kent and the south-west of Scotland, the cross-channel rail link and the international rail terminal at St. Pancras.

7.8 Schedule 7 continues to throw up issues. There follows the usual statistical analysis, a summary of the Government's response to my latest recommendations, and a short treatment of some of the other issues to which my attention was drawn over the period under review.

## Statistical analysis

### *Frequency of use*

7.9 The UK-wide figures for person examinations over the past seven years are as follows:<sup>161</sup>

	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
<b>Examinations</b>	87,218	73,834	68,945	60,514	46,964	34,500	28,083
<b>&gt;1 hour</b>	2,695	2,290	2,253	2,274	1,889	1,898	1,794
<b>Detained</b>	486	915	680	670	517	1,311	1,821
<b>Biometrics</b>	n/a	769	592	547	353	462	511

Some 256 million passengers transited UK eligible ports in 2015/16. Accordingly, barely one hundredth of 1% of travellers through eligible ports were subject to a Schedule 7

<sup>157</sup> See *The Terrorism Acts in 2014* (September 2015), 6.17-6.27. See, however, 7.54-7.57 below.

<sup>158</sup> *Beghal v DPP* [2015] UKSC 49; see *The Terrorism Acts in 2014*, September 2015, 6.12 and 6.34-6.38.

<sup>159</sup> *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA 6; [2016] 1 WLR 1505. See further 4.4-4.6 above and 7.27 below.

<sup>160</sup> I asked the NGO Liberty, which had conduct of the case (Application no. 23780/08), why the case was withdrawn but was told that client confidentiality prevented me from being told. Mrs Beghal has now taken her case to Strasbourg. But as the *Malik* saga demonstrates, such cases can take several years to determine.

<sup>161</sup> Source: ACPO/NPCC/Home Office: figures for Northern Ireland have been added to those prepared by the Home Office for Great Britain. The adjustments to figures given in some previous years (e.g. *The Terrorism Acts in 2013*, July 2014, 7.4) are explained by the exclusion of data from the Crown Dependencies, which are not part of the UK.

examination. Most such examinations, on past form, are completed within 15 minutes.<sup>162</sup> A substantially larger number of people will however have been asked screening questions: see 7.32-7.37 below.

- 7.10 The sharp decline in the number of examinations has continued unchecked: the 2015/16 figures were down by 68% over six years, and by 19% on 2014/15. The declining trend is observable across the country, with the largest volume ports showing particularly high reductions. The likely causes are said to be the same as last year:<sup>163</sup> they include improved passenger data capture, better use of targeting techniques and an increased emphasis on outbound flights and safeguarding activity.
- 7.11 I first drew attention in my report of 2011 to the downloading of electronic devices in the course of Schedule 7 examinations. Further information about this practice was published in my report of 2013.<sup>164</sup> In the year 2015/16, according to information supplied to me by the police:
- (a) 1,677 people had their mobile devices downloaded under Schedule 7; and
  - (b) A total of some 4,300 devices were downloaded.<sup>165</sup>
- 7.12 Anyone questioned for more than an hour since July 2014 has been detained and given the associated rights. The figures indicate that 27 people were detained prior to the 1-hour mark in 2015/16. The commonest reason for detaining before the 1-hour mark is probably for the purpose of taking biometrics. Other reasons (set out in the Schedule 7 Code of Practice at 46) include detention for the purpose of preventing uncooperative persons from leaving as they would otherwise be entitled to do.
- 7.13 Examinations declined in Northern Ireland as they did in other parts of the UK, though more modestly. The 3,496 Northern Ireland examinations in 2014/15 (down by 8% on the previous year) made up more than 10% of the UK total. But remarkably, nobody is recorded as having been detained in either 2013/14 or 2014/15.<sup>166</sup> I have in the past reviewed Schedule 7 operations at Belfast port and Belfast City Airport, but it would be worth investigating this further with ports officers in Northern Ireland.

### **Utility**

- 7.14 There were 58 arrests at the border in 2015/16 (up from 39 in 2014/15), and 318 seizures of cash (down from 391) to a value of £3.3 million. Schedule 7 stops played a significant

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<sup>162</sup> Sample data from four forces indicated that 63% of sub-1 hour examinations were completed within 15 minutes, and 88% within 30 minutes: *The Terrorism Acts in 2012*, July 2013, 10.9-10.10.

<sup>163</sup> *The Terrorism Acts in 2014*, September 2015, 6.5-6.6.

<sup>164</sup> *The Terrorism Acts in 2012*, July 2013, 10.65-10.80.

<sup>165</sup> The figure of 4,300 is partly made up of extrapolated data, because data for the number of devices downloaded was not collected in the period April-June 2015.

<sup>166</sup> *Northern Ireland Terrorism Legislation: Annual Statistics 2014/15*, October 2015, Table 16.

part in some of these, as well as in a number of the prosecutions concluded in 2015 and summarised on the website of the CPS by its Counter-Terrorism Division.<sup>167</sup>

7.15 But as I have consistently reported, the value of Schedule 7 far exceeds that which is measurable in terms of arrests, seizures and evidence usable in court. I have previously detailed the utility of Schedule 7 in yielding intelligence about the terrorist threat, in disruption and deterrence and in the recruitment of informants.<sup>168</sup> This continued during the year under review.<sup>169</sup>

7.16 There was a reduction in the total number of intelligence reports filed after Schedule 7 stops from the almost 11,000 filed in 2014/15 to less than 10,000 in 2015/16 (the lowest figure since 2009/10, though changes in recording practice mean that caution in making comparisons is required). Those figures do not include serious and organised crime reporting. The proportion of reports that proved valuable has remained steady.

### ***Examinations by ethnicity***

7.17 The collection of ethnicity data for Schedule 7 stops has been carried out on a self-definition basis since April 2010. The UK-wide figures are as follows:<sup>170</sup>

#### Examined less than 1 hour

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>	<b>2014/15</b>	<b>2015/16</b>
<b>White</b>	47%	46%	42%	46%	39%	33%
<b>Black</b>	8%	8%	8%	8%	7%	6%
<b>Asian</b>	26%	25%	22%	19%	23%	28%
<b>Other</b>	16%	16%	17%	16%	18%	21%
<b>Mixed/not stated</b>	4%	5%	11%	12%	13%	12%

#### Examined more than 1 hour

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>	<b>2014/15</b>	<b>2015/16</b>
<b>White</b>	14%	12%	14%	12%	11%	12%
<b>Black</b>	15%	14%	14%	13%	10%	8%
<b>Asian</b>	45%	36%	33%	34%	36%	36%
<b>Other</b>	20%	24%	25%	26%	26%	26%
<b>Mixed/not stated</b>	6%	14%	15%	14%	17%	18%

<sup>167</sup> E.g. *R v Majdi Shajira; R v Imran Mohammed Khawaja, Tahir Farooq Bhatti and Asim Ali; R v Mustafa Abdullah; R v Abdurraouf Eshati*.

<sup>168</sup> See, e.g., *The Terrorism Acts in 2011*, June 2012, 9.43-9.53; *The Terrorism Acts in 2012*, July 2013, 10.55-10.62.

<sup>169</sup> Though if press reports are to be believed, opportunities are sometimes missed: "Terror suspect was let out of UK by police after telling officers he was visiting women he had met on a dating site", Mail Online, 3 October 2016.

<sup>170</sup> Source: ACPO/NPCC/Home Office. The adjustments to figures given in previous years (e.g. *The Terrorism Acts in 2013*, July 2014, 7.4) are explained by the exclusion of data from the Crown Dependencies, which are not part of the UK, and by a column of erroneous figures given in my July 2014 report for detentions in 2011/12, correct versions of which were given in my July 2013 report and are reproduced here.

## Detained

	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
<b>White</b>	8%	8%	9%	11%	11%	12%
<b>Black</b>	21%	23%	22%	18%	12%	8%
<b>Asian</b>	45%	35%	31%	35%	35%	36%
<b>Other</b>	21%	23%	22%	22%	27%	26%
<b>Mixed/not stated</b>	5%	11%	16%	14%	15%	18%

## Biometrics

	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
<b>White</b>	8%	6%	9%	11%	11%	9%
<b>Black</b>	21%	23%	24%	19%	11%	11%
<b>Asian</b>	46%	35%	30%	32%	35%	33%
<b>Other</b>	20%	24%	22%	23%	27%	29%
<b>Mixed/not stated</b>	6%	12%	15%	15%	15%	18%

- 7.18 I expressed the view in my 2013 and 2014 reports that while it remains essential that the police should exercise their powers under Schedule 7 in a sensitive, well-informed and unbiased manner, these statistics do not constitute evidence that those powers were being used in a racially discriminatory manner.<sup>171</sup>
- 7.19 Accuracy in this area is hard to achieve, particularly bearing in mind the high proportion of those examined who declined to state their ethnicity, and the difficulties in ascertaining the ethnic make-up of the international travelling public (as opposed to the general population). I have already recommended that more detailed ethnicity data be collected (1.11(c) above).<sup>172</sup> But the statistics show that those who self-define as Asian were, in 2015/16 as in previous years, several times more likely to be questioned and detained under Schedule 7 than their presence in the general population would seem to warrant.<sup>173</sup> Were Schedule 7 supposed to be a randomly-exercised power, this would be strongly suggestive of unlawful discrimination. But it is not. In deciding whom to select, ports officers “*must be informed by the threat from terrorism to the United Kingdom and its interests posed by the various terrorist groups, networks and individuals*

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<sup>171</sup> See, in particular, *The Terrorism Acts in 2013*, July 2014, 7.8-7.15.

<sup>172</sup> The Equalities and Human Rights Commission [EHRC] has noted that Civil Aviation Authority [CAA] data from 2010 indicate that 6.8% of international air passengers in the UK were “Asian or other”, as against 8.5% of residents of England and Wales (2011 Census): K. Hurrell, *An experimental analysis of examinations and detentions under Schedule 7 of TA 2000*, EHRC, December 2013, Table 9; see *The Terrorism Acts in 2013*, July 2014, 7.9.

<sup>173</sup> Those figures would be higher if persons of Asian appearance constituted a significant proportion of those defining as mixed or not stated. The often-quoted statement that “Asian passengers are 42 times more likely to be stopped under schedule 7 than their White counterparts”, which features on the website of the NGO Liberty on a page entitled “Schedule 7”, is not supported by the EHRC study and appears incorrect.

*active in, and outside the United Kingdom*”, and must take into account such factors as *“individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected”, “any information on the origins and/or location of terrorist groups”, and “possible current, emerging and future terrorist activity”*.<sup>174</sup> In many cases, officers will be acting on specific intelligence relating to individuals.

7.20 Since 53-55% of those arrested, charged and convicted of terrorism-related offences in Great Britain in 2015 were of Asian appearance (8.25 below), it is unfortunate but not surprising that persons of Asian appearance made up as many as 28% of those examined for under Schedule 7 for less than an hour, and 36% of those examined for more than an hour or detained, in 2015/16.<sup>175</sup> It is necessary always to be alert to the possibility of discrimination: but discrimination is not established by these figures, which are consistent with (though not probative of) a proportionate police reaction to the current threat.

7.21 As recorded last year, my conclusions on this score were subject to scrutiny (and approval by a majority of the Supreme Court, with Lord Kerr dissenting) in the case of *Beghal v DPP*.<sup>176</sup> But following criticism in that case of *“potentially confusing”* wording in the Schedule 7 Code of Practice, a Circular was published in March 2016 which instructs officers to disregard or re-interpret aspects of the Code of Practice (paras 18 and 19), and emphasises that:

“It is only appropriate for race, ethnic background, religion and/or other ‘protected characteristics’ (whether separately or together) to be used as criteria for selection if present in association with factors which show a connection with the threat from terrorism.”<sup>177</sup>

That Circular applies pending an equivalent revision to the Code of Practice. Its clarification of this important principle is welcome.

## **Response to previous recommendations**

7.22 I said last year that a number of recommendations I had made in 2014 could usefully be revisited in the light of the June 2015 judgment of the Supreme Court in *Beghal*.

7.23 Those recommendations (first submitted to the HASC, and repeated in my 2014 report) were:

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<sup>174</sup> *Examining officers and review officers under Schedule 7 to TA 2000: Code of Practice*, March 2015, para 19.

<sup>175</sup> Though before concluding from these figures that persons of Asian appearance are significantly *under*-represented in the figures, it should be remembered that substantial numbers refused to state their ethnicity and that the overwhelming majority of those involved in Northern Ireland Related Terrorism (as to which, see 2.13-2.20 above; 8.6, 8.16 and 9.11-9.13 below) are white.

<sup>176</sup> *DPP v Beghal* [2015] UKSC 49; *The Terrorism Acts in 2014*, September 2015, 6.12.

<sup>177</sup> Home Office, *Circular 001/2016: schedule 7 to the Terrorism Act 2000*, 15 March 2016.



- (a) that a suspicion threshold should be applied to detention and to the copying of data from personal electronic devices;
- (b) that safeguards should be provided in respect of legally privileged material, excluded material and special procedure material;
- (c) that safeguards should be applied to private electronic data gathered under Schedule 7;<sup>178</sup> and that
- (d) there should be a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial.<sup>179</sup>

As stated in my 2014 report, those recommendations had been given significant support by both the HASC and the JCHR.<sup>180</sup>

7.24 When repeating those recommendations in 2015, I was conscious that they had already been rejected by the Government. It seemed to me however that there was a case for revisiting them in the light of the extensive comments made by the Supreme Court in *Beghal*.

7.25 In her response published in November 2016 (Cm 9357), the Secretary of State gave a mixed reaction to my recommendations.

7.26 As to 7.23(a) above, she declined to apply a **suspicion threshold** to any of the Schedule 7 powers, noting that comments of the Supreme Court which might have appeared supportive of that recommendation were *obiter dicta*, in the sense that they were not directed to an issue that required decision on the facts before the Supreme Court.<sup>181</sup>

7.27 As to 7.23(b) above (**journalistic material**), she drew attention to a change made to the Schedule 7 Code of Practice in response to an observation of the Court of Appeal in the *Miranda* case. The Court had noted that while there was

“no absolute rule that judicial scrutiny was required in cases involving state interference with journalistic freedom, the natural and obvious adequate safeguard against the unlawful exercise of the Schedule 7 powers in such a case was prior judicial or other independent and impartial oversight, or immediate post factum oversight in urgent cases”.<sup>182</sup>

But the chosen remedy was not to introduce a system of judicial oversight (on a retrospective basis where time did not permit otherwise) but to specify that examining

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<sup>178</sup> As to this practice, see 7.11 above and *The Terrorism Acts in 2012*, July 2013, 10.65-10.80.

<sup>179</sup> *The Terrorism Acts in 2013*, July 2014, 7.28-7.34.

<sup>180</sup> *Ibid.*, 7.31.

<sup>181</sup> Those comments were identified and discussed in *The Terrorism Acts in 2014* (September 2015), 6.35(a). I remarked there that the comments were *obiter* and that they might require elucidation.

<sup>182</sup> *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA 6; [2016] 1 WLR 1505, headnote at 1506F-G.

officers must never use Schedule 7 to examine or copy material they reasonably believe is journalistic material as defined in PACE 1984 s13.<sup>183</sup> The Government chose therefore not to avail itself of the middle way offered by the Court of Appeal. Unpublished Home Office guidance of 2016 on reviewing and retention of journalistic material under Schedule 7 however emphasises that examining officers who wish to examine, copy or retain journalistic material have a number of other potential options.<sup>184</sup>

7.28 As to 7.23(c) above (**safeguards on electronic data**), the Home Secretary responded that “*the Home Office is working with the police to review whether the Digital Downloads at Ports policy for Schedule 7 currently provides sufficient guidance on this*”. I have followed this up with the police, who tell me that they have conducted initial analysis of the utility (or otherwise) of holding download data for given periods of time. Once further work has been done on the value of the intelligence obtained, the findings will be submitted to the Home Office.

7.29 This is an issue which future Independent Reviewers are likely to wish to keep under careful review. The operational utility (or otherwise) of the data is of course one part of the equation. But, in addition:

(a) Any policy must fully comply with the applicable legal constraints.<sup>185</sup>

(b) There must be effective guarantees of the proper implementation of whatever guidelines are applied.<sup>186</sup>

7.30 As to 7.23(d) above (**bar on admissibility of admissions made during Schedule 7 examinations**), the Home Secretary stated in relation to the strong recommendations of the Divisional Court and of the Supreme Court:

“I agree that such material should be inadmissible and will consider whether it is necessary to legislate to put this beyond doubt.”

7.31 I suggest that legislation would indeed be advisable:

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<sup>183</sup> In essence, material acquired or created for the purposes of journalism.

<sup>184</sup> These include applying to a magistrate or sheriff for a warrant under TA 2000 Schedule 5 para 1 or, in urgent cases, obtaining authority to examine and seize relevant material from a senior police officer under para 15. See also PACE 1984 Schedule 1, Data Protection 1998 s55 and the arrest power under TA 2000 s58.

<sup>185</sup> As well as *Beghal* itself, relevant at least by analogy may be the DNA retention case *S and Marper v UK* [2008] ECHR 1581, which prompted the Protection of Freedoms Act 2012, and the cases referred to in *The Terrorism Acts in 2013*, July 2014, fnn 153 and 161. In the words of Ben Emmerson QC, UN Special Rapporteur, “*the collection of data at borders, in particular biometric data, must be accurate and up-to-date, proportionate to a legitimate aim, obtained lawfully, stored for a limited time and disposed of safely and securely. Border authorities must be trained properly on the risks, limitations and human rights impact of the technologies used.*” (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/71/384, 13 September 2016, para 18, referencing the Office of the UN High Commissioner for Human Rights).

<sup>186</sup> As to which, a cautionary tale was told by the Commissioner for the Retention and Use of Biometric Material in his *Further report by the Biometrics Commissioner on issues raised in his 2015 report*, May 2016: see 7.58-7.59 below.

- (a) because the Supreme Court has said so, with the consequence that the chances of such evidence ever being admitted are practically zero; but also
- (b) because if the bar is enacted (rather than having to be inferred from comments of Supreme Court or of the Home Secretary, neither of whom decides on the admissibility of evidence in a criminal trial), officers will be in a position to give an assurance to those being examined under Schedule 7 that whilst they are obliged to answer questions, their answers may not be used against them in criminal proceedings.<sup>187</sup> They could indeed be required by the Code of Practice to do so. I have spoken to officers who consider that in cases where the element of compulsion is questioned, this could be a useful way of defusing the situation.

### Screening questions

- 7.32 As I have previously remarked, for every person subject to a Schedule 7 examination there are others (perhaps, at a rough estimate, 10 to 20 others) who are asked “*screening questions*” with a view to determining whether a Schedule 7 examination is necessary. Screening questions are referred to in the Schedule 7 Code of Practice (para 20), but there is no specific statutory power to ask them, and answers cannot be compelled. They can range in practice from one or two questions to sequences for which persons being questioned may be asked to step away (or drive away) from their route through the port. Screening questions, formerly known as “*short stops*”, can last up to a few minutes. The police do not keep records of the persons to whom screening questions have been asked.
- 7.33 It is plainly sensible that police should have screening questions available to them as an informal means to help them decide when they want to question somebody at greater length. Were details of every screening session required to be entered on a form, the process would lose its informality and become cumbersome as well as potentially more worrying to travellers. But care is required to get screening questions right. In particular:
- (a) It would be no more appropriate to select for screening questions on the basis solely of ***race, ethnic background and/or religion*** than it would to select for examination on that basis (see 7.21 above).
  - (b) Screening questions should not be allowed to go on for longer than ***a few minutes***, or to turn into a kind of unregulated Schedule 7 examination.
  - (c) ***Consistent principles*** should be applied to mark the stage at which screening questions must stop and a Schedule 7 examination (if required) should start.
- 7.34 Thought has been given to some of these questions by police, culminating in the very recent issue of NPCC advice on some aspects of the law concerning screening questions. That guidance accepts the principle that if an individual is delayed following

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<sup>187</sup> As I said in written evidence to the HASC: *The Terrorism Acts in 2013*, July 2014, Annex 2 para 44.

the asking of basic screening questions with a view to enquiries being made (e.g. checking their story, conducting database checks), there is a potential interference with their Article 8 rights. In those circumstances, a Schedule 7 examination should be commenced so as to ensure that the interference is capable of justification in law.

- 7.35 The advice, though helpful, does not deal comprehensively with all the issues that can arise.<sup>188</sup> Senior police officers at ports have expressed to me the view that if these issues were dealt with in the Code of Practice, and if screening questions were given statutory basis in Schedule 7 itself, “*we would all know where we stand*”. I agree.
- 7.36 The screening process also deserves attention because its relatively frequent use may go some way to explaining the discrepancy between the very low incidence of Schedule 7 examinations (7.9 above) and the perception of some Muslims that they are “*stopped*” on a routine basis when they travel abroad. There are cases (not limited to persons of interest to the police or security services) in which that perception seems to be justified. I was recently told by a Government lawyer who has a Muslim name (and high-level security clearance) that he has been stopped by police on each of the five occasions that he has left the country in the past two years and on the majority of occasions that he has re-entered it, generally through the main London airports of Heathrow and Gatwick.<sup>189</sup> On each occasion, screening questions were asked but no full examination ensued.
- 7.37 This account also raises concerns over the effectiveness with which “*nil returns*” are fed into the system to discourage repeat stops, a topic which I have addressed in earlier reports by reference to those who are subject to examinations.<sup>190</sup> Since records are not made of screening questions, there would appear to be no fool-proof mechanism by which this can be achieved when a person has been asked screening questions but not examined. I return to the issue of screening questions at 10.14 below.

### **New ports policing hub model**

- 7.38 I heard a good deal from ports officers in Kent about the DRR (Demand Risk and Resource) review recommendations for counter-terrorism ports policing in England and Wales. These were perceived as cost-saving measures which, by concentrating activities in hub ports, risked having the effect of reducing the coverage of General Maritime (GM) and General Aviation (GA) in small ports and airports and in remote beaches and landing places on the south coast. It was feared that coverage of beaches and marinas would be reduced, and that “*no evidence*” would be wrongly construed as “*no problem*”.

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<sup>188</sup> For example, (1) whether it is permissible to detain the occupants of a coach, and if so for how long, pending screening questions being asked to each of them (a currently rare scenario, but one that cropped up from time to time when large aid convoys were travelling to Syria); (2) whether it is permissible to check databases as screening questions are being asked, without invoking Schedule 7; (3) the relationship between screening questions and carding, provided for in para 16 of Schedule 7 and still practised in some Scottish ports.

<sup>189</sup> He also commented that he was invariably stopped, and for longer, when travelling to the US.

<sup>190</sup> See e.g. *The Terrorism Acts in 2011*, June 2012, 9.70(b).

7.39 When I put these concerns to SO15, they responded with the following statement:

“The development of the new CT Ports policing fixed and flexible hub model will include an efficient and effective national to local tasking process to enable resource to flex out to meet demand, based on threat, risk, and harm. National Ports Services will work closely with partner agencies at the border to understand threat and priorities and provide support for the frontline. This will enable the CT ports network to build on a national intelligence-led approach and respond accordingly.”

7.40 It is not for me to evaluate the wisdom of (or the necessity for) DRR, or to predict whether its drawbacks will outweigh its advantages. But my successor may at some stage choose to look at coverage of smaller south and east coast ports, marinas and landing places. It is conceivable that they might be an option for returning foreign fighters or other terrorists, as they appear to be for the migrants who are sometimes reported to be using them, or seeking to use them, in order to get into the country.<sup>191</sup> The extent of this risk, and the potential of Schedule 7 to help mitigate it (in conjunction with the activities of others, including Border Force), would bear further investigation.

### Improving access to advance information

7.41 On my visits in 2015/16 to the seaports of Kent and to Cairnryan and Loch Ryan in the south-west of Scotland, the common and strongly-expressed refrain from ports officers on the ground was that they could do their jobs more effectively if they had better advance information about passengers arriving (and departing) by sea. In the absence of such information, it is impossible to target stops as precisely as it is for example at airports, where advance passenger information is widely available.

7.42 At the port of Dover, for example, I was told that:

(a) Outbound ferry manifests are not available in advance, though coach companies may be persuaded to provide passenger lists in advance, on the basis that this may help ensure swifter transit through the port.

(b) Inbound ferry manifests may be provided only shortly before ferries dock at Dover, and their quality varies between carriers. Some give details of the vehicle and lead passenger only, and “*mis-manifesting*” is described as “*rife*”.

The absence of detailed passenger information, supplied hours in advance, is to be contrasted with the generally good advance information available at airports. Deprived of the knowledge that could allow for the refined exercise of rules-based targeting,<sup>192</sup> the task of police in deciding which cars to stop is a difficult one, and is likely to result in more

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<sup>191</sup> See, e.g., “Migrants rescued from sandbank off Kent coast”, BBC website 25 August 2016; “Illegal immigrants’ on run after sailing into sleepy Suffolk town”, The Telegraph, 11 September 2016.

<sup>192</sup> Rules-based targeting involves the “*washing*” of carrier data against intelligence-led indicators (or rules), so as to flag those passengers most closely matching the chosen rules. See, further, *The Terrorism Acts in 2013*, July 2014, fn 397.

stops than would otherwise be the case.<sup>193</sup> Their position is not made easier by the fact that inbound Schedule 7 controls are exercised at Dover, whereas immigration controls are exercised at Calais: police with Schedule 7 powers are therefore stationed not with immigration but with Customs officials, who have occasion to speak to a smaller proportion of passengers.

7.43 Similar concerns were expressed to me by ports officers at the Scottish ports of Loch Ryan and Cairnryan. The routes from Belfast and Larne across the Irish Sea are intra-UK routes, with the result that immigration controls are once again absent from the Scottish ports. Passenger manifests exist, but are incomplete and unreliable.

7.44 On one view, links between Scotland and Northern Ireland are no different in nature to other intra-UK routes, and the risk must be viewed in that context. No one suggests that Schedule 7 powers be extended to railway stations used for journeys within Great Britain (or Northern Ireland). On the other hand:

(a) Travel routes between Northern Ireland and Great Britain are already treated differently in law from those within Great Britain. Schedule 7 powers extend not just to those entering or leaving the United Kingdom, but to those entering or leaving "*Great Britain or Northern Ireland*".<sup>194</sup>

(b) The threat of terrorists crossing from Northern Ireland to Scotland is a real and substantiated one. The Canary Wharf truck bomb of 1996, manufactured by the IRA in South Armagh, killed two people, injured more than 100 and caused £150 million pounds worth of damage. It was transported from Larne to Stranraer on a Stena Lines ferry, then driven to London.

(c) The special importance of the Irish Sea routes, including those between Northern Ireland and Scotland, is accentuated by the fact that the land border between the Republic of Ireland and Northern Ireland is in most respects invisible.<sup>195</sup> This requires great trust to be placed on the Common Travel Area arrangements, since a terrorist who has managed to gain entry to the Republic of Ireland (or who comes from the Republic of Ireland) can normally travel to Northern Ireland without passing a border check.

7.45 There is legislation in place for the collection of passenger data, notably Immigration Act 1971 s2 (for immigration purposes) and the Immigration and Asylum Act 2006 (for policing purposes, including safeguarding national security). Both those Acts were amended by CTSA 2015, so as to enable operators to be required to send information

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<sup>193</sup> *The Terrorism Acts in 2011*, June 2012, fn 303.

<sup>194</sup> TA 2000 Schedule 7 paras 2(2)(b), 2(3).

<sup>195</sup> Though Schedule 7 powers are exercisable in Northern Ireland within a mile of the land border, and at the railway stations closest to the border: TA 2000 Schedule 7, paras 2(2), 3 and 4.

in a way that Government requires and that enables two-way communication via an interactive system.

- 7.46 It is however evident from my conversations with officers at affected ports that their ability to defend the country from terrorists (and to identify possible outbound terrorists) is impaired by a lack of the timely and comprehensive passenger manifests that would assist them in determining which passengers should be stopped and questioned.<sup>196</sup>
- 7.47 I understand from conversations at the Home Office and with police that there are different ways of addressing this issue.<sup>197</sup> The Home Office suggests that there are advantages to a consensual approach with operators, rather than the exercise of compulsion. It is also likely that Brexit will have an influence on what is considered feasible, both operationally and politically.
- 7.48 Against that background, I can only observe that there is widespread dissatisfaction with the quality of manifests on the part of police who are seeking to protect the population for terrorism at both Channel and Irish Sea ports. I share their view that better quality information, provided reliably and in advance, would substantially improve their ability to target Schedule 7 examinations effectively on these routes. I revert to this subject at 10.15 below.

#### **Requests to use Schedule 7 for reasons other than counter-terrorism**

- 7.49 I have alluded in past years to reports of police being asked to use Schedule 7 powers against people who might have been thought to be involved in other activities damaging to national security, notably espionage and nuclear proliferation. That practice is legally problematic, because of the uncontroversial principle that use of Schedule 7 will only be lawful if its purpose is to determine whether the subject appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism.<sup>198</sup>
- 7.50 The issue was highlighted by David Miranda's case. The initial request from MI5 for the use of Schedule 7 powers described Miranda as "*likely to be involved in espionage activity*".<sup>199</sup> That request was correctly rejected by the police, as it did not give sufficient assurance that there was a lawful (i.e. terrorism-related) basis for the use of Schedule 7.

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<sup>196</sup> Reliable manifests are desirable for other reasons too. Some 133 lives were lost in January 1953 when the ferry Princess Victoria sank in a storm between Stranraer and Larne. On my trip to Scotland in April 2016 I observed a memorial in Agnew Park, Stranraer, erected for the 50<sup>th</sup> anniversary of the disaster, which records that "*No passenger manifest was kept and the exact number of those who lost their lives may never be known.*"

<sup>197</sup> For example, it was put to me by police that there would be operational advantages in allowing Schedule 7 powers to be used at Paris and Lille, where UK police officers currently observe interactions between passengers and UK Border Force but have no power to conduct Schedule 7 examinations or make arrests. It was also suggested to me that there may be an opportunity to extend powers at Coquelles, though it was pointed out that "*French privacy laws hinder the downloading of mobile devices*".

<sup>198</sup> *The Terrorism Acts in 2013*, July 2014, 4.14, citing *Miranda v SSHD and MPC* [2014] EWHC 255 (Admin), para 41.

<sup>199</sup> *Ibid.*, 4.12.

- 7.51 In the end the courts defused, or postponed, the problem by ruling that the definition of terrorism is sufficiently broad to cover Mr Miranda's case.<sup>200</sup> But even that wide definition of terrorism will not extend to every case in which there are national security concerns, falling short of reasonable suspicion, to stop and examine a person who may be involved in espionage or nuclear proliferation.
- 7.52 I took the opportunity to ask police in late 2015 what proportion of the intelligence reports filed after Schedule 7 stops related to concerns other than terrorism. They supplied me in February 2016 with figures for each year from 2009/10 to 2014/15. Surprisingly large proportions of those intelligence reports related to counter-espionage (between 5% and 8%) and counter-proliferation (between 8% and 17%). Some of those reports may of course have been the result of examinations which were genuinely conducted for a terrorism-related purpose. But the likelihood must be acknowledged that some were not.
- 7.53 I have no difficulty with the idea that a Schedule 7-type power should be available for use against possible spies and nuclear proliferators.<sup>201</sup> It would however be unsatisfactory and unlawful if a power limited to terrorism were being used for other purposes. I return to this subject at 10.16 below.

#### **Period of detention and review**

- 7.54 The current six-hour limit on the period for which a person may be examined and detained was reduced from nine hours by ASBCPA 2014, and reviews by a senior officer were instituted after one hour of detention and at two-hour intervals thereafter.<sup>202</sup>
- 7.55 Given the extensive powers available to police under Schedule 7, and the ability of police to arrest at any time in a case of reasonable suspicion of involvement in terrorism, it was entirely understandable that the Government, and Parliament, should have chosen to limit the detention period in that way. The police have not suggested to me otherwise.
- 7.56 My attention has however been drawn to operational problems that are said to flow from these new requirements. As the police put it to me in September 2016:

“The time limit causes problems mainly where there are examinations involving a number of examinees or where there are complications with the examination (medical issues, difficulties in obtaining legal advice, interpreters etc.)

There are also difficulties where multiple persons are examined simultaneously; meaning that all of them have to have their detention reviewed one hour after detention begins. This is particularly so at more remote locations, such as sea ports,

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<sup>200</sup> 4.4 above.

<sup>201</sup> *The Terrorism Acts in 2013*, July 2014, 4.15.

<sup>202</sup> Those changes were not specifically recommended by me, though I did suggest in my first annual report that a consultation and review of Schedule 7 should cover, among other questions, whether the maximum period of detention should be reduced from 9 hours and whether the reasoned authorisation of a senior officer should be required for all detentions, or all examinations beyond a particular time: *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 9.33(j)(m). That consultation was launched in 2012 and bore fruit in ASBCPA 2014.



where there may not be more than one review officer available. The ability to delay the review, as with PACE reviews, would be useful in these circumstances.”

7.57 I have not sought to quantify these difficulties (though past requests for specific examples have produced only meagre returns), and do not suggest that the current framework is inadequate or needs to be amended. I do however record these comments from the police so that my successor can have them in mind and investigate further as appropriate.

### **Retention of biometric material**

7.58 In March 2016 a report by the then Biometrics Commissioner, Alastair MacGregor QC, drew attention to serious and widespread irregularities concerning the retention of biometric material (fingerprints and DNA samples) obtained under Schedule 7. As a consequence of his persistent questioning, it had become apparent by December 2015 that:

(a) there had been procedural errors and handling delays in relation to material taken on or after 31 October 2013 which had led, or would lead, to the loss of a significant number of biometric records that probably could and should have been retained on grounds of national security; and that

(b) other such material had been retained on the counter-terrorism databases beyond its lawful retention date.<sup>203</sup>

7.59 Remedial measures were put in place and the Commissioner was able to report in May 2016 that proper steps had been taken to remedy the deletion and expiry problems, to minimise the risk of their recurrence and to mitigate their adverse consequences. He added:

“I shall continue to keep these matters under close and active review and have little doubt that my successor as Biometrics Commissioner will do likewise.”<sup>204</sup>

Sadly, Alastair MacGregor died in September 2016, having already been succeeded in the office of Commissioner.<sup>205</sup> He had drawn attention to matters of potential concern to national security, privacy, administrative efficiency and compliance with the law. His work stands in the highest tradition of fearless and detailed independent review.

## **Complaints**

### ***System and numbers***

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<sup>203</sup> Commissioner for the Retention and Use of Biometric Material, Annual Report, March 2015.

<sup>204</sup> *Ibid.*, Further Report by the Biometrics Commissioner on Issues Raised in his 2015 Annual Report, May 2016.

<sup>205</sup> The current Biometrics Commissioner is Professor Paul Wiles.

7.60 As reported last year, the Independent Police Complaints Commission [IPCC] no longer asks forces to refer to it all complaints and conduct matters arising from the use of Schedule 7.<sup>206</sup> But:

(a) Police forces still have to refer any complaints that allege a discriminatory use of counter-terrorism powers.<sup>207</sup>

(b) The IPCC will review the position if the evidence suggests that its closer involvement would be helpful.

(c) Anyone unsatisfied with the outcome of a complaint may appeal to the IPCC.

Anyone examined under Schedule 7 is, in addition, given a leaflet at the start of the examination that explains how a complaint can be made.

7.61 Now that the IPCC has ceased to collate complaints centrally, no central record is kept of their details and of disposals. Enquiries of all forces have produced a total of 43 complaints recorded during 2015/16, as against 20 in the previous year. I have not reviewed those complaints individually, but the main themes are said to be people unhappy at being singled out for questioning and passengers missing flights. Police are unable to point to any complaint which eventuated in proceedings for misconduct. Police in Kent told me that the increasing use of body-worn cameras is proving helpful in enabling complaints to be swiftly resolved.

7.62 The advantage of a complaint is that it enables both sides to be heard and a balanced conclusion reached. For that reason, when people share unsatisfactory experiences of Schedule 7 with me, I encourage them to bring a formal complaint (and to copy me in for information, as a few people did in 2015/16). It is obviously vital that the process should be as simple and as credible as possible, and with my Special Advisers I am prepared to engage as necessary with police, the IPCC and others to see whether more can be done.

### ***Other avenues***

7.63 A person whose aim is to draw attention to the supposed iniquities of Schedule 7, may feel that there are more immediate and effective ways of doing so than filing a formal complaint. Ahmed Ali from Derby posted a 10-minute video on YouTube in early 2016, in which he complained of the humiliation of being asked to leave a plane where he was seated with his family, and claimed to have been stopped and questioned some 20 times over two years “*purely because I am Muslim and have a beard*”. By the time I saw the video (and contacted Mr Ali to discuss his experiences), it had been viewed hundreds of

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<sup>206</sup> *The Terrorism Acts in 2014*, September 2015, 6.14-6.16.

<sup>207</sup> Police (Complaints and Misconduct) Regulations 2012, Regulation 4(2)(a)(iv).

thousands of times. More videos, a sympathetic article in the Daily Mail<sup>208</sup> and an appearance on the BBC's Victoria Derbyshire show<sup>209</sup> followed.

7.64 Another visual account of Schedule 7 was made by the celebrated singer Aar Maanta, an exile from Somaliland whom I had the opportunity to meet (thanks to my Special Adviser Hashi Mohamed) at a Somali awards evening. The video of his hit song Deeqa features a reconstruction of Aar Maanta himself being questioned at an airport about his associations and habits by well-meaning but uncomprehending police officers.<sup>210</sup>

7.65 Though such accounts may be described as one-sided, they are unavoidable manifestations of modern media and social media culture. The ease with which these versions of reality can be put into the public domain sharpens the need for processes to be fair, and police accountable.

### ***Frequently asked questions***

7.66 The handful of people who contact me each year to express dissatisfaction about Schedule 7 stops often raise the same points. I took the opportunity in September 2016 to put three of those points to the police for their considered answers, which I reproduce here since they may be of general interest:

#### My question 1: "random" stops

*Why do police (if what I am told is true) persist in referring to Schedule 7 stops as "random", when patently they are not, and not intended to be? I can understand that on a human level officers would not wish to offend, but the cumulative effect is to build distrust in these "random stops that are not really random". Is there any guidance out there on (avoiding) use of this term?*

#### Police answer

"Without knowing the full circumstances it is not possible to say why officers used the term "*random stop*" (if indeed they did) It is possible to envisage a situation where an officer may stop many individuals to screen them on a random basis before then using their responses to inform a decision whether this should lead to an examination (based on the factors in the Code). If the officer is asked at this early point why the stop has been made, they may offer the response '*routine stop check*'.

Of course, once a decision is made to select the person for examination following the screening process this would be in line with the factors in the Code of Practice, and I would expect the officer to refer to this, if asked. I would not expect the officer to give exact reasons as this may expose intelligence or other tactics. A form of words outlining

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<sup>208</sup> "Muslim man due to fly on honeymoon with his pregnant wife is taken off plane and quizzed over terror 'because he has a beard'", Daily Mail, 10 February 2016.

<sup>209</sup> 26 August 2016, BBC2. I was another of the guests.

<sup>210</sup> I am indebted to James Fergusson, author of *The World's Most Dangerous Place: Inside the Outlaw State of Somalia* (2014), for the information that Aar Maanta has family links with Sayyid Mohammed Hassan, the so-called "*Mad Mullah*", who led a rebellion against the British in their northern Somali protectorate after being humiliated by a British customs official in 1895.

that Schedule 7 is a no suspicion power and that selection is based on factors relating to the threat of terrorism should form this response.

Examining Officers are not only accredited but also receive other training relating to their use of Schedule 7 powers. As a part of the training they are provided with inputs that should give them confidence to answer the “*Why have you stopped me?*” question but it seems that old habits die hard and that the message has not got through to all Ports Officers. Rest assured we will feed this back into our training team so that the course content can be reviewed in relation to this issue.”

#### My question 2: questions about religious observance

*The mosque question still seems to come up a lot, and often causes offence. Again, is there or should there be guidance to the effect that it should only be asked if there is some concrete reason for doing so?*<sup>211</sup>

#### Police answer

“Questioning is based on the circumstances of each stop, but it is fair to assume that questions will be asked about places, clubs, groups or organisations that the person may frequent. This will include places of worship. To make a determination in relation to CPI [commission, preparation or instigation] the officer would want to know who the person mixes with and his friends and associates.

Again this issue is addressed in a number of courses, especially when exploring what a “*relevant question*” is or may be. Also it is discussed within “*Cultural Awareness*” sessions because it can be quite a contentious question and officers should deal with the matter in a sensitive manner.”

#### My question 3: use of phone / email details

*What use might be made of the phone/email details taken from a traveller in respect of whom no further action is taken, and what can be said about progress on the rules for retention of data, particularly in the light of the judgment in Beghal?*

#### Police answer

“During an examination a record is made of pertinent information. This would include personal details and ancillary information such as telephone numbers and email addresses. Along with all other information gleaned, it will be used to make a determination of whether the person is involved in CPI. Information is retained in line with the Data Protection Act and the Management of Police Information guidelines.<sup>212</sup> We would not disclose to any examinee whether or not their individual data is being

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<sup>211</sup> Shortly before going to print, I was told by a partner in a highly reputable London law firm of a Schedule 7 examination at Heathrow Airport to which he had been called by a Muslim client. Though generally complimentary about police conduct of the interview, he was understandably surprised when his client was asked how many times in a day he prayed. I find it hard to imagine circumstances in which a question about prayer habits could be considered necessary or appropriate.

<sup>212</sup> The question of whether those guidelines are sufficient is referred to at 7.29(a) above.

retained or not, or processed in a particular way etc., as this may expose, by process of elimination, who was of interest and who wasn't."

- 7.67 The above answers will not satisfy everyone, but they reflect a genuine desire on the part of ports officers (however imperfectly realised on occasion) to do their job professionally, not to cause unnecessary offence and to learn from their own experience and that of others. Those characteristics go to the core of the distinctive UK tradition of "*policing by consent*"<sup>213</sup> – a tradition that has never been more necessary than it is today, and whose value is particularly evident when applying vital but sensitive powers such as those in TA 2000 Schedule 7.

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<sup>213</sup> This is a reference to the principle, attributed to Sir Robert Peel and contained in the General Instructions issued to new police officers since 1829, that the power of the police "*is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect*".

## 8. ARREST AND DETENTION

### Introduction

- 8.1 Whilst arrest and detention are in most circumstances governed by the Police and Criminal Evidence Act 1984 [**PACE**], there are a number of respects in which the rules applicable to terrorism suspects are different:
- a) A special **power of arrest** is provided for by TA 2000 s41, for use in relation to certain terrorist offences only. Unusually, the arresting officer need have no specific offence in mind: it is enough, by s40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism.
  - b) A maximum period of **pre-charge detention**, in excess of the 96 hours allowed under PACE, applies in relation to persons arrested under s41. Having fluctuated between 7 and 28 days over the currency of the Act, the maximum period (which is only rarely approached in practice) has stood at 14 days since January 2011.<sup>214</sup> Detention must be reviewed at 12-hour intervals during the first 48 hours; beyond that time, warrants for further detention must be obtained from a court. Police bail is not available.
  - c) The **treatment of detainees** is governed by special rules contained in Part I of TA 2000 Schedule 8 and (save in Scotland) by PACE Code H.
  - d) There are wider powers to take and retain **identification data and samples**.

### Arrests in 2015

- 8.2 In **Great Britain** there were 55 arrests in 2015 under TA s41, in line with the recent average.<sup>215</sup>
- 8.3 A more eye-catching figure, often quoted by Ministers, is for “**terrorism-related arrests**”. 280 of those were recorded in 2015, as compared to 289 in 2014 and an annual average of 222 since September 2001.<sup>216</sup>
- 8.4 As I have previously noted,<sup>217</sup> caution is required in relation to these figures. Only 109 of the 280 terrorism-related arrests in 2015 (39%) had resulted in charges by June 2016.<sup>218</sup>

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<sup>214</sup> The history is detailed in *The Terrorism Acts in 2011*, June 2012, 7.12-7.16. 12 days has been described by the ECtHR as “a relatively short period of time” and “the early stages of the deprivation of liberty” (*Magee and others v UK*, judgment of 12 May 2015, para 105), though the fact that no charges have at that stage been brought, and that detention is usually in a police cell rather than prison accommodation, makes close scrutiny of the conditions of detention essential: 8.28-8.37 below.

<sup>215</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, Table A.01

<sup>216</sup> *Ibid.* There were 3,157 “terrorism-related arrests” in Great Britain between 11 September 2001 and December 2015.

<sup>217</sup> *The Terrorism Acts in 2012*, July 2013, 8.3-8.7; *The Terrorism Acts in 2013*, July 2014, 8.3.

<sup>218</sup> *Operation of police powers under TA 2000 and subsequent legislation*, September 2016, Table A.03..

But 88% of those who had been charged by June 2016 following “*terrorism-related arrests*” in 2015 were charged with offences considered to be linked to terrorism.<sup>219</sup>

- 8.5 Continuing a recent trend, the great majority (80%) of “*terrorism-related arrests*” were under PACE rather than TA 2000 s41.<sup>220</sup> This contrasts with the period 2003-2007, in which over 90% of such arrests were under TA 2000. Some possible explanations were identified in last year’s report.<sup>221</sup>
- 8.6 In **Northern Ireland**, figures are compiled on the more straightforward basis of persons arrested under TA 2000 s41. There were 149 in 2015/16, well down on the previous year (227) and indeed below the average for the past 10 years (170).<sup>222</sup> Even so, almost three times as many people were subject to s41 arrest in Northern Ireland (which has just 3% of the UK population) as in the rest of the UK.

### Periods of detention in 2015

- 8.7 In **Great Britain**, of the 55 persons arrested in 2015 under TA 2000 s41:
- a) Just 25% were held in pre-charge detention for less than 48 hours (after which time, a warrant for further detention is required from the court). This compares to 31% in 2014, 40% in 2013 and a total of 59% between September 2001 and the end of 2015.
  - b) 93% were held for less than a week, in line with the average of 89% since September 2001.
  - c) Though just four people were held beyond a week, three of those were released only on the last day of the 14-day maximum period (as were eight people in 2014).<sup>223</sup>
- 8.8 Between July 2006 and January 2011, the maximum period of detention under TA 2000 stood at 28 days. In the case of the airline liquid bomb plot of 2006, all 28 days were used before charging decisions were reached. When the maximum period was reduced to 14 days in 2011, it was generally recognised that the time limit could come under pressure in particular circumstances, and to that end an emergency Bill was prepared and given pre-legislative scrutiny against the eventuality that a difficult investigation might require it to be urgently introduced.<sup>224</sup>
- 8.9 It has not been submitted to me that an extension from 14 days is currently required, and I recommend no such extension. I have however observed from my own visits in particular to Southwark police station in London that the pace of terrorism investigations

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<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.* March 2016, Table A.01.

<sup>221</sup> *The Terrorism Acts in 2014*, September 2015, 7.6.

<sup>222</sup> PSNI, *Police Recorded Security Situation Statistics*, 12 May 2016, Table 3.

<sup>223</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, Table A.02.

<sup>224</sup> For a detailed account, see *The Terrorism Acts in 2011*, June 2012, 7.12-7.16.

is extremely high, with officers and experts working around the clock and highly conscious of the time constraints. Challenges for police and prosecutors include:

- (a) the fact that public safety tends to require **early arrests**, before the plot is ripe;
- (b) the **complex** and geographically diffuse nature of some plots;
- (c) the quantities of **electronic material** that may need to be investigated; and
- (d) the **unavailability of police bail** for TA 2000 arrests.<sup>225</sup>

Any notion that suspects are simply left to cool their heels while police shuffle paper or relax could scarcely be further from the truth.

8.10 One could imagine circumstances – whether a particularly complex plot, or a surge in work caused by some catastrophic event – that could place the 14-day limit under irresistible pressure. It is to be hoped that no reversion to 28 days will be required (let alone the further extensions to 42 or even 90 days that were unsuccessfully promoted by previous Governments), but now as in 2011, the possibility of a modest extension should not be altogether ruled out.

8.11 In **Northern Ireland**, a breakdown for the 149 arrested in 2015/16 is not yet available, but of the 227 persons arrested under TA 2000 s41 in 2014/15:

- a) 92% were held in pre-charge detention for less than 48 hours, and 62% for less than a day.
- b) Nobody was held for longer than a week.<sup>226</sup>

8.12 As in previous years, therefore:

- a) the TA 2000 s41 arrest power was used with far greater frequency in Northern Ireland than in Great Britain; but
- b) detention beyond 48 hours, common in Great Britain, is rare in Northern Ireland.

### Numbers charged in 2015

8.13 In **Great Britain** 83 of people subject to terrorism-related arrest in 2015 were charged with terrorism-related offences in 2015. That figure does not convey the full charging picture (since some persons arrested previously may also have been charged in 2015),

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<sup>225</sup> On police bail, my own recommendations and those of others have not found favour: *The Terrorism Acts in 2011*, June 2012, 7.71-7.73 and 12.15; *The Terrorism Acts in 2013*, July 2014, 8.31-8.32 and 12.6(b). See further 8.52-8.55 and 10.21 below.

<sup>226</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2014/154*, October 2015, Table 6.



but still has value for comparative purposes. The equivalent figures for 2010 and 2011 were 20 and 36. An average of 57 were charged annually between 2001 and 2015.<sup>227</sup>

- 8.14 Of the 83 charged in 2015 after arrest in 2015, 45 were charged under the Terrorism Acts, 6 under TA 2000 Schedule 7 for failure to comply with border controls, and 32 under other legislation.<sup>228</sup>
- 8.15 The average charging rate for those subject to “*terrorism-related arrests*” between 2001 and 2015 was 39% (1,228 out of 3,157).<sup>229</sup> As of June 2016, 39% of those subject to terrorism-related arrests in 2015 had been charged.
- 8.16 In **Northern Ireland**, by contrast, only 32 (19%) of the persons arrested under TA 2000 in 2013/14, 35 (18%) of those arrested in 2014/15 and (as of May 2016) 18 (12%) of those arrested in 2015/16, had been charged. These are:
- a) the three lowest numbers charged for 10 years, and
  - b) the three lowest charge rates in the past 10 years.<sup>230</sup>

The very low charge rate in Northern Ireland is disappointing. I have previously and repeatedly emphasised the need for reasonable suspicion in relation to each person arrested under s41, and suggested that the low charge rate may be an indicator that the arrest power is overused in Northern Ireland.<sup>231</sup>

- 8.17 On this subject, the PSNI has carried out an internal review of 168 previous arrests, together with the 32 consequent charges, and concluded that the power was not overused. Specifically:
- (a) It reported that in all 168 cases, the arrests arose from “*terrorism investigations*”, with 74 arrests being made by the Terrorist Investigation Unit, 58 by the Major Investigation Team and 36 by District officers.
  - (b) Of the 32 people charged, 14 (8% of those arrested and 44% of those charged) were charged with a TACT offence. The remaining 18 (11% of those arrested and 56% of those charged) were charged under PACE. The PSNI was satisfied however that these charges were for “*terrorism-related*” offences such as murder, possession of firearms, making an explosion and the possession of explosives.
- 8.18 An independent review of those arrests has since been conducted at my request by Alyson Kilpatrick BL. I was particularly interested to know whether TA 2000 s41 was

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<sup>227</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, Table A.04. Some figures from previous years have been revised.

<sup>228</sup> *Ibid.*, Table A.03.

<sup>229</sup> *Ibid.* The Home Office has clarified for me that these figures relate to the total number of terrorism-related arrests and charges since 11 September 2001, not just those who were charged in the same year they were arrested.

<sup>230</sup> PSNI, *Security Situation Statistics*, 12 May 2016, Table 3.

<sup>231</sup> See, e.g., *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, July 2011, 7.43-7.47 and 12.5.

used when PACE was more appropriate, and whether the low charging rates indicated that the threshold of reasonable suspicion had not always been reached. Alyson Kilpatrick was afforded access to all relevant information to enable an assessment to be made of the grounds for the arrests, the decisions to charge or not to charge and the oversight of the arrests by counter terrorism supervisors. Subsequently, she interviewed a senior PSNI officer with responsibility for counter-terrorism investigations.

- 8.19 The conclusion of the review was that the arrests under consideration did result from terrorism-related investigations of suspected terrorism related offences, and that arresting officers anticipated charging under TA 2000. However, intelligence indicating a charge under TA 2000 was often not converted into evidence sufficient to charge.
- 8.20 The conversion of intelligence into evidence is a challenge in many terrorism-related investigations but appears to be particularly difficult in Northern Ireland. Factors are sometimes said to include suspects who can operate locally, leaving little online trace; the need to protect sources of intelligence; and fear of retaliation on the part of witnesses (a feature of small tight-knit communities). Those factors may also explain some failures to proceed post charge (as to which, see 9.17 below).
- 8.21 I understand that the Northern Ireland Policing Board is soon to receive a confidential and detailed report from the PSNI, further to a recommendation in its Human Rights Annual Report 2015, which will explore the issues in depth. I anticipate receiving a copy of that briefing.

### **Gender, age, ethnicity and nationality**

- 8.22 The Home Office has published detailed figures for the gender, age, ethnicity and nationality of those subject to terrorism-related arrest and charge and conviction in 2013.<sup>232</sup> No such figures are published in Northern Ireland.
- 8.23 **Women** comprised 16% of those arrested for terrorism-related offences in 2015, 14% of those charged and 16% of those convicted. These are exceptionally high figures.<sup>233</sup>
- 8.24 It is often said that there are more **juvenile** suspects nowadays, but the figures fluctuate. Of those arrested for terrorism-related offences in 2015, 14% were aged under 20: a figure down on 2015 (19%) and not much greater than the average since September 2001 (12%).<sup>234</sup>
- 8.25 As to **ethnic appearance**, the figures (based on officer-defined data) are as follows for Great Britain:<sup>235</sup>

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<sup>232</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2016, Tables A.09-A.12c.

<sup>233</sup> *Ibid.*, Table A.09. The equivalent figures for the period September 2001 to December 2015 were 9%, 8% and 7%.

<sup>234</sup> *Ibid.*, Table A.10.

<sup>235</sup> *Ibid.*, Table A.11.

<b>2015</b>	<b>White</b>	<b>Black</b>	<b>Asian</b>	<b>Other</b>	<b>N/K</b>
<b>% terrorism-related arrests</b>	25%	14%	53%	8%	0%
<b>% terrorism-related charges</b>	24%	20%	53%	2%	0%
<b>% terrorism-related convictions</b>	21%	18%	55%	5%	0%

They correspond reasonably closely to the following figures for the period 2005-2012, also based on police perceptions:<sup>236</sup>

<b>2005-2012</b>	<b>White</b>	<b>Black</b>	<b>Asian</b>	<b>Other</b>	<b>N/K</b>
<b>% terrorism-related arrests</b>	25%	14%	44%	16%	2%
<b>% terrorism-related charges</b>	24%	17%	46%	11%	2%
<b>% terrorism-related convictions</b>	26%	16%	47%	8%	3%

8.26 As to (self-defined) *nationality*, British citizens comprised 78% of those arrested for terrorism-related offences, 81% of those charged with and 82% of those convicted of such offences in 2015.<sup>237</sup> These are well in excess of the equivalent figures for the period September 2001 - December 2015, which are 55%, 68% and 67%.

8.27 Of the 542 persons convicted of terrorism-related offences in Great Britain between September 2001 and December 2015, the largest numbers of foreign nationals have come from Algeria (27), Pakistan (15), Albania (14) and Somalia (12).

### Conditions of detention

8.28 I have previously explained the arrangements by which I exercise the Independent Reviewer's power to visit detention centres (colloquially known as "*TACT suites*") in order to verify whether the requirements of TA 2000 Schedule 8 and of PACE Code H have been complied with in relation to persons detained under TA 2000 s41 under a warrant for further detention (i.e. for more than 48 hours).<sup>238</sup>

8.29 In exercising my functions in this regard, I relied heavily during the period under review on the reports completed by Independent Custody Visitors, which are sent to me usually on a same-day basis or on the day following an inspection. I sometimes make contact with custody visitors to discuss problems identified in their reports. If they do not set my mind at rest, I have the option of visiting myself in order to observe the problem. I hope that in future it will be possible for my Special Advisers to take on some of this work.

<sup>236</sup> Figures provided to me in personal communication from the Home Office. The 2013 percentages are in *The Terrorism Acts in 2013*, July 2014, 8.15.

<sup>237</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, March 2015, Tables A.12a-A.12c.

<sup>238</sup> *The Terrorism Acts in 2012*, July 2013, 8.24-8.34; *The Terrorism Acts in 2014*, September 2015, 7.22-7.36.

- 8.30 I applaud the Independent Custody Visitors for the tireless and often thankless work that they perform as a public service and on a voluntary basis. Their reports are a great help (and almost invariably a reassurance) to me. The ICVs are an important guarantor of confidence in police detention, including in terrorism cases.
- 8.31 My application to join the National Preventive Mechanism **[NPM]**, pending since 2014, was unresolved as this report went to press.<sup>239</sup> During the period under review I was invited to attend an NPM meeting in Belfast on an observer basis, and did so. I have also held further outline discussions about the possibility, referred to in my last annual report, of future collaborative work with NPM members, focussing in depth on TACT suites and aimed at producing a set of common guidelines or recommendations.<sup>240</sup> Competing priorities mean that it has not been possible as yet to make definite plans for what I believe could be a very useful exercise.
- 8.32 Also dealt with at some length in my last annual report was the crucial importance of strong and independent forensic medical examiners **[FMEs]**, and of not allowing the process of NHS Commissioning to dilute the considerable expertise that is brought to that task in the terrorism detention centres of London.<sup>241</sup>
- 8.33 On this, the Home Secretary agreed with me that “*the FME role is vitally important*” and that “*it is important to maintain the existing high standard of FME provision nationally*”. She added, in her response to my report (Cm 9357, November 2016):
- “Procurement decisions in this area are a matter for the police, supported by NHS England Commissioners, and must be taken in line with service specifications set by the College of Policing and NHS England,. A detailed specification for the provision of healthcare to individuals detained under terrorism legislation is provided by an appendix to the National Service Specification for Police Custodial Healthcare. This was recently developed by the police and NHS England working in partnership, and in consultation with a national clinical expert panel including representation from the Faculty of Forensic and Legal Medicine, British Medical Association and experienced Terrorism FMEs from around the country. It sets out the enhanced skills, qualifications and experience required by Forensic Practitioners working in this challenging environment, as well as giving a detailed specification for the service they must provide and setting robust standards for how they should do so.”
- 8.34 I have renewed contact in 2016 with the Faculty of Forensic and Legal Medicine and with the Metropolitan Police on this subject, and will remain responsive to their concerns and those of others with first-hand knowledge of terrorist detention.

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<sup>239</sup> The NPM was established in 2009 “*to strengthen the protection of people in detention through independent monitoring*”: <http://www.nationalpreventivemechanism.org.uk/>. It currently comprises 20 statutory bodies.

<sup>240</sup> Some of the reasons why this could be useful are explained in *The Terrorism Acts in 2014*, September 2015, 7.25-7.26.

<sup>241</sup> *Ibid.*, 7.28-7.34.

## Right not to be held incommunicado and to access a solicitor

8.35 In Northern Ireland, which is the only place where figures are kept:

(a) 51 of the 53 persons who requested to have someone informed of their detention under s41, and

(b) every one of the 220 persons who requested access to a solicitor

were allowed their request immediately in 2014/15.<sup>242</sup>

8.36 These figures are typical, and commendable. Between January 2001 and March 2015, only 21 people have been refused the former right, and five the second (none of them since 2008).

8.37 I look forward to the equivalent figures being provided for Great Britain, at least where access to a solicitor is concerned. I was told in 2014 that work on this was in progress.<sup>243</sup>

## Litigation

8.38 The Government was largely successful in 2015/16 in four long-running cases before the ECtHR.<sup>244</sup>

8.39 The first case was the Fourth Section judgment of 20 October 2015 in ***Sher v United Kingdom*** (52101/11), a case arising out of Operation Pathway<sup>245</sup> in which various aspects of TA 2000 arrest and detention were challenged.<sup>246</sup> Complaints that the ECHR was violated by the withholding of certain evidence from the applicants when considering the grant of warrants for further detention, and the holding of one such hearing for a short period in closed session, were rejected. The ECtHR also rejected complaints concerning the search of suspects' homes during their detention.

8.40 There were held to be sufficient safeguards against the risk of arbitrariness both in respect of the proceedings for warrants of further detention, in the form of a legal framework setting out clear and detailed procedural rules, and in respect of the search warrants, which had been issued by a judge, without the applicants suggesting that there had been no reasonable grounds for doing so.

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<sup>242</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2014/15*, Tables 7 and 8. see TA 2000 Schedule 8, paras 6 and 7.

<sup>243</sup> *The Terrorism Acts in 2013*, July 2014, 1.9; *The Terrorism Acts in 2012*, July 2013, 1.30(c).

<sup>244</sup> See also *McAuley's Application* [2014] NIQB 31, in which the applicant argued unsuccessfully that he was wrongly excluded from part of a hearing for a warrant for further detention under TA 2000 Schedule 8 para 33(3).

<sup>245</sup> On which my predecessor Lord Carlile QC wrote a detailed report, accessible via my website.

<sup>246</sup> See *The Terrorism Acts in 2013*, July 2014, 8.26-8.29.

- 8.41 On 14 March 2016 a panel of the Grand Chamber of the ECtHR declined a request to transfer the case to the Grand Chamber, with the result that the judgment of the Fourth Section became final on that date.
- 8.42 The second case was **RE v United Kingdom** (62498/11), a decision of the Fourth Section of 27 October 2015 which became final on 27 January 2016.<sup>247</sup> The applicant had been arrested and detained in Northern Ireland on three occasions in connection with the murder of a police officer. The Court found no fault with the arrangements currently in place for the secure handling, storage and destruction of retained material in the context of legal consultations. But it found a historic violation of Article 8 ECHR because necessary guidelines had not been brought into force until the month after the applicant's detention in May 2010. The applicant was awarded 1500 Euros by way of compensation.
- 8.43 An equivalent complaint about the surveillance of communications between vulnerable detainee and appropriate adult was unsuccessful, in part because legal professional privilege did not attach to such communications.
- 8.44 The third case was the Grand Chamber decision in **Ibrahim and others v United Kingdom** (50541/08, 50571/08, 50573/08 and 40351/09) a case brought by three of the failed 21/7 London bombers and a fourth man who had been convicted of assisting one of them. As I recorded last year, the Fourth Section of the Court found by a majority of 6-1 that the "safety interviews" to which the men had been exposed without the presence of lawyers, in the interests of discovering whether further attacks were imminent, had not breached their rights to a fair trial.<sup>248</sup>
- 8.45 The case was then referred to the Grand Chamber, which gave judgment on 13 September 2016. The ruling of the Fourth Section was upheld in relation to three of the men. It was overturned in relation to the fourth, who should have been cautioned at the point when he started to incriminate itself. It did not however follow that he was wrongly convicted, and no compensation was awarded.
- 8.46 Though the case is in substance a victory for the Government, consideration should be given to amending PACE Code H to as ensure that it properly encapsulates the limits on permissible safety interviews as set out in *Ibrahim*.<sup>249</sup>
- 8.47 The fourth case was **McEvitt and Campbell v United Kingdom** (61474/12 and 62780/12). The applicants were alleged perpetrators of the Omagh bombing of 1998, which killed 29 people. Though never prosecuted, they were sued by families who suffered as a result of the bomb, and ordered to pay damages. The ECtHR dismissed as manifestly ill-founded their claims that the judge should have applied a criminal burden

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<sup>247</sup> See *The Terrorism Acts in 2012*, July 2013, 8.54-8.55.

<sup>248</sup> Judgment of 16 December 2014. I reported on another case in which safety interviews were used in my first report as Independent Reviewer, *Operation Gird: report following review*, May 2011.

<sup>249</sup> See further 8.51(c) below.

of proof, and that it had been unfair to admit the evidence of an FBI agent who had not been made available in court for questioning.

- 8.48 I make some more general comments about human rights case law at 11.11(b) below.
- 8.49 I have been told that judicial review proceedings were brought in 2016 by Sean McVeigh, challenging the decisions of the PSNI and the courts in Northern Ireland to seek, issue and execute a search warrant under TA 2000 Schedule 5 as part of a murder investigation, and to retain for a lengthy period a number of items seized. The ECHR compatibility of Schedule 5 is challenged on the basis that there are inadequate safeguards against abuse.

## Recommendations

- 8.50 I noted last year that one effect of drawn-out Strasbourg litigation, particularly where bail and warrants for further detention are concerned, was to place in the deep freeze the various recommendations that I made on this theme in my reports of 2011 and 2012.<sup>250</sup>
- 8.51 The relevant cases have now been decided, largely in favour of the Government, and the legal fog has cleared. In the circumstances, my outstanding recommendations in relation to Schedule 8 are the following:
- (a) The **amendment of TA 2000 Schedule 8 para 32** should be considered, with a view to providing that a warrant for further detention should only be issued if the court is satisfied that the person to whom the application relates was lawfully arrested; that the person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest; that there is a real prospect of evidence emerging during the period for which further detention is sought; and that the continued detention is proportionate in all the circumstances.<sup>251</sup>
  - (b) The law should be changed so as to allow the **detention clock to be suspended** in the case of detainees who are admitted to hospital.<sup>252</sup> The rules should reflect PACE Code C para 14 by stating that a person in police detention at a hospital may not be questioned without the agreement of a responsible doctor. If

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<sup>250</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 7.50 and 12.8; *The Terrorism Acts in 2011*, June 2012, 7.63-7.74 and 12.14-12.16. Those recommendations were not predicated on the outcome of any litigation: in her response of March 2015 to my last annual report the Home Secretary declared herself “sympathetic” to one of them (suspension of the detention clock in the case of TA 2000 detainees admitted to hospital).

<sup>251</sup> This recommendation is taken from *The Terrorism Acts in 2011*, June 2012, 7.76: the reasons for it were explained at 7.63-7.69. It is designed to make clear the existing requirements of domestic law: nothing in the subsequent ECtHR case law requires more extensive amendments to be made.

<sup>252</sup> This recommendation is taken from *The Terrorism Acts in 2011*, June 2012, 7.78: the reasons for it were explained at 7.74. I described the recommendation as “unanswerable”, and both the Home Secretary and her predecessor, now the Prime Minister, have described themselves as sympathetic to it: *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, Cm 9357, November 2016.

questioning takes place at a hospital, or on the way to or from a hospital, the period of questioning concerned should count towards the total period of detention permitted. Otherwise, the period of detention should be suspended until questioning takes place or until the person arrives back at the police station, whichever is the sooner.

(c) PACE Code H should be reviewed to as ensure that it properly encapsulates the limits on permissible **safety interviews** as set out in *Ibrahim*.<sup>253</sup>

8.52 To these I add once again my recommendation for a police power to bail persons arrested under s41, a recommendation made also by my predecessor Lord Carlile and by others over the years ranging from the JCHR to my Senior Special Adviser, Clive Walker.<sup>254</sup> I set out the reasons for this proposal in in my report of 2012.<sup>255</sup> It has the twin advantages of **preventing unnecessary detention** and giving the police **operational flexibility**. The central point is that the ability to grant police bail (where it is not considered dangerous to do so, and subject to an end-stop so as not unduly to prolong uncertainty) gives the police more time to complete their investigations before a charging decision must be made, reducing the pressure that is being felt in some cases as the 14-day limit grows nearer.

8.53 Professor Walker's enquiries of police officers have revealed that the operational value of police bail is one of the reasons why arrests for terrorism-related offences are increasingly made under PACE rather than TA 2000 s41.<sup>256</sup> But the price of using this means to gain a bail power is the loss of the extended detention and search powers that Parliament intended to be applied to terrorism offences when it enacted s41.

8.54 To confer a bail power on police who have arrested under s 41 would, in short, offer:

(a) for less dangerous suspects, the possibility of release on bail (which the ECtHR has described as "*highly desirable*" in human rights terms);<sup>257</sup> but also

(b) for the police, the potential of more time for a charging decision to be reached, without the corresponding loss of other advantages associated with TA 2000 s41 arrest.

8.55 As in the case of the definition of terrorism (chapter 4 above) and proscription (chapter 5 above), my recommendation concerning police bail is unlikely to be acted upon in the short term. Nonetheless, I repeat it so that my position is clear: 10.21 below.

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<sup>253</sup> See 8.44 above.

<sup>254</sup> For references to these recommendations, see *The Terrorism Acts in 2011*, June 2012, fnn 230-232. Professor Walker returns to the subject in his Guest Chapter of this report: see [Annex 2](#), para 12.

<sup>255</sup> *The Terrorism Acts in 2011*, June 2012, 7.71-7.73 and 7.77.

<sup>256</sup> See the Guest Chapter at [Annex 2](#), para 12. For a recent example, see "Man bailed after being arrested on the street on suspicion of terror offence", Mail Online, 3 October 2016.

<sup>257</sup> The ECtHR in *Magee v UK* stated in May 2015 that it would be "*highly desirable*" for the court considering a warrant for further detention to have competence to consider release on bail, but that this was not a requirement of the ECHR: *The Terrorism Acts in 2014*, September 2015, 7.41.



## 9. CRIMINAL PROCEEDINGS

### Statistics – Great Britain

9.1 Abundant statistics are now published by the Home Office on a quarterly basis, accompanied by a helpful commentary.<sup>258</sup> I seek here to give no more than some headline figures.

#### ***Charges in 2015***

9.2 I have already noted (at 8.13 above) that 83 persons were charged with terrorism-related offences as a principal offence in 2015. Of these:

- a) 51 persons were charged principally under the terrorism legislation.<sup>259</sup>
- b) The other 32 persons were charged principally with terrorism-related offences under non-terrorism legislation.<sup>260</sup>

9.3 The commonest charge in 2015 was once again for preparation of terrorist acts under TA 2006 s5, which was charged 19 times as a principal offence.<sup>261</sup> Section 5 offences vary in seriousness, but at the top end can be punished by life imprisonment.<sup>262</sup> It is now recorded as the most-charged provision of terrorism legislation over the period since 9/11 (125 principal charges, 22% of the total), despite the fact that it reached the statute book only in 2006.<sup>263</sup>

9.4 The commonest “*terrorism-related*” charge not under the terrorism legislation was for conspiracy to defraud, charged 11 times as a principal offence. Conspiracy to defraud might of course in other circumstances be characterised as an offence unrelated to terrorism.<sup>264</sup>

#### ***Trials in 2015***

9.5 56 trials for terrorism-related offences were completed in 2015 (as against 38 in 2014 and 44 in 2013). Previous good conviction rates were maintained: 49 defendants (88%)

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<sup>258</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to 31 December 2015*, March 2016, Tables A, C and P series.

<sup>259</sup> *Ibid.*, Table A.05a.

<sup>260</sup> *Ibid.*, Table A.05b.

<sup>261</sup> *Ibid.*, Table A.05a.

<sup>262</sup> See the recent guideline case *R v Kahar* [2016] EWCA Crim 568, 9.32-9.36 below. The most serious terrorist offenders of all (e.g. the 21/7 London would-be bombers, and the airline liquid bomb plotters of 2006) tend, if they survive, to be charged with murder, attempted murder or conspiracy to murder.

<sup>263</sup> Though since the statistics record only the principal offence charged, it is conceivable that lesser offences e.g. TA 2000 sections 57 and 58 (recorded 77 and 60 times respectively between 2001 and 2015) would run it close if all charges were included in the totals.

<sup>264</sup> *The Terrorism Acts in 2012*, July 2013, 8.6(b).

were convicted, and 7 acquitted.<sup>265</sup> As has become normal in recent years, there were many guilty pleas.

### **Sentences in 2015**

9.6 Of the 49 defendants convicted in Great Britain:

- (a) 4 received life sentences.
- (b) 1 received a sentence of between 20 and 30 years.
- (c) 1 received a sentence of between 10 and 20 years.
- (d) 14 received sentences of between 4 and 10 years.
- (e) 25 received sentences of between 1 and 4 years.

Two received sentences of less than a year, one a non-custodial sentence and one a hospital order.<sup>266</sup>

### **Prison in 2015**

- 9.7 At the end of 2015, 143 persons were in prison for terrorism-related offences (up from 127 a year earlier). Listed separately in the statistics are 25 “*domestic extremist/separatist*” prisoners (down from 59 a year earlier).<sup>267</sup>
- 9.8 Of the 143 prisoners described as “*terrorists*”, 139 declared themselves to be Muslim. The “*domestic extremist*” prisoners however claimed a rich variety of religious affiliation, with various forms of Christianity and “*no religion*” predominating, and a single declared Muslim.<sup>268</sup>
- 9.9 When Government makes a point of classing XRW attackers who meet the statutory definition as terrorists,<sup>269</sup> I repeat my observation of last year that it seems anomalous to maintain the distinction between “*terrorism-related*” and “*domestic extremist/separatist*” for the purposes of the prison statistics.
- 9.10 Following recommendations in a classified report (which I have read) commissioned from Ian Acheson, a former prison governor, the Justice Secretary announced in August 2016 that planning was under way to develop units within the high security estate to allow

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<sup>265</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to 31 December 2015*, March 2016, Table C.01.

<sup>266</sup> *Ibid.*, Table C.04.

<sup>267</sup> *Ibid.*, Tables P.01 and P.02.

<sup>268</sup> *Ibid.*, Table P.04.

<sup>269</sup> E.g. Pavlo Lapshyn, the 2013 killer of Mohammed Saleem who also perpetrated a mosque-bombing campaign.

greater separation and specialised management of extremists who pose the highest risk to other prisoners.<sup>270</sup>

## Statistics – Northern Ireland

### **Charges in 2014/15**

- 9.11 I referred at 8.16 above to the continued low charge rate for those arrested under TA 2000 in Northern Ireland.
- 9.12 A breakdown for the 149 arrests in 2015/16 is not yet available, but of the 227 people arrested under TA 2000 s41 in 2014/15, 35 were subsequently charged with a total of 130 offences.
- 9.13 Of those:
- (a) 22 were charged with a total of 34 offences under TA 2000: 16 for membership of a proscribed organisation (s11), 7 for directing a terrorist organisation (s56), 6 for collecting information likely to be useful in terrorism (s58), 3 for possession of articles useful for terrorism (s57) and 2 for weapons training (s54).
  - (b) 8 were charged under TA 2006 or CTA 2008: 7 for preparation of terrorist acts (TA 2006 s5), and 1 for failure to comply with notification requirements (CTA 2008 s54(1)(a)).
  - (c) A wide range of other offences was also charged, including 29 charges of murder.<sup>271</sup>
- 9.14 In this connection, it is interesting and potentially encouraging to note recent proposals directed *inter alia* to reforming committal proceedings, case management, bail and referral of lenient sentences.<sup>272</sup>

### **Convictions in 2015**

- 9.15 Of the 227 persons detained under TA 2000 s41 in 2014/15:
- (a) just 35 had been charged with terrorism-related offences by June 2015, and

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<sup>270</sup> See MoJ / NOMS, *Summary of the main findings of the review of Islamist extremism in prisons probation and youth justice*, 22 August 2016. The review visited prisons in the Netherlands, France and Spain, each of which isolates extremist prisoners. I have myself visited prisons where extremist prisoners are isolated in Jordan and Algeria, as well as Maghaberry Prison in Northern Ireland which segregates extremist prisoners but which was not cited as a model by Ian Acheson. See further International Centre for the Study of Radicalisation, *Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus*, October 2016.

<sup>271</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2014/15*, October 2015, Tables 11A, 11b, 9. I am told by the NIO that the 29 charges of murder relate to the charges brought against Seamus Daly in April 2014 in relation to the Omagh bombing.

<sup>272</sup> Northern Ireland Executive, *Tackling paramilitary activity, criminality and organised crime: Executive Action Plan* (2016).

(b) only two of them had been prosecuted (both of them were convicted).<sup>273</sup>

9.16 Those figures were of course subject to further update. But as of 9 June 2015, of the 34 persons arrested in 2013/14 and charged with terrorism-related offences, only 9 had as yet been prosecuted (of whom 8 were convicted).

9.17 Contacts in Northern Ireland have suggested to me that difficulties and delay in bringing cases to a conclusion are a result of factors such as:

(a) the difficulties in turning intelligence into evidence alluded to at 8.20 above;

(b) aggressive adversarial court processes, with all defendants requesting old style committals during which every point is fought over;

(c) numerous disclosure applications in which applications are made to discover methodology and identify people; and

(d) delay in the court process more generally, with limited case management, very few (if any) early pleas, and frequent adjournments.<sup>274</sup>

Part 2 of the Justice Act (Northern Ireland) 2015 provides for restrictions on the holding of preliminary investigations, but it stops short of abolishing old-style committals, and the relevant sections are still to be brought into force. The special rules which have assisted the effective case management of terrorist cases in England and Wales have no equivalent in Northern Ireland.<sup>275</sup>

9.18 A total of 15 persons were convicted of an offence under the terrorism laws in Northern Ireland in 2014/15, 11 in the Crown Court and 4 in the Magistrates' Court. That annual figure is lower than in 2013/14, but higher than in the period 2007-2013.<sup>276</sup>

### **Attorney General's consent**

9.19 Under both Terrorism Acts, the permission of the Attorney General is required before prosecutions may be brought in respect of offences said to have been committed outside the UK or for a purpose wholly or partly connected with the affairs of a country other than the UK.<sup>277</sup>

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<sup>273</sup> *Ibid.*, Table 10.

<sup>274</sup> The impact of legacy inquests and of judicial review relating to legacy cases has also compounded the delay. Recent figures for trust in the criminal justice system are footnoted to 2.18 above.

<sup>275</sup> Criminal Practice Directions 2015 Division XIII, Annex IV, replacing the Protocol on the case management of terrorism cases issued in 2006 by the President of the Queen's Bench Division.

<sup>276</sup> *Ibid.*, Table 15.

<sup>277</sup> TA 2000 section 117(2A); TA 2006 section 19(2).

9.20 In 2015, the Attorney General's permission was given for the prosecution of no fewer than 40 suspects. This reflects the impact of Syria (9.22 below) and compares to 36 suspects in 2014 and just 10 in 2013.<sup>278</sup>

### Subject-matter of prosecutions

9.21 The principal convictions in England and Wales in 2015 (and in 2016, thus far) are recorded by the Counter-Terrorism Division of the CPS and available from the CPS website. That document is an instructive read for anyone who is interested in learning more about the current nature of terrorist activity in (and emanating from) the UK.

9.22 I do not attempt a summary of the 31 cases recorded for 2015, save to note that a high proportion of them have a strong connection with Daesh and/or Syria.<sup>279</sup> Conduct leading to convictions included:

- (a) **travelling to Syria** to fight, or attempting to do so (*R v Zakariya Ashiq; R v Ednane Mahmood; R v Mustafa Abdullah; R v Yahya Rashid*);
- (b) attending **training** camps in Syria, receiving weapons training and/or **recruiting** others to do so (*R v Imran Mohammed Khawaja, Tahir Farooq Bhatti and Asim Ali; R v Mustakim Jaman and Tuhin Shahensa*);
- (c) **planning atrocities in the UK**, inspired by Daesh (*R v Brustholm Zianani; R v Mohammed Rehman and Sana Ahmed Khan*);
- (d) arranging to **send money or goods** to friends or relatives fighting in Syria (*R v Hana Khan, R v Majdi Shajira; R v Mohammed Abdul Saboor*);
- (e) using social media or email to **encourage others to prepare for jihad**, including in the UK (*R v Alaa Esayed; R v Malcolm Hodges*);
- (f) **disseminating** Dabiq, a magazine published by Daesh to glorify its actions (*R v Hassan Munir*), or other publications encouraging violent jihad (*R v Usman Choudhary; R v Atiq Ahmed; R v Abdul Miah; R v Mohammed Kahar*); and
- (g) **possessing information** of practical utility for terrorism (*R v Y, a 16-year-old girl; R v Abdulraouf Eshati*).

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<sup>278</sup> Source: Attorney General's Office.

<sup>279</sup> See, further, Professor Walker's Guest Chapter ([Annex 2](#)) at para 13.

- 9.23 One of the most serious convictions was of a British **14-year-old** who plotted with an Australian jihadist to commit an attack on an Anzac Day parade in Melbourne by beheading police officers. The boy was found to be “*dangerous*” and so sentenced to detention for life with a minimum term of six years. Life sentences were imposed also on Mohammed Rehman and Sana Ahmed Khan, Daesh supporters who assembled explosives to be remotely detonated or used for a terrorist attack in London.
- 9.24 Two men who by virtue of their previous convictions for terrorism offences were subject to **notification requirements** under Part 4 of CTA 2008 (Omar Brookes and Simon Keeler) were apprehended at the Hungary/Romania border in November 2015, brought back to the UK under European Arrest Warrants and convicted of failure to comply with their notification requirements. They were sentenced to two years’ imprisonment, the judge (Saunders J) commenting: “*It is important that the police are able to track the movements of convicted terrorists.*”<sup>280</sup>
- 9.25 Not all the convictions referred to by the Counter-Terrorism Division were of Muslims, or of jihadi sympathisers. Thus:
- (a) One major prosecution was of Sikhs who had attempted to stir up hatred against Muslims (*R v Satinderbir Singh and others*).
  - (b) The anti-semitic Joshua Bonehill-Paine was convicted of stirring up racial hatred;
  - (c) The so-called “*ginger extremist*” Mark Colborne, who is said to have plotted to kill Prince Charles, was convicted of a terrorist offence.
  - (d) Silhan Ozcelik was convicted of preparing acts of terrorism after leaving the UK to join the PKK, the Kurdish terrorist organisation.
- 9.26 It bears repeating, because amid loose talk of “**secret justice**” it is often not appreciated, that every one of these persons was convicted by a randomly-selected jury of citizens, after a trial in which (having been given disclosure of potentially exculpatory material) they were given the opportunity to see and to test every scrap of evidence that the prosecution deployed against them.<sup>281</sup>

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<sup>280</sup> “Convicted terrorists jailed for two years after flouting travel ban”, The Guardian, 8 January 2016.

<sup>281</sup> That said, there have been many cases of the screening of witnesses, especially in Northern Ireland: see further *McKevitt and Campbell v UK* (8.46 above). What I have described as extreme reporting restrictions were imposed on the trial of Erol Incedal and Mounir Ramoul-Bouhadjar in late 2014 (*The Terrorism Acts in 2014*, September 2015, 8.18-8.19); but both defendants heard all the evidence against them, and the Court of Appeal upheld the reporting restriction as necessary in the interests of justice: *Guardian News v R and Incedal* [2016] EWCA Crim 1. Cf. “Man who rejected MI5 convicted of terror charge after semi-secret trial”, Guardian website, 13 October 2016.

- 9.27 In the middle of the last decade, Home Secretaries such as David Blunkett and Charles Clarke wondered aloud whether the jury system was capable of dealing with terrorism cases, and whether there might not be advantages in moving to a French-style investigating magistrate system.<sup>282</sup> But the need for such a step was avoided in England and Wales by changes to the existing system: notably, improved cooperation between prosecutors and police;<sup>283</sup> the development of a specialist Counter-Terrorism Division within the CPS, and more active case management by the senior judges who hear terrorism cases.
- 9.28 These changes, and the high conviction rates achieved by the CPS in recent years (92% in the year to March 2016), are impressive. Though non-jury trials remain in Northern Ireland, it is a tribute to the criminal justice system that it has adapted to the challenge of terrorism post-9/11 without compromising the principles of a fair trial.

### Post-charge questioning

- 9.29 Power was conferred by CTA 2008 ss 22-26 to implement post-charge questioning, in exceptional circumstances, in relation to persons in detention charged with terrorism offences.<sup>284</sup>
- 9.30 The power was used on two subjects of a single investigation, Operation Exactness in 2014. That operation led to the conviction in 2016 of Tarik Hassane (who pleaded guilty) and Suhaib Majeed (after trial) for plotting to kill police or soldiers in a shooting inspired by Daesh. Majeed had originally been arrested for, and charged with, non-terrorist firearms offences. The subsequent return to the UK and arrest of Majeed's co-conspirator, Hassane, triggered the arrest of Majeed under TA 2000 s41. The need to question Majeed regarding the relevance of the charged firearm to the emerging terrorist plot prompted the Crown Prosecution Service to apply to the court for authority for the police to conduct post-charge questioning.
- 9.31 The CPS inform me that the only other use of the power to date was on Mohammed Aftab Suleman. He was charged with a number of offences contrary to TA 2000 s58, following which there was post charge questioning in relation to the discovery that he had also been disseminating the documents subject to the s58 charges. He made no comment and was later charged with dissemination offences. In July 2015 he was sentenced to 33 months' imprisonment after guilty pleas for collection and dissemination offences.

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<sup>282</sup> That system is illuminatingly described, together with much else in the French approach to terrorism, by Frank Foley in his book *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge University Press, 2013). See further V. Chalkiadaki, "The French 'war on terrorism' in the post-Charlie Hebdo era" (2015) 1 *eucri* 26.

<sup>283</sup> The need for this was underlined by Lord Carlile in his 2009 Report into Operation Pathway, though in most parts of England it was already well advanced by that stage.

<sup>284</sup> See C. Walker, "Post-charge questioning in UK terrorism cases: straining the adversarial process" (2016) 20 *International Journal of Human Rights* 649.

## Sentencing and section 5

- 9.32 The most significant recent criminal case, from the point of view of developing the law, was *R v Kahar* in the Court of Appeal (Criminal Division).<sup>285</sup> Having ascertained that it was “*unlikely that the Sentencing Council could produce guidelines on the Terrorism Acts for some time*”, the Court of Appeal took the opportunity to give detailed guidance in relation to sentences that should be imposed for preparing acts of terrorism under TA 2006 s5. Section 5 is an extremely versatile provision: it carries a maximum sentence of life, and may be founded on conduct committed abroad (1.7(d) above). As noted at 9.3 above, it has become the most commonly charged terrorist offence in Great Britain (at least as the principal count on the indictment) and it is increasingly used also in Northern Ireland.
- 9.33 The Court of Appeal set out six levels of offending, culminating in Level 1 (where an offender has taken steps which amount to attempted multiple murder, or something not far short of it), for which a life imprisonment with a minimum term of 30 to 40 years was said to be appropriate.<sup>286</sup>
- 9.34 It also rejected the submission that prosecuting authorities should only charge offences under s5 after consideration had been given to what other (more specific) charges could appropriately be brought against the defendant: though it accepted that there may be some cases in which it might be necessary to take into account, as one factor, the maximum sentence that could have been imposed for the offence(s) that could otherwise have been charged.<sup>287</sup>
- 9.35 I was pleased to read, in the Home Secretary’s response of November 2016 to my last annual report, that the (independent) Sentencing Council’s current plan includes a consultation process on terrorism offence guidelines beginning in May 2017. This initiative conforms to my recommendation of last year that the Sentencing Council should consider whether it might usefully consult on a definitive guideline for the sentencing of terrorist offences.<sup>288</sup> It is anticipated that the Sentencing Council will undertake research, policy and legal investigations as part of developing a guideline.<sup>289</sup> If this comes to pass, I believe that it would be a very positive development. Not only would it provide a framework for sentencers in a treacherous field: it would make it easier to rebut the persistent suggestions that sentencing varies according to the ethnicity or politics of the defendant.

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<sup>285</sup> *R v Kahar and others* [2016] EWCA Crim 568, 17 May 2016. See further the Guest Chapter, [Annex 2](#), para 14.

<sup>286</sup> *Ibid.*, para 29.

<sup>287</sup> *Ibid.*, paras 6-7.

<sup>288</sup> *The Terrorism Acts in 2014*, September 2015, 8.24 and 11.2(c).

<sup>289</sup> Research performed at my request by the Home Office might be a starting-point: Home Office, *analysis of charging and sentencing outcomes by religion*, 12 September 2013, summarised in *The Terrorism Acts in 2013*, July 2014, 9.18-9.24. See further Guest Chapter ([Annex 2](#)) para 14.



## Impact of Terrorism Acts on international NGOs

- 9.36 I referred in 2014 to concerns that had been raised with me about the impact of widely-drawn terrorist offences on the work of international NGOs, and recommended that a dialogue be initiated between international NGOs and policymakers, including in the Home Office and the Treasury.<sup>290</sup>
- 9.37 That dialogue has produced its first fruits in the shape of a guidance document,<sup>291</sup> consisting of a series of questions and answers aimed primarily at international NGOs. The NGOs with which I have spoken are appreciative of the document so far as it goes, but note that it offers only slight assurances<sup>292</sup> and consider there is more to be done on a number of fronts. I have chaired a Chatham House meeting to discuss the issue, but it is not within my power to drive the process forward. I do though encourage further dialogue, and expect to see more results.

## Impact on journalists and those involved in deradicalisation

- 9.38 TA 2000 s38B, inserted by ATCSA 2001, requires persons with information which they know or believe might be of material assistance in preventing the commission by another person of an act of terrorism, or in securing the apprehension, prosecution or conviction of another person for an offence involving the commission, preparation or instigation of terrorism, to disclose that information as soon as reasonably practicable to the police. There is a defence of reasonable excuse. The offence is punishable by up to five years in prison. The section has been used to convict family members and associates, for example of the 21/7 bombers and of Kafeel Ahmed, who died following the Glasgow Airport bombing of 2007. It has never, so far as I am aware, been used to prosecute a journalist (or indeed a lawyer).<sup>293</sup> But struck by an offence which I described as “startlingly *broad*”, I announced in my first review of the operation of the Terrorism Acts that I would keep a careful eye on it.<sup>294</sup>
- 9.39 The first concerns that were expressed to me about s38B came during the period under review, and were voiced by journalists at a meeting facilitated by the organisation Forward Thinking. The majority of journalists writing about terrorism are not inhibited or “*chilled*” in any way by s38B, though for the unsatisfactory reason that they have never heard of it. But in one submission made to me, it was suggested to me that s38B:

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<sup>290</sup> *The Terrorism Acts in 2013*, July 2014, 9.25-9.33; see also *The Terrorism Acts in 2014*, September 2015, 8.25-8.26.

<sup>291</sup> *For information note: operating within counter-terrorism legislation* (updated 27 June 2016).

<sup>292</sup> For example, it states: “*The risk that an individual or a body of persons corporate or unincorporated will be prosecuted for a terrorism offence as a result of their involvement in humanitarian efforts or conflict resolution is low*”, but this cannot amount to a guarantee, as demonstrated by the fact that Save the Children is reported to have been investigated for breaches of TA 2000 s 19 following alleged delays in notifying the theft of £200,000 worth of supplies and equipment from their premises in Somalia by al-Shabaab (Sunday Times, 25 October 2015, p. 5)

<sup>293</sup> The difficulties were explored by Professor Clive Walker in *The Terrorism and the Law* (2011), 3.07-3.55. See also TA 2000 s19, which applies to certain information gained in the course of trade, profession, business or employment.

<sup>294</sup> *Report on the operation in 2010 of TA 2000 and of Part 1 of TA 2006*, July 2011, paras 6.23-6.25.

- (a) has caused journalists actively to avoid lines of inquiry when investigating a story (“*in effect self-censorship*”);
- (b) causes “*the relevant sector of the public*” to avoid contact with journalists, for fear that they will be reported by journalists to the authorities; and
- (c) has led to editorial decisions to halt journalistic inquiry or “*kill*” a story.

These propositions were supported by statements made by journalists, producers and a film-maker, and supplied to me by a lawyer active with experience of terrorism cases. There was a measure of agreement with them at one meeting of journalists that I attended to discuss the matter, though less so at another meeting where undercover journalists were present.

9.40 A former police officer also sent me a short submission, in which he expressed the view that s19 and s38B could inhibit the activities of those involved in de-radicalisation and the prevention of violent extremism. As he put it:

“Most people take the line of least resistance and either discontinue contact or report and thereby sacrifice the confidence of those that they are seeking to divert.”

9.41 I do not exclude the possibility that s38B – despite its evident intention of protecting the public – might have harmful effects of the kind posited. But it would not be practicable simply to exempt journalists or those involved in de-radicalisation from the scope of s38B (or s19). Nor (having discussed the matter with the CPS and with a former Law Officer) do I detect any willingness to produce specific guidance designed to reassure journalists that they would not be prosecuted. There are, after all, already guidelines for prosecutors in cases involving the media which stress the very high priority to be given to the freedom to receive and impart information, including in cases where there is an express public interest defence.<sup>295</sup> The point is also made that the public interest in the prevention of acts of terrorism and in the apprehension and prosecution of terrorists is a very strong one, which will not easily be overridden.

9.42 For the moment, therefore, I do not consider any recommendation on this subject to be appropriate. But by raising the issue in this report, I invite further comments and submissions, which it may be that my successor as Independent Reviewer will wish to take into account or to act upon.<sup>296</sup>

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<sup>295</sup> *Guidelines for prosecutors on assessing the public interest in cases affecting the media*, September 2012, paras 14-41.

<sup>296</sup> See, generally, C. Walker, “Investigative Journalism and Counter Terrorism Laws” (2016) *Notre Dame Journal of Law, Ethics and Public Policy*.

## Radicalisers and hate preachers

- 9.43 The conviction in July 2016 of Anjem Choudary for inviting support for Daesh prompted a brief public debate, in which I participated,<sup>297</sup> over whether UK counter-terrorism laws are adequate to protect the population against radicalising “*hate preachers*”.
- 9.44 Choudary, a solicitor removed from the roll in 2002, was prominent from the 1990s in al-Muhajiroun (a group now proscribed in the UK, including under its various aliases), and is said to have been instrumental over many years in radicalising British Muslims who went on to be convicted of terrorism-related offences or to fight in Syria.<sup>298</sup>
- 9.45 It is entirely fair to ask why the law did not catch up with Anjem Choudary sooner. I raised the issue with the CPS and have been made aware in response of no fewer than 10 occasions between July 2002 and August 2015 on which his activities were referred to the CPS for review, but without prosecution ensuing.<sup>299</sup> The law was able to touch him only when (in 2006) he organised a demonstration without a licence and (in 2016) when he was eventually convicted under TA 2000 s12 and sentenced to 5 ½ years’ imprisonment for publicly inciting support for Daesh.
- 9.46 Choudary’s case is unusual. But even assuming that the issue is a general one, it would be wrong to assume that there is an obvious legislative solution. In particular:
- (a) The legal arsenal is already well-stocked: I referred to many of the relevant offences in my report of last year.<sup>300</sup>
  - (b) The difficulties in prosecuting hate preachers (as with other types of crime) may not be any inadequacy in the law, but rather the insufficiency of evidence.
  - (c) Before recommending change, it would also be wise to verify that the most effective use possible is being made of existing legislation.<sup>301</sup> This includes not only the range of criminal offences already mentioned, but:

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<sup>297</sup> J. Grierson, “Anjem Choudary raises questions about terror laws, says watchdog”, The Guardian, 17 August 2016.

<sup>298</sup> See the Hope not Hate publication of November 2013, *Gateway to Terror*, which identified terrorists said to have associated with al-Muhajiroun (including those responsible both for the 7/7 London bombings and the killing of Lee Rigby), and claimed that groups linked to Choudary had “*facilitated or encouraged*” up to 80 young Muslims from the UK, and 250 to 300 from across Europe, to join forces fighting President Assad.

<sup>299</sup> Offences considered included incitement to religious hatred (Public Order Act 1986, Part 3A), indirect encouragement to terrorism (TA 2006 s1), inciting terrorism overseas (TA 2000 s59), incitement/solicitation to murder (Offences Against the Person Act s4) and proscription offences (TA 2000 ss 11-13).

<sup>300</sup> *The Terrorism Acts in 2014*, September 2015, 9.7-9.9. Some are potentially very broad: as I recalled at 9.8, “*indirect encouragement*” in TA 2006 s1 was explained by a Home Office Minister during the passage of the Bill as making it an offence “*to incite people to engage in terrorist activities generally*” and even “*to incite them obliquely by creating a climate in which they may come to believe that terrorist acts are acceptable*”. It is hard to see how much further one could go in framing a law without infringing established guarantees of free speech (as to which, see *R v Brown* [2011] EWCA Crim 2571 and *R v Faraz* [2012] EWCA Crim 2820) or rendering juries unwilling to convict because of the lack of a direct link between the speech complained of and possible future terrorist violence.

<sup>301</sup> I have not investigated this issue myself in any depth, but some possible avenues of enquiry were set out by Hannah Stuart in *Disrupting extremists: more effective use of existing legislation* (Henry Jackson Society, 2014).

- (i) the ability to seek relief under ASBCPA 2014, as was done in the Britain First case summarised at 2.24 above; and
- (ii) the ability to seek TPIMs under TPIMA 2011 (though only in cases where the Home Secretary can properly conclude on the balance of probabilities that a person has been involved in terrorism-related activity, as defined in s4 of that Act).<sup>302</sup>

9.47 I reported last year on the Government’s plans to introduce a series of orders, to be imposed by the Home Secretary or by the civil courts, and to be known as “*banning orders*”, “*extremist disruption orders*” and “*closure orders*”. Hate preachers such as Anjem Choudary were routinely cited by Ministers as examples of the kind of people that extremist disruption orders could be designed to catch.

9.48 I spelled out my reservations about these plans in the form of 15 “*issues of particular sensitivity*” that Parliament might wish to consider. Emphasising the difficulty of defining extremism and the undesirability of circumventing the protections inherent in the criminal trial process, I added that:

“If it becomes a function of the state to identify which individuals are engaged in, or exposed to, a broad range of “*extremist activity*”, it will become legitimate for the state to scrutinise (and the citizen to inform upon) the exercise of core democratic freedoms by large numbers of law-abiding people.”<sup>303</sup>

There was, as it seemed to me, a risk of such a law:

“provoking a backlash in affected communities, hardening perceptions of an illiberal or Islamophobic approach, alienating those whose integration into British society is already fragile and playing into the hands of those who, by peddling a grievance agenda, seek to drive people further towards extremism and terrorism”.

Similar reservations have been stated by others, including organisations (Inspire, Quilliam) which have historically been supportive of Government activity in this area.

9.49 A Home Office Minister who gave evidence on these proposals in 2016 offered the welcome assurance that all aspects of them would be consulted upon.<sup>304</sup> It is to be hoped that any consultation will extend to the issue of whether such measures should be introduced at all. In that regard, consideration should be given not only to the merits or otherwise of the proposals, but to less rights-intrusive ways in which their objective

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<sup>302</sup> That concept, even reduced as I recommended by CTSA 2015 s20(2), includes conduct which facilitates or gives encouragement to the commission, preparation or instigation of acts of terrorism [CPI], or is intended to do so, as well as conduct which gives support or assistance to persons who are known or believed by the individual concerned to be involved in CPI.

<sup>303</sup> *The Terrorism Acts in 2014*, September 2015, 9.24-9.31.

<sup>304</sup> Karen Bradley MP, in evidence to the Joint Committee on Human Rights, whose report *Counter- Extremism* (HL Paper 39, HC 105) was published on 22 July 2016. See, generally, J. Dawson, *Counter-Extremism Policy*, House of Commons Library, May 2016.

might be achieved, including by better use of existing powers and by small changes to the existing criminal law.

9.50 In the latter connection, amendments that I have discussed with prosecutors and/or prosecuting counsel and that might be worth considering are:

- (a) **Extending TA 2006 s1** so that it penalises direct and indirect encouragement to terrorism in private, and not just (as at present) when the encouragement is “published”, for example in a leaflet or at a meeting. That change might make it possible to use undercover officers for the purposes of gathering evidence against those who are inspiring terrorists.
- (b) **Rewording TA 2000 s12**, not by changing its substance but by specifying examples of ways in which support for a proscribed organisation could be invited. Prosecutors with experience of such cases have told me that this could assist juries in matching the alleged conduct to the offence.
- (c) **Simplifying TA 2006 ss 1 and 2**, which I am told can be difficult to explain to juries; and revisiting the issue of their (currently partial) **extraterritorial effect**.

9.51 To be clear, I am not recommending those changes: much more detailed enquiry would be necessary before getting to that stage. But I offer them for discussion as a possible partial solution to the problems of prosecuting hate preachers, and in the spirit that our freedoms are better protected by a well-functioning criminal law than they are by a system based on coercive civil orders of broad and uncertain scope.

### Foreign Terrorist Fighters and the law

9.52 In evidence of April 2015 to my Investigatory Powers Review, MI5 told me that:

- a) The number who have **travelled to Syria and undertaken terrorist training** since 2012 is already higher than has been seen in other 21<sup>st</sup> century theatres, such as Pakistan/Afghanistan, East Africa and Yemen.<sup>305</sup>
- b) The threat posed on their return comprises not just **attack planning** but **radicalisation** of associates, **facilitation** and **fundraising**, all of which further exacerbate the threat.

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<sup>305</sup> Women and children travel too. Assistant Commissioner Mark Rowley QPM stated on 21 July 2015 that 43 women and girls were known to have travelled to Syria, and that the police had referred 12 families (with 30 children) to the family courts over the previous six months, “to try and manage those safeguarding issues”: oral evidence to Home Affairs Select Committee [HASC], *Counter-radicalisation*, HC 311, 21 July 2015, QQ 19-20. See further *Radicalisation cases in the Family Courts: Guidance issued by Sir James Munby, President of the Family Division*, 8 October 2015. See also the Guest Chapter, [Annex 2](#), paras 24-26.

- c) The number of UK-linked individuals who are ***involved in or have been exposed to terrorist training and fighting*** is higher than it has been at any point since the 9/11 attacks in 2001.

Those comments remain true today, even though the flow of Foreign Terrorist Fighters [FTF] both from the UK to Syria and in the reverse direction has in recent months undergone a very marked reduction.

- 9.53 I used some of the additional funding given to my office (1.7(a) above) to commission from my Senior Special Adviser, Clive Walker, a special, thematic study on FTFs and UK counter-terrorism law. Professor Walker's knowledge and experience of these laws, going back several decades, is unrivalled. His recent security clearance has given him access to classified material that he has not previously seen and formed the basis for his discussions with officials, prosecutors and police. He also interviewed experts from Denmark, Germany and the Netherlands. His report, prepared with the assistance of Alyson Kilpatrick in Northern Ireland, forms the Guest Chapter at Annex 2 to this report.
- 9.54 Professor Walker's conclusions, and 23 recommendations, are at para 31 of his Guest Chapter. Not all of them fall within the statutory remit of the Independent Reviewer, and since they are based on Professor Walker's own researches I have left them to speak for themselves rather than seeking to build them into or align them with my own recommendations. Nonetheless they deserve careful consideration, and I commend them in that spirit to the Government.

## 10. RECOMMENDATIONS

### Introduction

- 10.1 My five previous annual reports into the Terrorism Acts, shorn of their annexes, occupied almost 600 pages of text and made 47 recommendations. Some of the recommendations in those and my other reports have been accepted by Government; and of those which were not, some have achieved influence via parliamentary committees or the courts.<sup>306</sup>
- 10.2 But some of my recommendations have been rejected. A number of them are repeated, not in the expectation that they will be adopted in the short term, but as a marker of my position after six years of independent review. They are supplemented in the list below by some new ones.<sup>307</sup>

### Recommendations

#### *Statistics*

- 10.3 Efforts should continue to provide data and/or the publication of data regarding:
- a) the number and success rates of warrants for further detention in Great Britain;
  - b) the number of refusals of access to solicitors in Great Britain, and the length of any delays;
  - c) ethnicity data based on more up-to-date categories; and
  - d) the use of TA 2000 ss 43 and 43A stop and search powers in relation to police forces outside London and Northern Ireland.
- (1.11, 6.2 and 8.37 above).

#### *Ambit of independent review*

- 10.4 The Independent Reviewer of Terrorism Legislation should be given statutory authority to review:

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<sup>306</sup> Some examples from my first term as Independent Reviewer of recommendations which bore fruit (relating in particular to the operation of TFA 2010, the Bill which became the Justice and Security Act 2013 and TA 2000 Schedule 7) are described in my articles "The independent review of terrorism laws" [2014] Public Law 403-420 and "The independent review of UK terrorism law" (2014) 5 NJECL 432-446, both available from my website: see further (in relation to Schedule 7) 7.5 above. The most influential recommendations of my second term to date have been for the reform of TPIMs, including by the re-introduction of relocation and the introduction of compulsory meetings (see *Terrorism Prevention and Investigation Measures in 2014*, March 2015); for improvements to the justiciability of temporary exclusion orders in the Bill that became CTSA 2015; and the 124 recommendations in *A Question of Trust* (June 2015), more than 90% of which (together with the single, important recommendation of my August 2016 *Report of the Bulk Powers Review*) are reflected in the Investigatory Powers Act 2016.

<sup>307</sup> New recommendations are 10.7-10.10, 10.14-10.17, 10.20 and 10.23. I have left the recommendations made by Clive Walker in his Guest Chapter (*Annex 2*) to speak for themselves: 9.55 above.

- (a) the exercise of the Royal Prerogative power to cancel or refuse to issue a British passport; and
  - (b) any other law or power to the extent that it is used in relation to counter-terrorism
- (1.13-1.16 above).

### **Definition of terrorism**

10.5 In TA 2000 s1:

- (a) The phrase “*designed to influence the government or an international organisation*” in TA 2000 s1(1)(b) should be replaced by the phrase “*designed to compel, coerce or undermine the government or an international organisation*”.
- (b) TA 2000 s1(3) should be repealed.

(4.2-4.9 above).

### **Deproscription**

- 10.6 The recommendations first made in June 2012 for reform of the deproscription process should be adopted (5.14 above).
- 10.7 Applications for deproscription must be promptly handled, and statutory time limits respected (5.18(a) above).
- 10.8 Deproscription must follow automatically, without regard for discretionary factors, if the statutory test is not met (5.18(b) above).
- 10.9 When an application for deproscription is refused by the Secretary of State, the fullest possible reasons should be given so that the organisation in question can properly assess the prospects for appeal (5.18(c) above).
- 10.10 Persons should not be put to the expense and uncertainty of resorting to POAC unless the Government is prepared to defend its judgement and has the evidence confidently to do so (5.18(d) above).

### **Port and border controls**

- 10.11 The desirability of requiring objectively demonstrated grounds for the exercise of enhanced Schedule 7 powers should be kept under review, in the light of dicta in *Beghal v DPP* (7.23(a) and 7.26 above).
- 10.12 Any policy on the retention of electronic data must fully comply with the applicable legal constraints, and there must be effective guarantees of the proper implementation of whatever guidelines are applied (7.23(c) and 7.28-7.29 above).
- 10.13 There should be a statutory bar to the introduction of Schedule 7 admissions to a subsequent criminal trial (7.23(d) and 7.30-7.31 above).
- 10.14 Screening questions should be addressed in TA 2000 Schedule 7 as well as in the Schedule 7 Code of Practice. It should be clear that:



- a) It would be no more appropriate to select for screening questions on the basis solely of race, ethnic background or religion than it would be to select for examination on that basis.
- b) Screening questions should not be allowed to go on for more than a few minutes, or to turn into a kind of unregulated Schedule 7 examination.
- c) The stage at which screening questions must stop and a Schedule 7 examination (if required) should start should be defined on the basis of consistent principles.

(7.32-7.37 above).

- 10.15 Steps should be taken to ensure that the quality of manifest data is improved and that so far as possible, police at seaports and on the international rail network have timely access to reliable information about travellers so as to enable them more effectively to target their Schedule 7 stops (7.41-7.48 above).
- 10.16 The Schedule 7 power should only be used for its lawful purpose. If there is a national security need to extend the scope of the power so that it can be used to determine whether a port user is engaged in espionage or proliferation, consideration should be given to doing so (7.49-7.57 above).
- 10.17 Questions about private religious observance (e.g. prayer) should be asked, if at all, only in the highly exceptional case when there is a clear and objective reason for doing so (7.66 above).

### ***Arrest and detention***

- 10.18 The amendment of TA 2000 Schedule 8 para 32 should be considered, with a view to providing that a warrant for further detention should only be issued if the court is satisfied that the person to whom the application relates was lawfully arrested; that the person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest; that there is a real prospect of evidence emerging during the period for which further detention is sought; and that the continued detention is proportionate in all the circumstances. (8.51(a) above).
- 10.19 The law should be changed so as to allow the detention clock to be suspended in the case of detainees who are admitted to hospital. The rules should reflect PACE Code C para 14 by stating that a person in police detention at a hospital may not be questioned without the agreement of a responsible doctor. If questioning takes place at a hospital, or on the way to or from a hospital, the period of questioning concerned should count towards the total period of detention permitted. Otherwise, the period of detention should be suspended until questioning takes place or until the person arrives back at the police station, whichever is the sooner (8.51(b) above).
- 10.20 PACE Code H should be reviewed so as to ensure that it properly encapsulates the limits on permissible safety interviews as set out in *Ibrahim v UK* (8.51(c) above).
- 10.21 There should be a power to grant police bail where it is safe to do so to persons arrested under TA 2000 s41, so as to prevent unnecessary detention and give the police operational flexibility (8.52-8.55 above).

### ***Criminal proceedings***

- 10.22 I encourage further dialogue between international NGOs and the Government, with a view to resolving the difficulties that the NGOs have identified as a consequence of the anti-terrorism legislation (9.37-9.38 above).
- 10.23 Any further proposals to deal with the problem of radicalisers or “*hate preachers*” (including any consultation on proposals for a Bill on countering extremism) should take into account:
- (a) the options already available under existing legislation (9.46(c) above); and
  - (b) the possibility of amending or clarifying existing criminal offences, including along the lines identified at 9.50 above
- (9.43-9.51 above).

## 11. CONCLUSION

### The nature of the threat

- 11.1 The six years in which I have served as Independent Reviewer have not seen the complex, internationally-directed al-Qaeda plots that characterised the middle period of the past decade and that have been the most eye-catching examples of UK-based terrorist activity so far this century.<sup>308</sup> At the time of writing, only two people have been killed by terrorists in Great Britain in over eleven years.<sup>309</sup> The incidence of terrorism in the UK, and (notwithstanding recent atrocities in continental Europe and the US) in the West generally, is statistically tiny, and on an entirely different scale from the tens of thousands killed and injured every year in parts of the Middle East, Asia and Africa.
- 11.2 Nonetheless, as demonstrated in chapter 2 above, the terrorist threat to the UK is properly judged to be severe. Northern Ireland still experiences dozens of paramilitary-style bombings and shootings annually, and saw 23 deaths attributable to the security situation in the ten years to March 2016.<sup>310</sup> Terrorist attacks have been much rarer in Great Britain: but the source and nature of the threat has diversified. Brutal Daesh-inspired attacks are regularly disrupted. Many UK citizens have been the victims of terrorism abroad. Recent atrocities in neighbouring countries such as Belgium, Denmark, France and Germany (as well as the slaughter inflicted by Anders Breivik in 2011) provide shocking reminders of the power of terrorism to murder and to maim, particularly when perpetrated by those who welcome or are indifferent to their own deaths. Hardened terrorist fighters, including hundreds who came from the UK, are in Syria pondering their next move.
- 11.3 Other types of violent crime, some of them much more common and more deadly than terrorism, can be argued to be at least as deserving of resources and of attention.<sup>311</sup> But the evil of terrorism is not restricted to the body count, or even to the fear (exaggerated by alarmist media coverage, but nonetheless real) that it promotes in the general population. Islamist attacks in Europe remind us that terrorism is also an ideological attack on values that society holds dear. We have seen people killed in neighbouring countries during 2015-16 for satirising religion,<sup>312</sup> for enjoying music,<sup>313</sup> for discussing free speech,<sup>314</sup> or simply for being Jewish,<sup>315</sup> for celebrating a holiday,<sup>316</sup> for using public transport or for happening to find themselves near the political heart of Europe.<sup>317</sup> By

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<sup>308</sup> *The Terrorism Acts in 2012*, July 2013, 2.8.

<sup>309</sup> Mohammed Saleem and Lee Rigby, both in the spring of 2013.

<sup>310</sup> PSNI, *Police Recorded Security Situation Statistics*, 2015/16, 12 May 2016, Annex 1.

<sup>311</sup> To take a particularly shameful example, 82 women are said to have been killed by current or former partners in 2014/15: Office for National Statistics, *Compendium: Homicide*, February 2016.

<sup>312</sup> Charlie Hebdo (Paris), January 2015.

<sup>313</sup> Bataclan (Paris), November 2015.

<sup>314</sup> Copenhagen, February 2015.

<sup>315</sup> Hypercacher (Paris), January 2015.

<sup>316</sup> Nice, July 2016.

<sup>317</sup> Brussels, March 2016.

challenging the values on which society itself is based, terrorism is liable, if unchecked, to leave a toxic legacy of hatred and division.

### The justification for special laws

- 11.4 In the circumstances, the need for good intelligence and strong anti-terrorism laws, accompanied by proper safeguards, is surely self-evident. Such measures, if properly enforced, have the potential to protect the population not only from terrorism but from the more intrusive measures that would no doubt have to be contemplated if our existing protections failed. It was plots hatched in Britain that prompted the requirements to remove shoes and pour away liquids at airports across the world.<sup>318</sup> Further atrocities risk provoking further inconveniences and invasions of our freedoms, whether the security arches found in Middle Eastern hotels; the bag checks practised on the Beijing metro; warrantless search, curfew and house arrest as practised in France under the current state of emergency;<sup>319</sup> or the system of internal passports that still regulates residence and movement in parts of the former Soviet Union.
- 11.5 Terrorism-specific laws should be avoided so far as possible. Terrorism has been used as an excuse for illiberal laws and practices in many parts of the world. When times are calmer, I still hope to see

“a root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement established criminal laws and procedures”.<sup>320</sup>

But the case for at least some specific laws against terrorism was set out by Lord Lloyd in the 1996 report that gave rise to TA 2000, has been promoted by the UN<sup>321</sup> and is now generally accepted.

- 11.6 The operational justifications for such specific laws were recently spelled out by the European Court of Human Rights:

“[T]errorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court.”<sup>322</sup>

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<sup>318</sup> The 2001 shoe bomber (Richard Reid); the 2006 airline liquid bomb plot (Operation Overt).

<sup>319</sup> See generally Council of Europe, *Factsheet – Derogation in time of emergency* (Strasbourg, 2015).

<sup>320</sup> *The Terrorism Acts in 2012*, July 2013, 4.5, cited by the Supreme Court in *R v Gul* [2013] UKSC 63, para 34.

<sup>321</sup> See e.g. UN Security Council Resolutions 1373 (2001), 1566 (2004), 2178 (2014), 2199 (2015).

<sup>322</sup> *Sher v United Kingdom* (no. 52101/11), judgment of 20 October 2015, para 149: see 8.38 above. Compare the justifications of “defending further up the field” and “intelligence that cannot be disclosed” in the article “Shielding the compass: how to fight terrorism without defeating the law” (2013) 3 EHRLR 233-246, available from my website.

That perceptive formulation identifies the rationale for most of the provisions of the Terrorism Acts, as well as for other features of national security law such as closed material procedures.

### The dangers of discretion

- 11.7 Counter-terrorism, nationality and immigration law in the UK are characterised by broad statutory powers which Parliament has granted to Ministers on the basis that they can be trusted to exercise them with punctilious regard for the law.<sup>323</sup> Where Ministers and civil servants fulfil their part of the bargain – as in my experience they generally do – this makes for a strong and nimble system, untrammelled by legalistic restrictions on decision-makers.
- 11.8 But trust needs to be continually earned, and can never be taken for granted.<sup>324</sup> Where it is forfeit in relation to one area, others will also become the object of suspicion. Cynicism about the exercise of counter-terrorism powers already exists in some quarters. If it spreads to the public (or affected communities in Great Britain and in Northern Ireland), the authorities risk losing the public consent that is needed if strong laws are to be accepted and if the police are to be enabled to do their job.
- 11.9 The Supreme Court pointed forcibly in 2013 to the dangers of broad discretions in this area, including for civil liberties and the rule of law.<sup>325</sup> For the same reasons, attention is needed to the issues raised above concerning the definition of terrorism, deproscription and Schedule 7,<sup>326</sup> as well as to any plans that may emerge for the proposed Counter-Extremism Bill.<sup>327</sup>

### Overall assessment

- 11.10 But it would be wrong to end on a negative note. Despite the specific reservations that I continue to express about the formulation and operation of the Terrorism Acts, the overall picture seems to me to be one of appropriately strong laws, responsibly implemented and keenly scrutinised by Parliament and by the courts.
- 11.11 Two little-noticed facts are that:

- (a) **UK counter-terrorism law as a whole is less intrusive than was the case six years ago** (since when, under the Coalition Government, the maximum of 28-day

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<sup>323</sup> For illustrations, see my reports *The Terrorism Acts in 2013*, July 2014, 4.9-4.22 (counter-terrorism) and *Citizenship removal resulting in statelessness*, April 2016, 3.16-3.18 (citizenship). Current surveillance law is similarly based on broad statutory discretions: the Investigatory Powers Bill currently before Parliament (following practice in other common law countries) increases judicial involvement in the approval of warrants precisely in order to reinforce the necessary public trust in the system: see *A Question of Trust*, June 2015, 13.1-13.6 and 14.47-14.57.

<sup>324</sup> Hence the comment made to me during the year under review to the effect that some of our laws are so broad that a licence should be required for their export.

<sup>325</sup> *R v Gul* [2013] UKSC 64, paras 28-29, 33-37 and 60-64.

<sup>326</sup> See, respectively, chapters 4, 5 and 7 above.

<sup>327</sup> *The Terrorism Acts in 2014*, September 2015, 9.24-9.31.

pre-charge detention – once threatened with extension – has been reduced to 14; the TA 2000 s44 stop and search power has been repealed; control orders have been replaced by TPIMs; the threshold for asset freezes has been raised; and Schedule 7 has been reformed).<sup>328</sup> This is despite the increased threat level in recent years.

(b) ***ECtHR decisions since 2011 have tended to uphold elements of UK law applicable to terrorism*** as consistent with European human rights standards.<sup>329</sup>

- 11.12 Laws against terrorism need to bear down hard on all kinds of extremists who espouse violence: but it is important also that they do not alienate the rest of the population. Findings by an international human rights court that they are rights-compliant can be useful in achieving this. As I suggested recently to the Parliamentary Assembly of the Council of Europe, European human rights law does not so much hamper the fight against terrorism and extremism as underline the legitimacy of that fight.<sup>330</sup>
- 11.13 My overall impression is that though port controls remain a frequently-mentioned irritant, the Terrorism Acts are no longer the focus for grievance that they once were.<sup>331</sup> Indeed they have been overtaken as a source of grievance by aspects of the Prevent strategy to counter extremism.<sup>332</sup>
- 11.14 I conclude that the Terrorism Acts, as refined by Parliament and by the influence of the courts, are a broadly proportionate reaction to the current threat. They have some unsatisfactory features, and vigilance will continue to be needed over their operation. But based on my own observations over six years, the hostile narrative of power-hungry

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<sup>328</sup> New powers – the s47A stop and search power, the temporary exclusion orders provided for by CTSA 2015 and the power to deprive single UK nationals of their citizenship – tend to have been used rarely if at all. Another, the police power temporarily to remove passports from outgoing travellers under CTSA 2015, has been of greater utility.

<sup>329</sup> *Jobe* (2011: collection of information useful for terrorism); *Magee* (2015: detention); *Sher* (2015: detention, search); *Abdulla Ali* (2015: prejudicial reporting); *RE* (2015: legal consultations, historic violation only); *da Silva* (2016: self-defence); *Ibrahim* (2016: safety interviews); *McKevitt and Campbell* (2016: compensation for Omagh bombing). Though *Othman* (2012) placed conditions on the deportation of Abu Qatada (as had the English Court of Appeal), those conditions were eventually satisfied so the case is hard to classify as a defeat for the Government.

<sup>330</sup> See *Terrorism, tolerance and human rights*, presentation of 11 October 2016: [Annex 3](#).

<sup>331</sup> Factors in this change are the repeal of the much-resented TA 2000 s44 stop and search power after the judgment of the ECtHR in *Gillan and Quinton v UK*; the visible threat posed by the rise of Daesh (not least to Muslims in the UK); and a growing realisation that the reformed Schedule 7 is used much less frequently than in the past, and in part for safeguarding vulnerable young people on outbound journeys through UK ports.

<sup>332</sup> The Prevent strategy aims to “respond to the ideology of extremism and terrorism and the threats we face from those who promote it” and to “prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support”: CONTEST Annual Report for 2015, Cm 9310, July 2016, 2.30-2.42. It has recently been described as “odd” that “the most moderate of Britain’s counter-terror efforts provokes the most opposition”: “Driving away the shadows”, *The Economist*, 20 August 2016. I do not review Prevent but have consistently suggested that it would benefit from fuller transparency, more engagement and independent review: on the first two fronts, some progress has been made in recent months. See further [Annex 2](#) at paras 21-23.

security services, police insensitivity to community concerns and laws constantly being ratcheted up to new levels of oppression is, quite simply, false.<sup>333</sup>

- 11.15 Public and parliamentary debate over the appropriate extent of laws against terrorism will continue, as in a healthy democracy it should. Review by an independent security-cleared person has for 40 years served to inform that debate, to reassure, and where necessary to raise the alarm. Independent review may be considered a token of good faith: a price paid by Government for powers that intrude on individual rights but that cannot easily be evaluated because their operation is often secret.
- 11.16 It has been an honour to exercise the responsibilities of the Independent Reviewer. I look forward to passing them on to a successor who will bring fresh qualities and insights to the role.

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<sup>333</sup> The most striking illustration of this, for me, is that the London Olympics and Paralympics of 2012 – the best excuse imaginable for the accumulation of new counter-terrorism powers – saw neither an increase in such powers nor, remarkably, any request to increase them: *The Terrorism Acts in 2011*, June 2012, 2.48. Indeed the Games were shortly preceded both by the repeal of the TA 2000 s44 no-suspicion stop and search power (which had previously been frequently used in London) and by the return of several formerly-relocated control order subjects to London from the provinces.

# **ANNEX 1**



## LIST OF ACRONYMS

### Legislation

ASBCPA 2014	Anti-social Behaviour, Crime and Policing Act 2014
ATCSA 2001	Anti-Terrorism, Crime and Security Act 2001
CTA 2008	Counter-Terrorism Act 2008
CSA 2010	Crime and Security Act 2010
CJCA 2015	Criminal Justice and Courts Act 2015
CTSA 2015	Counter-Terrorism and Security Act 2015
DRIPA 2014	Data Retention and Investigatory Powers Act 2014
ESA 1883	Explosive Substance Act 1883
HRA 1998	Human Rights Act 1998
IA 2014	Immigration Act 2014
JS(NI)A 2007	Justice and Security (Northern Ireland) Act 2007
PACE	Police and Criminal Evidence Act 1984
PFA 2012	Protection of Freedoms Act 2012
POCA 2002	Proceeds of Crime Act 2002
PTA 2005	Prevention of Terrorism Act 2005
RIPA 2000	Regulation of Investigatory Powers Act 2000
SCA 2015	Serious Crime Act 2015
TA 2000	Terrorism Act 2000
TA 2006	Terrorism Act 2006
TAFA 2010	Terrorist Asset-Freezing Etc. Act 2010
TPIMA 2011	Terrorism Prevention and Investigation Measures Act 2011

### Other

ACPO	Association of Chief Police Officers (now replaced by NPCC)
API	Advance Passenger Information
AQAP	Al-Qaeda in the Arabian Peninsula
CAA	Civil Aviation Authority
CIRA	Continuity Irish Republican Army
CJEU	Court of Justice of the European Union
CPI	Commission, preparation or instigation [of acts of terrorism]
CPS	Crown Prosecution Service
CTIRU	Counter-Terrorism Internet Referral Unit
CT Network	Police Counter-Terrorism Network
CTU	Counter-Terrorism Unit

CTIU	Counter-Terrorism Intelligence Unit
CTRA	Counter-Terrorism Research and Analysis (OSCT)
DE	Domestic Extremism
ECHR	European Convention of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EDL	English Defence League
EHRC	Equalities and Human Rights Commission
FME	Forensic Medical Examiner
GA	General Aviation
GCHQ	Government Communications Headquarters
GM	General Maritime
HASC	Home Affairs Select Committee
HMIC	Her Majesty's Inspectorate of Constabulary
HMIP	Her Majesty's Inspectorate of Prisons
HOSB	Home Office Statistical Bulletin
ICT	International Counter-Terrorism
ICVs	Independent Custody Visitors
IED	Improvised Explosive Device
IMC	Independent Monitoring Commission (Northern Ireland)
INSLM	Independent National Security Legislation Monitor (Australia)
IPCC	Independent Police Complaints Commission
IPCLB	Independent Privacy and Civil Liberties Board (UK)
IS	Islamic State / Daesh
ISIL	Islamic State in Iraq and the Levant (same as IS)
ISIS	Islamic State in Iraq and Syria/al-Sham (same as IS)
ISYF	International Sikh Youth Federation
JCHR	Joint Committee on Human Rights
JTAC	Joint Terrorism Analysis Centre
MCB	Muslim Council of Britain
MI5	Security Service
MI6	Secret Intelligence Service
MPS	Metropolitan Police Service
NCA	National Crime Agency
NCTP HQ	National Counter-Terrorism Policing Headquarters
NCTPOC	National Counter-Terrorism Policing Operations Centre
NIPB	Northern Ireland Policing Board
NIO	Northern Ireland Office
NPCC	National Police Chiefs' Council (replaced ACPO)

NPM	National Preventive Mechanism
ONH	Óglaigh na hÉireann (Soldiers of Ireland)
OSCT	Office for Security and Counter-Terrorism, Home Office
PCLB	Privacy and Civil Liberties Board (UK)
PCLOB	Privacy and Civil Liberties Oversight Board (US)
PIRA	Provisional Irish Republican Army
PNR	Passenger Name Records
POAC	Proscribed Organisations Appeal Commission
PMOI	People's Mujahideen of Iran
PRG	Proscription Review Group
PPS	Public Prosecution Service (Northern Ireland)
PSNI	Police Service of Northern Ireland
PWG	Proscription Working Group
RAAD	Republican Action Against Drugs
RIRA	Real Irish Republican Army
RPG	Rocket-Propelled Grenade
SDSR	Strategic Defence and Security Review
SIAC	Special Immigration Appeals Commission
SO15	Counter-Terrorism Command, Scotland Yard
SOCA	Serious Organised Crime Agency
START	(National Consortium for the) Study of Terrorism and Responses to Terrorism (US)
TACT	Terrorism Act
TE-SAT	Terrorism Situation and Trend Report (Europol)
TPIMs	Terrorism Prevention and Investigation Measures
TRA	Terrorism-Related Activity
UVIED	Under-Vehicle Improvised Explosive Device
XRW	Extreme Right Wing

# **ANNEX 2**

GUEST CHAPTER**FOREIGN TERRORIST FIGHTERS AND UK COUNTER TERRORISM LAWS****Professor Emeritus Clive Walker Q.C. (Hon)****Background: phenomenon, meaning, and threat**

1. The purpose of this chapter is to analyse and assess how UK counter-terrorism laws and policies have adapted to the phenomenon of ‘foreign terrorist fighters’. For these purposes, the focus will be upon persons linked to conflict or terrorism in Iraq and Syria associated with the rise and establishment of Islamic State (Daesh). The chapter has been principally authored by Professor Emeritus Clive Walker, University of Leeds, who is Senior Special Adviser to the Independent Reviewer of Terrorism Legislation, with material on Northern Ireland from Alyson Kilpatrick. The analysis was based on a review of literature, but also hugely benefited from a series of interviews held in June and July 2016 with UK security officials and experts. Participants from selected overseas jurisdictions also took part, with the focus on European neighbours facing similar problems, especially Denmark, Germany, and the Netherlands.<sup>334</sup>
2. There is no UK legal definition of ‘foreign terrorist fighter’, though the term ‘foreign fighter’ appears in official documents,<sup>335</sup> with Islamic State (Daesh) depicted as ‘currently the predominant terrorist threat to the UK and our interests overseas’.<sup>336</sup> The most significant official definition is in recital 8 of UN Security Council Resolution 2178 of 15 August 2015, which cites ‘individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict’.<sup>337</sup> There is no further definition of ‘terrorist’, though the collection of international criminal law and counter-financing treaties provide some elucidation. As for secondary commentaries, one

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<sup>334</sup> For wider surveys, see Al Qaeda Sanctions Committee, *Analysis and Recommendations with regard to the Global Threat from Foreign Terrorist Fighters* (S/2015/358, New York, 2015); Schmid, A.P. and Tinners, J., *Foreign (Terrorist) Fighters with IS* (ICCT, The Hague, 2015); van Ginkel, B. and Entenmann, E., *The Foreign Fighters Phenomenon in the European Union* (ICCT, The Hague, 2016); de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016) chaps.20-23.

<sup>335</sup> See HM Government, *CONTEST: Annual Report for 2014* (Cm.9048, London, 2015) paras.1.3, 2.5, 2.23, 2.39, 2.44; *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) para.2.10.

<sup>336</sup> HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) para.1.7.

<sup>337</sup> See de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016) chaps.13, 14.

influential scholar has argued that foreign fighting involves 'any military activity (training or fighting), using any tactic (terrorist or guerrilla tactics), against any enemy (Western or non-Western)—so long as it occurs outside the West.'<sup>338</sup> This *ad hoc* definition embodies several elements of controversy.

- (a) Most important of all, it is not qualified by the term, 'terrorist', and so can encompass a wider range of activities, especially involvement in foreign state forces and in private military companies. These points are drawn out next.
- (b) The usage of 'foreign fighter' could encompass affiliation to a state-affiliated military organization whether as a committed volunteer or as a paid or conscripted recruit. This exclusion sparks debate about why involvement in some past conflicts, such as the Spanish Civil War,<sup>339</sup> has been condoned (or even revered)<sup>340</sup> and also why UK citizen service in the military of foreign states, such as the French Foreign Legion (acting in Operation Barkhane) or the Israel Defence Force (in Palestine), does not spark official disquiet.<sup>341</sup> So far as the latter form of engagement is concerned, there are crucial distinctions from Islamic State in that French or Israeli state forces are committed to abide by international law, including international humanitarian law, and have not been condemned as organisations by the United Nations. Furthermore, in UK law, the joining of official state forces will not *per se* amount to 'terrorism' nor to any breach of other laws (as discussed below).
- (c) Next, the usage of the wider term, 'foreign fighter' can also comprise involvement as security personnel in activities under the aegis of private military companies. So long as they operate within national and international law, especially those following the International Code of Conduct for Private Security Service Providers 2012,<sup>342</sup> such employees are likely to be treated as engaged in legitimate activities, illustrated by the use of heavily armed guards on ships in the Gulf of Aden.<sup>343</sup>

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<sup>338</sup> Hegghammer, T., 'Should I stay or should I go?' (2013) 107 *American Political Science Review* 1, 1. Compare the more elaborate version at Hegghammer, T. 'The rise of Muslim foreign fighters: Islam and the globalization of jihad.' (2011) 35 *International Security* 53, 58.

<sup>339</sup> See Malet, D., *Foreign Fighters* (Oxford University Press, Oxford, 2013).

<sup>340</sup> See Baxell, R., *Unlikely Warriors* (Aurum Press, London, 2014).

<sup>341</sup> See Channel 4, Factcheck: What about the Britons who fight for Israel? (<http://blogs.channel4.com/factcheck/factcheck-britons-fight-israel/18448>), 7 July 2014.

<sup>342</sup> [http://icoca.ch/en/the\\_icoc](http://icoca.ch/en/the_icoc).

<sup>343</sup> See Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480863/use-of-armed-guards-to-defend-against-piracy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480863/use-of-armed-guards-to-defend-against-piracy.pdf), 2013).

- (d) Reference to 'military activity' implies that the levels of intensity and seriousness of violence will be higher than the intermittent and clandestine violence more often associated with terrorist tactics in the UK, whether committed by foreigners or citizens.<sup>344</sup> These severe conditions are met in Iraq and Syria, but not in most terrorism-related campaigns.
- (e) There is no exclusion of fighters who claim citizenship of the conflict state or kinship ties to its residents or even a common bond through religion. Aside from being an inappropriate qualification in an internecine conflict, as far as UK counter-terrorism law is concerned, such links are rejected as amounting to any form of legal justification, save perhaps for a claim to the defence of blood relatives.<sup>345</sup>
- (f) Finally, whether the fighter is paid or not seems less crucial. Many groups designated as terrorist have made payments to 'volunteers', including Islamic State (Daesh), but payment is unlikely to be a prime motivation in the case of foreign fighters in Syria and Iraq compared to politics, religion and culture.<sup>346</sup>

3. Foreign fighting is nothing new for previous conflicts<sup>347</sup> or for the current proponents of jihad.<sup>348</sup> Foreigners have previously participated in conflicts in Bosnia, Chechnya, Somalia, and Afghanistan. Indeed, Al Qa'ida's involvement in the resistance to Russia in Afghanistan, incorporating mainly Saudi and Egyptian contingents, was 'pivotal' to its development.<sup>349</sup> British-based jihadis also reflect these experiences, as evidenced by the profiles of some of those brought before the British courts for terrorism activities<sup>350</sup> and, more controversially, persons with British links who were detained (originally in Afghanistan and Pakistan) by US authorities in *Guantánamo Bay*.<sup>351</sup> However, the ongoing conflicts in Iraq and Syria, associated with the establishment of the Islamic State of Iraq and the Levant (2013–14) and then Islamic State

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<sup>344</sup> Prominent cases of foreigners conducting terrorism in the UK range from Palestinian extremists in the 1980s (such as *R v Nezar Nawat Mansour Hazi Hindawi* (1988) 10 Cr. App. R. (S.) 104) to some of those convicted of the 21 July 2005 attempted bombings (*R v Ibrahim* [2008] EWCA Crim 880).

<sup>345</sup> See *R v AY* [2010] EWCA Crim 762, paras 14, 23, 26; *R v Farooqi* [2013] EWCA Crim 1649, para 68; *R v Gul* [2013] UKSC 64.

<sup>346</sup> See Borum, R. and Fein, R., 'The psychology of foreign fighters' (2016) *Studies in Conflict & Terrorism* <http://dx.doi.org/10.1080/1057610X.2016.1188535>.

<sup>347</sup> Malet, D., *Foreign Fighters* (Oxford University Press, Oxford, 2013); Flores, M., 'Foreign fighter involvement in national and international wars' in de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016).

<sup>348</sup> For the meaning of 'jihadist terrorism', see Rehman, J., *Islamic State Practices, International Law and the Threat from Terrorism* (Hart Publishing, Oxford, 2005).

<sup>349</sup> Gerjes, F.A., *The Rise and Fall of Al Qaeda* (Oxford University Press, Oxford, 2014) p.38.

<sup>350</sup> See, for example, *R v Rowe* [2007] EWCA Crim 635; *Secretary of State for the Home Department v AP* [2010] UKSC 24; *Secretary of State for the Home Department v CE* [2011] EWHC 3159 (Admin); *XX v Secretary of State for the Home Department* [2012] EWCA Civ 742; *Mohamed and another v Secretary of State for the Home Department* [2014] EWCA Civ 559; *DD v Secretary of State for the Home Department* [2015] EWHC 1681 (Admin).

<sup>351</sup> See Worthington, A., *The Guantánamo Files* (Pluto Press, London, 2007).

(Daesh) (2014 onwards), have instigated greater national and international apprehensions about foreign terrorist fighters than in previous conflicts. Amongst the causes are: proximity and accessibility of the battlefield; the more effective deployment of social media to spread inviting messages; and the scale and diversity of opportunities for volunteers associated with the assumption of statehood rather than some clandestine terrorist vanguard.<sup>352</sup> As a result, the current threat level for international terrorism in the UK was raised to SEVERE on 29 August 2014 because of the activities of Islamic State (Daesh); in the words of Prime Minister David Cameron, 'what we're facing in Iraq now with ISIL is a greater and deeper threat to our security than we have known before'.<sup>353</sup> The resultant threat has both qualitative and quantitative aspects.

4. As for the qualitative threat from Islamic State (Daesh), several elements coalesce. One is the outward challenge to international law, policy, and peace, a problem marked out by UN Security Council Resolutions (UNSCR) which have condemned the phenomenon of foreign terrorist fighters, and their gross violations of international humanitarian law, human rights, and destruction of cultural heritage.<sup>354</sup> The second is the inward threat to national interests. Foreign terrorist fighters seek to inspire and recruit others at home, thereby deepening the threat of the infliction of terrorism and the detriment to social cohesion. Thwarted foreign terrorist fighters who are intercepted before reaching their destination may then seek more proximate targets. Most serious of all, returning foreign terrorist fighters can apply back home military techniques, logistical networks and status, all of which might be utilised in attacks by them or by those they inspire.<sup>355</sup> Early doubts about the seriousness of this domestic threat<sup>356</sup> have been starkly dispelled by mass deaths from attacks such as in Belgium, France, Tunisia, and Turkey during 2015 and 2016.<sup>357</sup>

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<sup>352</sup> See Hegghammer, T., 'The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad' (2010/11) 35 *International Security* 53; Malet, D., 'Foreign Fighter Mobilization and Persistence in a Global Context' (2015) 27 *Terrorism & Political Violence* 454; Weiss, M. and Hassan, H., *ISIS: Inside the Army of Terror* (Regan Arts, New York, 2015); Stern, J., and Berger, J., *ISIS: The State of Terror* (Ecco Press, New York, 2015); Atwan, A-B., *Islamic State: The Digital Caliphate* (Saqi, London, 2015); Klausen, J., 'Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq' (2015) 38 *Studies in Conflict & Terrorism* 1; Johnston, P.B. et al, *Foundations of the Islamic State* (RAND, Santa Monica, 2016).

<sup>353</sup> <https://www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference>.

<sup>354</sup> UNSCR 2178 of 15 August 2014, paras.7-10; UNSCR 2249 of 20 November 2015.

<sup>355</sup> Byman, D., 'The Homecomings: What Happens When Arab Foreign Fighters in Iraq and Syria Return?' (2015) 38 *Studies in Conflict & Terrorism* 581.

<sup>356</sup> Byman, D. and Shapiro, J., *Be Afraid, Be a Little Afraid* (Brookings Policy Paper 34, Washington DC, 2014).

<sup>357</sup> Yourish, K. et al, 'How many people have been killed in ISIS attacks around the world' *New York Times*, 1 July 2016, <http://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world.html>. Compare the earlier assessment by Hegghammer, T. and Nesser, P., 'Assessing the Islamic State's Commitment to Attacking the West' (2015) 9 *Perspectives on Terrorism* 14.



5. In quantitative terms, around 22,000 foreign terrorist fighters have been involved in Syria and Iraq, mostly from the Middle East and Africa (especially Tunisia).<sup>358</sup> Up to 5,000 Europeans have been recruited.<sup>359</sup> As for the UK, the official estimate as at 30 June 2016 is that:

‘Approximately 850 UK-linked individuals of national security concern have travelled to engage with the Syrian conflict. Of total travellers from the UK, just under half have returned to the UK, approximately 15% are deceased and just under half of the remainder have returned to the UK. The majority of individuals in theatre are affiliated with Daesh. The average age at time of travel of UK-linked individuals of national security concern engaging in the Syrian conflict has reduced significantly. Nearly half of those travelling aged 18 and under have departed since July 2014. We have also observed an increase in the number of women, families and minors engaging in the conflict, although they remain a small proportion of overall travellers. We judge that individuals who have travelled to the Syria theatre and engaged with extremist groups pose an increased risk on their return, due to the high probability of their having an increased capability and mindset to commit violent acts.’<sup>360</sup>

The total UK-related figures given above are in practice broken down further into several categories based on a fluid risk assessment, ranging from those who might attack in the UK or are involved in external attack planning, through those who have become aligned with active terrorists, to those who harbour extreme views but are disconnected or distant from the perpetration of harms. In this light, the epithet, ‘terrorist’, can become somewhat misleading as many travellers (including most females) intend to engage in acts of solidarity of a humanitarian or support nature and not in combat. Though they may still aid the cause of Islamic State (Daesh) through their involvement, most are never prosecuted as ‘terrorists’. Of course, many find that the reality of Islamic State (Daesh) to be contrary to their expectations, but the varied motivations and experiences raise issues about labelling. Another revealing feature is that around a half have not returned as yet, so pending challenges will be faced in handling their reintegration.

6. As for future trends, two features emerge. One is that rates of recruitment and travel have been downwards from a peak in 2014, though the prevalence of social media messages of encouragement means that the generation of new recruits persists. Possibly, the allure of Iraq and Syria has reduced and the security measures against travellers have improved. According to

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<sup>358</sup> United Nations Counter-Terrorism Committee Executive Directorate, *Background Note: Special Meeting of the Counter-Terrorism Committee with Member States and Relevant International and Regional Organisations on “Stemming the Flow of Foreign Terrorist Fighters”* (Madrid, 27-28 July 2015) p.1.

<sup>359</sup> Schmid, A., *Foreign (Terrorist) Fighter Estimates* (ICCT, The Hague, 2015) p.11.

<sup>360</sup> This statement was provided by the Home Office, but aspects are confirmed in HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) paras.1.4, 2.35.

then Prime Minister David Cameron, 'Daesh is on the back foot: it has lost 45% of the territory that it once held in Iraq; its finances have been hit; more than 25,000 Daesh fighters have now been killed; desertion has increased; and the flow of foreign terrorist fighters has fallen by 90%.'<sup>361</sup> The second is that the reduced rate of travel may not immediately correspond to a lesser threat. While Islamic State (Daesh) has been condensed in 2015 and 2016, more substantial and frequent terrorist attacks have occurred elsewhere. The two factors could be unrelated, but some commentators suggest a connection through the dispersal of foreign terrorist fighters or through strategic displacement.<sup>362</sup>

7. Four comments may be distilled from the foregoing discussion.

- (a) The first relates to terminology.<sup>363</sup> To reflect the many shades of the phenomenon, terms such as 'travellers (outgoers)' and 'returnees (incomers)' would be more comprehensive and less charged terms than 'foreign fighters' or 'foreign terrorist fighters'. However, those latter terms have established currency in international discourse, though their inexactitude should contend against any attempt to build legal rules on their foundations. As between those two terms, the narrower term, 'foreign terrorist fighter', should be preferred to 'foreign fighter', since it is based on the UN precedent and avoids the equally thorny, but distinct, issues around foreign state fighting or private company fighting. The term, 'foreign terrorist fighter' (FTF), should also be clarified by specifying the different risk categories of those within the chosen terminology so as to provide a better picture of the phenomenon and risk threat.
- (b) Second, the FTF phenomenon is insufficiently reflected in policy statements. It is to a limited degree mentioned in the CONTEST annual reviews, as noted previously. However, the variant policies against FTFs, which engage especially the Pursue and Prevent elements of CONTEST, have not been stated in one chapter of CONTEST or any other specific policy paper, unlike the position for the European Union<sup>364</sup> and United Nations.<sup>365</sup> A valuable precedent is the Ministry of Security and Justice's *Netherlands Comprehensive Action Plan to Combat Jihadism* (2014), which concentrates on FTFs. CONTEST is currently under substantial revision for the first

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<sup>361</sup> Hansard (House of Commons) vol.613 col.285 13 July 2016.

<sup>362</sup> See Jenkins, B.M., 'Is the surge in terrorist attacks coincidence or coordinated campaign?' *The Hill* 11 July 2016.

<sup>363</sup> See also Schmid, A.P. and Tinnes, J., *Foreign (Terrorist) Fighters with IS* (ICCT, The Hague, 2015) chap.2.

<sup>364</sup> *Communication from the Commission delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union* (COM(2016) 230 final) para.2.1.

<sup>365</sup> *Report of the Secretary-General on the threat posed by ISIL (Daesh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat* (S/2016/92, New York, 29 January 2016).

time since 2011,<sup>366</sup> and so a specific segment which draws together the FTF policy responses would be opportune. Relevant headings might include (with associated counter-measures for each aspect): motives and triggers; preparations for travel; activities abroad; and return to the UK.<sup>367</sup>

- (c) Third, a policy restatement could also trigger further reflection on kindred laws against enlistment in foreign armies and neutrality laws. Current foreign enlistment laws are narrowly based. The Foreign Enlistment Act 1870 only catches involvement in a foreign armed force at war with a friendly foreign state; it has never sustained any prosecution for illegal enlistment or recruitment.<sup>368</sup> Few terrorism groups will fall within the definition of a 'foreign state' under section 30 of the 1870 Act. Islamic State (Daesh) might claim *de facto* recognition, given its effective control of territory, but this possibility is ruled out by explicit UK law proscription and international law condemnation. Some argue that neutrality laws are a preferable basis for action, since they avoid reliance on the troubled definition of 'terrorism' and provide a more comprehensive solution which does not pick sides in conflict.<sup>369</sup> However, this idea causes more problems than it solves.<sup>370</sup> First, service in the armed forces of other countries when not at war is not generally considered as disloyalty to one's own country. Second, recruitment to official state forces does not generally amount to 'terrorism' in international law, whereas, even if not linked to a proscribed organisation, fighting against a government such as Syria can still be 'terrorism',<sup>371</sup> and UNSCR 2178 encourages the labelling of non-international conflict opponents as terrorists.<sup>372</sup> A third problem is that a wider neutrality law multiplies rather than reduces exceptional claims to self-defence or humanitarian relief. It also discriminates against persons with dual citizenship who are helping their country of origin. The fourth problem is that blanket enforced neutrality may not correlate with foreign policy interests.

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<sup>366</sup> See Home Office, *Prevent Strategy* (Cm.8092, London, 2011).

<sup>367</sup> See Sinai, J., 'A Framework for Assessing the Mobilization of Westerners by Jihadists in Syria and Intervention Points for Counter-Measures' (2016) 10 *Perspectives on Terrorism* 45.

<sup>368</sup> *Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries* (Cmd.6569, London, 1976) para.38.

<sup>369</sup> See Forcese, C. and Mamikon, A., 'Neutrality law, anti-terrorism and foreign fighters' (2015) 48 *UBC Law Review* 305.

<sup>370</sup> See Blackburn, J. and Walker, C., 'Interdiction and indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 *Modern Law Review* 840.

<sup>371</sup> See *R v Jones* [2006] UKHL 16.

<sup>372</sup> Kraehenmann, S., *Foreign Fighters under International Law* (Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 2014).

(d) Whatever the difficulties of terminology a sustained and rational strategy against FTFs is essential. The UNSCR 2178 of 24 September 2014 demands that states prevent suspected FTFs from entering or transiting their territories and enact legislation to prosecute FTFs (articles 1-10).<sup>373</sup> This UN demand for action has been reinforced by the Council of Europe's Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2015, which requires the criminalisation of participating in an association or group for the purpose of terrorism, receiving training for terrorism, and travelling abroad for the purpose of terrorism.<sup>374</sup> With extraordinary alacrity, the European Union also signed the Convention and Protocol,<sup>375</sup> and has also developed a draft Directive on combating terrorism and a slew of other policies,<sup>376</sup> including the introduction of a European Passenger Name Record system,<sup>377</sup> measures on radicalisation,<sup>378</sup> and the strengthening of Europol through the setting up of a European Counter Terrorism Centre and an EU Internet Referral Unit.<sup>379</sup> While demanding state action, the UNSCR 2178 also reaffirms the need to observe all obligations under international human rights law, international refugee law, and international humanitarian law.<sup>380</sup> For the United Kingdom, consistency with established policies (such as CONTEST) and with national and international norms of constitutionalism must also be achieved.

8. Having set the scene, the prime focus of the remainder of this chapter is on the legal responses to FTFs - both current and proposed. However, the phenomenon is multifaceted, and so an explanation going beyond the terrorism legislation and even beyond criminal justice, policing and security is needed. The following scheme of study will be adopted. The prime concentration,

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<sup>373</sup> For reviews of progress, see *Implementation of Security Council resolution 2178 (2014) by states affected by foreign terrorist fighters* (S/2015/338, 14 May 2015; S/2015/683, 2 September 2015; S/2015/975, 29 December 2015). For 'well-founded fears' about UNSCR 2178, see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Sixth Annual Report* (A/71/384, 13 September 2016) para.45.

<sup>374</sup> CTS 217. See Piacente, N., 'The contribution of the Council of Europe to the fight against foreign terrorist fighters' [2015] 1 *eu crim* 12.

<sup>375</sup> COM (2015) 292 final. The UK government does not intend to opt in: House of Commons European Committee B, 7 March 2016.

<sup>376</sup> European Commission, *European Agenda on Security* (COM(2015) 185 final); EU Counter Terrorism Coordinator, *State of Play on Implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015* (6450/16 and 6785/16, Brussels, 2016). See de Kerchove, G. and Höhn, C., 'The regional answers and governance structure for dealing with foreign fighters' in de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016).

<sup>377</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

<sup>378</sup> European Commission, *Communication supporting the prevention of radicalisation leading to violent extremism* (COM (2016) 379 final).

<sup>379</sup> Council of the European Union, *Enhancing Counter Terrorism Capabilities at EU level* (14244, Brussels, 2015). See Dewar, D. and Ellerman, J., 'May the (well balanced) force be with us? The launch of the European Counter Terrorism Centre' (2016) 31 *Computer Law & Security Review* 195.

<sup>380</sup> Recital, para 7. For the status of FTFs under these branches of international law, see de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016) chaps.9-12, 15.

in the section which follows, will be on criminal justice policing and prosecution, much of which resides within the terrorism legislation. That will be followed by a shorter consideration of the myriad of non-criminal justice responses and resolutions, much of which resides outwith the terrorism legislation. Since this chapter mainly deals with England and Wales, the jurisdiction most affected by FTFs, more limited commentary deals with Scotland and Northern Ireland, leading into conclusions and recommendations.

### **Criminal justice, policing and prosecution aspects**

9. Policing powers have been little modified because of the FTF phenomenon, with the exception of specialised powers in relation to travel documents (examined below). However, many arrests have occurred under the Terrorism Act 2000 and kindred powers:

#### ***Arrests related to Syria 2014-2016 (6 June)***<sup>381</sup>

<b>Total</b>	<b>2014</b>	<b>2015</b>	<b>2016 (6 June)</b>
Arrests	167	166	38
Charges	68	62	17
Convictions	58	52	0

<b>Inbound</b>	<b>2014</b>	<b>2015</b>	<b>2016 (6 June)</b>
Arrests	28	23	4
Charges	7	7	1
Convictions	6	4	0

<b>Outbound</b>	<b>2014</b>	<b>2015</b>	<b>2016 (6 June)</b>
Arrests	37	36	4
Charges	16	8	1
Convictions	14	2	0

10. As well as arrests, the power of examination at ports under Schedule 7 of the Terrorism Act 2000 is in the front line of FTF policing. As discussed in chapter 7 of the Independent Reviewer’s 2016

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<sup>381</sup> Source: National Terrorist Arrest Database (NTAD). Outbound arrests do not include suspects at preparatory stage or those who have merely stated an intention or facilitated travel. The charging rate of 39% in 20014 and 2015 is similar to the general rate (= 34%): Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2016* (Statistical Bulletin 04/16, London, para.3.4.

report, a continued decline has occurred in the use of examination powers.<sup>382</sup> Within that overall decline has been a rise in detentions by 39% in 2015-16 (to 1,821), though the Home Office attributes that rise to the statutory reforms undertaken by the Anti Social Behaviour and Police Act 2014 which ensure that a mandatory detention takes place where any examination lasts for more than an hour. Certainly, Schedule 7 has been used extensively against the FTF phenomenon. For instance, in *Re Z*,<sup>383</sup> an application was granted without notice for wardship of a 17 year old Somali girl. She was stopped at an airport under Schedule 7 with a one-way ticket. Several other such cases have occurred,<sup>384</sup> with some families of travellers being critical when intervention has failed.<sup>385</sup> Adult travellers have also been intercepted.<sup>386</sup>

11. One note of controversy concerning travel controls is the allegation of a policy either surreptitiously to allow jihadis to travel to Islamic State (Daesh) or even expressly to permit the exit of those who have surrendered their passports – the so called ‘home and away’ policy. Some have openly supported such a policy.<sup>387</sup> However, while border security is far from foolproof and several embarrassing departures have occurred,<sup>388</sup> there is little evidence of such a policy, and it has been expressly rejected on sound grounds. Whilst it may save short-term resources and avoid deepening the hostility of the suspect,<sup>389</sup> the downside lies in creating a jihadi who is a greater long-term risk, given ‘the prospects of their coming back more trained, more angry, more radicalised, to this country’.<sup>390</sup>
12. The statistics revealed above are instructive and could form part of the specific report advocated earlier. Insights into police powers can reveal problems of resourcing and also legal constraints, such as the availability of effective powers to apply police bail and travel restrictions. At present, police bail is not available under the Terrorism Act 2000, section 41, while the only response

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<sup>382</sup> Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2016* (Statistical Bulletin 04/16, London, 2016) para.6.3.

<sup>383</sup> [2015] EWHC 2350 (Fam).

<sup>384</sup> Gadher, D., ‘Police seize children of jihadist mum’ *Sunday Times* 4 January 2015 p.8; Quinn, B., ‘Mother who tried to move family to Syria ordered to give up children’ *The Guardian* 27 May 2016.

<sup>385</sup> de Bruxelles, S., ‘Why wasn’t runaway girl stopped, family ask’ *Sunday Times* 2 October 2014 pp.13, 14.

<sup>386</sup> *R v Majdi Shajira, R v Imran Mohammed Khawaja, Tahir Farooq Bhatti and Asim Ali, R v Abdulraouf Eshati* ([https://www.cps.gov.uk/publications/prosecution/ctd\\_2015.html](https://www.cps.gov.uk/publications/prosecution/ctd_2015.html), 2015).

<sup>387</sup> Dathan, M., ‘Give all Isis sympathisers a free flight to Syria and you’ve solved the problem, says UKIP candidate’ *The Independent* 30 March 2015. Mr Justice Hayden has also been quoted as commenting, ‘why not just let them go?’. Hamilton, F., ‘Judge questions excessive cost of stopping jihadists’ *The Times* 6 October 2016 p.12.

<sup>388</sup> A noteworthy example is Siddhartha Dhar who absconded from police bail in September 2014. Police banned him from travelling and ordered him to hand in his passport. However, he took a coach for Paris and then announced his arrival in Syria: ‘What a shoddy security system Britain must have to allow me to breeze through Europe to [IS]’ (<http://www.bbc.co.uk/news/uk-35225636>, 4 January 2016). The failings of border controls have been the subject of recent reports: Public Accounts Committee, *Reforming the UK border and immigration system* (2014–15 HC 584); National Audit Office, *E-borders and successor programmes* (2015-16 HC 608).

<sup>389</sup> This point was made following the conviction of Nadir Syed whose passport had been confiscated: Gutteridge, T., ‘Terror police are letting ISIS fanatics LEAVE Britain as they lose grip on jihadis’ *The Independent* 15 December 2015.

<sup>390</sup> House of Commons Home Affairs Committee, *Counter Radicalisation* (2015-16 HC 311), Oral evidence from Mark Rowley Q16.

available when travel conditions are breached is a return to custody which is not allowed where pre-charge custody time limits have already been reached. The reform of police bail powers is the object of the Policing and Crime Bill 2016-17,<sup>391</sup> which specifies (clauses 67, 68) that when a person is (a) arrested under section 24 of the Police and Criminal Evidence Act 1984 (or the Northern Ireland equivalent) in respect of an offence mentioned in section 41(1) or (2) of the Counter-Terrorism Act 2008, (b) is released before charge and on bail, (c) subject to a travel restriction condition ie a requirement on an individual not to leave the UK, a requirement to surrender travel documents, and a requirement not to be in possession of any travel documents, criminal offences are committed in the event of breach. The amendments seek to deter breaches of travel restrictions and provide for a sanction for those who attempt to leave or who return to the UK (in that case, avoiding evidential difficulties relating to activities abroad), in addition to potential sanctions for more serious terrorism-related offences. However, the rather convoluted drafting by reference to the CTA 2008 rather than the TA 2000, section 41 signals a determination not to allow any form of police bail under section 41. Its absence is being keenly felt by the police, who are often resorting to powers under PACE 1984 as an alternative in order to fill this very gap. The absence of police bail under section 41 appears counter-productive and should be reconsidered. Save for the most serious and complex of cases, section 41 is becoming an unanticipated irrelevance because of this shortcoming.

13. Moving onto investigation and prosecution of foreign terrorist fighters, a good sense of the range of relevant offences may be gained by analysing the lists of successful prosecutions recorded for 2015 and 2016 (to 19 July) recorded by the Counter-Terrorism Division of the Crown Prosecution Service.<sup>392</sup> Many recorded cases relate to travel or intended travel by FTFs, plus several others arise from general incitement activities or even planned attacks in the UK: 14 out of 31 in 2015; 5 out of 14 in 2016. In more detail, the following patterns emerge (with some overlap in categorisation).

- (a) For would-be travellers who did not actually depart the UK (5 prosecutions), the preparation of terrorism (TA 2006, section 5) is by far the most frequent and serious charge. It applied in every relevant case. The cases are: *R v Trevor Mulindwa* (detained at Heathrow on his way to Somalia; 2015); *R v Mustakim Jaman and Tuhin Shahensha* (Jaman helped others to leave and Shahensha planned to go to Syria; 2015); *R v Mohammed Kahar* (detailed inquiries about how to reach Syria as well as funding and dissemination offences; 8 years on appeal [2016] EWCA Crim 568); *R v Junead Khan and Shazib Khan* (preparing to leave for Syria and preparing attacks on

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<sup>391</sup> HL no.55.

<sup>392</sup> <https://www.cps.gov.uk/publications/prosecution/ctd.html>.

military personnel in East Anglia; 2016); *R v Naseer Taj* (arrested two days before travel to Syria where he had the ambition to be a suicide bomber; the main charge under section 5 was also accompanied by convictions under the TA 2000, section 58, the Identity Documents Act 2010, section 4; 2016).

- (b) For returnees who managed to leave the UK (including those intercepted *en route*), there were 8 prosecutions. Once again, the TA 2006, section 5, is the main charge (6 prosecutions). The cases are: *R v Imran Mohammed Khawaja, Tahir Farooq Bhatti and Asim Ali* (Khawaja had been in Syria and was convicted under sections 5 and 8 of the TA 2006 and section 54 and 57 of the TA 2000; Bhatti pleaded guilty to an offence of assisting an offender, contrary to section 4 of the Criminal Law Act 1967; Ali pleaded guilty to entering a funding arrangement with Khawaja contrary to section 17 of the TA 2000; 2015); *R v Zakariya Ashiq* (Ashiq was intercepted in Jordan; 2015); *R v Ednane Mahmood* (he was persuaded to return from Turkey and was convicted also under the TA 2006, section 2; 2015); *R v Yahya Rashid* (he was arrested in Turkey after visiting the British Embassy and was also convicted of offences of fraudulently obtaining funds for travel; 2015); *R v Silhan Özçelik* (she was returned from Cologne after travelling to join the PKK; [2016] EWCA Crim 568); *R v Ayman Shaukat, Alex Nash, Kerry Thomason and Lorna Moore* (Nash had travelled to Syria but was turned back in Turkey; Shaukat, the ringleader, assisted travel of Nash and Moore's husband, Sajid Aslma; Kerry Thomason was convicted for assisting her husband, Isaiah Siadatan; Moore was convicted under section 38B of the TA 2000 in relation to knowledge of her husband's plans; 2016). Amongst the other charges (2 prosecutions) were: *R v Mustafa Abdullah* (he had returned from Syria via Sweden and was stopped at the airport with documents leading to a conviction under section 58 of the TA 2000; 2015); and *R v Tareena Shakil* (she travelled in 2014 to Ar-Raqqa and returned in 2015; she was convicted of membership contrary to section 11 of the TA 2000 and encouraging terrorism contrary to the TA 2006, section 1; 2016).
- (c) Remaining prosecutions (6) have related to funding and supportive activities, including: *R v Hana Khan* (two offences contrary to section 17 of the TA 2000 after she tried to send money to a foreign fighter in Syria; 2015); *R v Majdi Shajira* (supply of shoes contrary to section 17; 2015); *R v Mohammed Abdul Saboor* (supply of a pair of ballistic glasses contrary to section 17; 2015); *R v Abdulraouf Eshati* (possessing documents relating to the supply of military equipment to Libyan groups contrary to section 58 of the TA 2000; 2015); *R v Forhad Rahman, Adeel Brekke and Kaleem Kristen Ulhaq* (the defendants assisted Aseel Muthana to leave the UK so that he could join his older brother in Syria; all were convicted under section 5 of the TA



2006, and Ulhaq, who also wanted to leave, was convicted under section 17 of the TA 2000; 2016). One other prosecution related to a failure to comply with notification requirements under the CTA 2008, Part IV: in *R v Trevor Brooks and Simon Keeler*, the defendants were detained at the Hungary/Romania border by border police; 2015.

14. Issues arising from this survey of prosecutions are as follows.

(a) Most detected FTFs related to Iraq/Syria are not prosecuted. The current rate of prosecution for Iraq and Syria related activities is said to be 24% (54 prosecuted and 30 pending out of 350),<sup>393</sup> a figure which should be published periodically and clarified.<sup>394</sup> Given that prosecution is meant to be a primary response for both travellers and returnees under the UNSCR 2178, paras.4 and 6, what is the explanation for the apparently low rate of prosecution? Part of the explanation is statistical – that the 350 total represents persons who have been assessed by intelligence sources to be FTFs. The 350 have not all been referred or considered for prosecution or even police investigation, so the prosecution rate of referred cases is effectively higher. However, there are also substantive reasons affecting prosecution rates. Some allege that prosecutions seem to involve odd choices – persons who have mental difficulties or have failed to implement their plans – leading to the inference that darker motives are in play, such as refusal to cooperate. However, the key factor is officially claimed to be not so much the inability to detect returnees (though outgoers are more challenging), but the ability to sustain a prosecution in accordance with the Code for Crown Prosecutors by which there must be sufficient evidence to provide a realistic prospect of conviction and it must be in the public interest to prosecute. Save for cases involving fighters for entities other than Islamic State (Daesh) or children (both considered below), the public interest is not decisive since the view was expressed by police, prosecutors and security agencies that prosecution is their top priority – ‘the number one aim’ – though it is not implemented at all costs. Rather, it is the quality and nature of the evidence which seems to be pivotal. Regarding quality, the gathering of admissible evidence from chaotic foreign conflict zones is challenging. Common forms of evidence will derive from materials left before departure (gathered by house searches), communications data and social media postings created whilst abroad, and admissions during interview, though the more mature FTFs will seek to cleanse

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<sup>393</sup> Hansard (House of Lords) HL8065 11 May 2016, Lord Keen.

<sup>394</sup> One later clarification is that this total of 54 includes persons involved in ancillary activities, such as financing, and not just returning ‘fighters’ (the total prosecutions of whom is 14, 10 of which have been convicted): Hansard (House of Lords) HL1579 5 September 2016, Baroness Williams.

themselves of materials before they return home. The collation of the prosecution dossier can require expert evidence as to translations and the pinpointing of locations, all of which involves considerable effort and cost. Some assistance has been derived from the Serious Crime Act 2015. Section 81 amends the list of extra-territorial offences under the TA 2006, section 17, by extending UK territorial jurisdiction over the TA 2006, sections 5 and 6, so as to enable the prosecution of UK-linked individuals and those who seek to attack the UK where the evidence is based on activities abroad.<sup>395</sup> As for the nature of the evidence, most powerful will be intended or actual involvement in fighting or ancillary financing or tangible support (such as equipment provision). Such activities are most likely to convince a jury of wrongdoing rather than misplaced idealism. It follows that just one prosecution for membership has occurred under the TA 2000, section 11 (*R v Tareena Shakil*), and incitement offences under the TA 2006, sections 1 and 2, have also been confined to advocacy on a profuse scale.

- (b) Section 5 has provided the most important basis for prosecution of FTFs. The explanation can be found in the broad range of situations covered by the offence, allied to the facility for early intervention (in the case of travellers). But two problems arise.
- (c) One is its use in preference to more specific charges which might result in unfairness on two grounds. One is that the breadth of the offence widens the admissibility of evidence especially around the idea of 'mindset'. Secondly, the resort to section 5 may increase the possible maximum sentence, given that it carries life imprisonment. On this point of offence choice, the Court of Appeal in *R v Kahar* has refused to give any guidance:<sup>396</sup>

‘As a matter of constitutional principle, it is generally for the prosecutor to decide what charge to prefer. Whatever may have been the purpose of Parliament, the offence under s.5 is clearly on its ordinary language wide enough to cover conduct that might otherwise be charged as conspiracy or even attempt to commit particular offences and/or (given the overlap recognised in *Roddis* [2009] EWCA Crim 585 at [9] and in *Iqbal & Iqbal*) to cover conduct that might otherwise be charged as another offence under the anti-terrorist legislation itself. It would, in our view, be inappropriate, both legally and practically, to confine the discretion of the prosecution as to the

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<sup>395</sup> The changes followed the conviction of Mashudur Choudhury (<http://www.theguardian.com/uk-news/2014/may/20/briton-convicted-terror-offence-syria-jihadist-training-camp>): (Hansard (House of Lords) vol.755 col.558, 15 July 2014).

<sup>396</sup> [2016] EWCA Crim 568, para.7, Lord Thomas.

choice of charge (as embodied, for example, in paragraphs 6.1-6.5 of the Code for Crown Prosecutors) in the way suggested – albeit that there may be some cases in which it might be necessary to take into account, as one factor, the maximum sentence that could have been imposed for the offence(s) that could otherwise have been charged.’

Consequently, it is here suggested that clear advice as to the prospects and consequences of prosecution is recommended by way of action from the Counter Terrorism Division (CTD) of the CPS as a warning to potential FTFs. A standing statement of this kind would reinforce the dire consequences threatened by the CTD Head, Sue Hemming, in a press interview on 3 February 2014 (which is not even recorded on the CPS website).<sup>397</sup>

- (d) The second issue arising with section 5 is the potential range of sentencing given the wide scope of ‘preparatory acts’. The *Kahar* judgment has directly engaged with this point. However, it has delivered a complex categorisation which is based on eight express factors (sophistication of plans and route; duration; depth of radicalisation; indoctrination and involvement of others; equipment and funds; activity in the conflict zone; and reasons and methods of return).<sup>398</sup> These engender six levels of sentencing, ranging from Levels 1 (steps which amount to attempted multiple murder or to a conspiracy to commit multiple murder – but no physical harm has been caused), and Levels 2 and 3 (each a little below on the scale because the activities were not quite so near in preparation or where the harm would not be quite as serious), though to Levels 4 (joining or supporting a terrorist group but on the periphery of the actual combat or with a longer term view to carrying out attacks), 5 (an offender who sets out to join a terrorist organisation overseas but does not complete the journey or an offender who makes extensive preparations but does not get very far) and 6 (one who never sets out or who sets out but does not, or cannot go very far or who has a minor role in relation to intended acts).<sup>399</sup> This litany of levels may be useful for shaping estimates of the resources to devote to prosecutions. But the judgment might be criticised for its lack of legal precision by employing overlapping and indistinct categories which even the Court of Appeal then ignored in addressing the sentence in most of the six cases before it. Therefore, a more comprehensive approach to offence choice and sentencing for the range of terrorist offences remains desirable. The Court of Appeal hinted that this task should be

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<sup>397</sup> See O'Neill, S., 'Britons who fight to topple Assad will face courts when they return' *The Times* 4 February 2014.

<sup>398</sup> *Ibid.*, paras.19, 20

<sup>399</sup> *Ibid.*, paras.28-34.

undertaken by the Sentencing Council.<sup>400</sup> The Sentencing Council might also consider the length of the sentences in the UK. There may be a disjunction here between policies of rehabilitation and reintegration and policies of retribution. Such a dilemma arose in the case of Yusuf Sarwar, who was jailed for 10 years 3 months (including a 20% discount for guilty plea) after his mother revealed to police that he was in Syria where, for several months, he received from Al-Nusra (which was proscribed after they left the UK) limited firearms training and handled firearms on patrol close to the combat zone: ‘This is not justice. They said I was doing the right thing, that when my son came back they would try to help, but this terrible sentence – all they have done was to set me against my son.’<sup>401</sup> The mother drew comparison with the contemporary conviction of Ryan McGee, a right-wing extremist and serving soldier, who was convicted under the TA 2000, section 58 and the Explosive Substances Act 1883, section 4, for collecting materials for bomb-making but was sentenced to just two years.<sup>402</sup> Sentences in Continental Europe also tend to be much lighter. Thus, the major ‘Context’ case in the Netherlands at the end of 2015, involving multiple foreign terrorist fighters and facilitators, produced no sentence beyond 6 years.<sup>403</sup>

- (e) Aside from section 5, other offences which have made frequent appearances are the TA 2000, sections 17, 57 and 58. No special issues or new criticisms have arisen in their usage. Other offences designed with Islamic State (Daesh) in mind have not materialised at all. This observation includes offences against the payment of ransoms made in response to terrorist demands which were augmented by the CTS Act 2015, section 42. Countries other than the UK are reported to have continued to make such payments, despite UNSCR 2033 of 27 January 2014, which called upon all Member States to prevent terrorists from benefiting from ransom payments.<sup>404</sup>

15. The two ‘special cases’ identified above which might trigger public interest considerations in prosecution are as follows.

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<sup>400</sup> [2016] EWCA Crim 568, para.181.

<sup>401</sup> McVeigh, T., ‘“Police betrayed me”, says mother of imprisoned British jihadi’ *The Observer* 7 December 2014. *R v Sarwar & Ahmed* [2015] EWCA Crim 1886 was described as a Level 4 case in *R v Kahar* [2016] EWCA Crim 568, para.32.

<sup>402</sup> [https://www.cps.gov.uk/publications/prosecution/ctd\\_2014.html#a14](https://www.cps.gov.uk/publications/prosecution/ctd_2014.html#a14).

<sup>403</sup> *Prosecutor v Imane B*, Hague District Court, 10 December 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102>. The prosecutor had sought a maximum of five years: para.4.32.

<sup>404</sup> See Dutton, Y.M., ‘Funding terrorism: the problem of ransom payments’ (2016) *San Diego Law Review* (forthcoming).

(a) The first relates to those who adhere to anti-Islamic State (Daesh) forces. Recruitment to the official state Syria Arab Army does not of itself involve offences relating to terrorism. More contentious are forms of foreign fighting in Iraq and Syria for unofficial armed groups.<sup>405</sup> One might here distinguish those that are proscribed under Part II of the TA 2000 and others. The proscribed organisation of prime interest is the Kurdistan Workers' Party (Partiya Karkeren Kurdistan – PKK). In *R v Hundal; R v Dhaliwal*,<sup>406</sup> another proscribed group, the International Sikh Youth Federation (which was deproscribed in 2016), was not proscribed in the UK when the appellants joined it in Germany. But the court was clear that, after proscription in the United Kingdom, involvement anywhere in the world became potential crimes. Accordingly, in *R v Silhan Özçelik* in 2015,<sup>407</sup> the defendant, 18, was convicted under section 5 of travel to attempt to join the PKK in order to fight Islamic State. However, those who join other non-proscribed Kurdish groups, even if linked to the PKK, do not seem to face equal jeopardy of prosecution. This situation applies to the Yekîneyên Parastina Gel (YPG - People's Defense Units), which is the main armed unit of the Federation of Northern Syria – Rojava. It has developed a foreign volunteer wing, called the Lions of Rojava. Involvement in these unofficial forces against Islamic State (Daesh) (or even the Syrian Arab Army) appears not to be equated for the purposes of UK law with fighting for Islamic State (Daesh). Several cases have been detected of involvement by British citizens, but no prosecution has been sustained.<sup>408</sup> The same pattern has been repeated in other jurisdictions.<sup>409</sup> The death of one such fighter, Konstandinos Erik Scurfield, was the occasion for praise of his actions in Parliament.<sup>410</sup> Yet, even if not linked to a proscribed organisation, the use of violence against the Syrian government or against a population concentration in Islamic State (Daesh) can still amount to 'terrorism' within the TA 2000, section 1. Furthermore, the police claim to make a full investigation of such cases. From a risk perspective, these foreign fighters are still trained and have dangerous links, though they are generally not motivated or instructed to attack the UK. Some are currently on police bail, while investigations are ongoing into terrorism and war crimes, and

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<sup>405</sup> See Bakker, E. and Singleton, M., 'Foreign fighters in the Syria and Iraq conflict' in de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016).

<sup>406</sup> [2004] EWCA Crim 389.

<sup>407</sup> <https://www.cps.gov.uk/publications/prosecution/ctd.html>. Her appeal against conviction and sentence (21 months) was dismissed in *R v Kahar* [2016] EWCA Crim 568.

<sup>408</sup> A prosecution was commenced against Bherlin Gildo for weapons training and possessing materials arising from his involvement in Jabhat al Nusra (prior to its proscription in 2013); the prosecution was withdrawn because the CPS concluded that the evidential element of the Code test was no longer satisfied. For press allegations regarding the background, see Norton-Taylor, R., 'Terror trial collapses after fear of deep embarrassment for security services' *The Guardian* 1 June 2015.

<sup>409</sup> Notable cases are Jamie Reece Williams and Ashley Dybell (Australia) and Jitse Aske (Netherlands).

<sup>410</sup> Hansard (House of Commons) vol.593 col.988, 4 March 2015, Dan Jarvis.

prosecutions may result in the future. But would the public interest in defeating Islamic State (Daesh) or even the Syrian Arab Army rule out prosecution? Several cases of foreign fighters in this category (often former soldiers) have been reported.<sup>411</sup> The CPS CTD have indicated that some cases are under consideration under the evidential test, with the public interest test yet to come into play. In addition, consent from the Attorney General is required for extra-territorial prosecutions under the TA 2006, section 17. Consequently, issues of public interest are twice engaged, but the Attorney General has not yet delivered any decision on this type of case. By way of comment, the CPS and Attorney General should clarify the public interest in regard to these categories of fighters and should publicise it as a warning to travellers.

- (b) The other issue to engage the public interest in prosecution policy concerns the treatment of minors - those aged under 18 but above the age of prosecution (12 in Scotland and 10 elsewhere).<sup>412</sup> The involvement of children as FTFs has been documented in various ways. One noticeable trend in recent arrest statistics under section 41 of the TA 2000 is that in the year ending September 2015, the number of under-age suspects arrested for terrorism-related offences rose from 8 to 15.<sup>413</sup> Prosecutions have resulted.<sup>414</sup> For instance, X, a 14 year old at the time of arrest, pleaded guilty to an offence of inciting terrorism overseas contrary to section 59 of the TA 2000. From his bedroom, X plotted with an Australian jihadist, 18-year-old Sevdet Besim, to commit an attack upon an Anzac Day Parade in Melbourne.<sup>415</sup> Their plot was developed over the Internet and the intention was that police officers would be murdered by beheading. The purpose of this proposed attack was to promote ISIS, and X had been instigated by Abu Khaled al-Cambodi. Linked to this Anzac Day plot, a British girl aged 16, who was a friend, pleaded guilty to two section 58 offences (possessing bomb making recipes and also the Islamic State magazine, *Dabiq*).<sup>416</sup> The involvement of children, including at least 50 from the UK living within its territory, is a tactic of Islamic State (Daesh): 'IS has often shown that they train ... minors to

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<sup>411</sup> See Timothy Wordsworth (*Mail Online* 8 November 2015); Joe Robinson (*The Guardian* 25 January 2016); Joe Ackerman and Jac Holmes (*The Independent* 24 April 2016).

<sup>412</sup> Children and Young Persons Act 1963, s.16; Criminal Justice (Children) (Northern Ireland) Order 1998, Art.3; Criminal Justice and Licensing (Scotland) Act 2010, s.52;

<sup>413</sup> Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to September 2015 Statistical Bulletin 08/15* (London, 2015) p.1. In oral evidence from Mark Rowley, Assistant Commissioner for Specialist Operations in the Metropolitan Police Service, commented that many more arrestees are under 20 and that about a quarter of suspects are vulnerable through age or mental health (House of Commons Home Affairs Committee, *Counter Radicalisation* (2015-16 HC 311) pp.7, 10).

<sup>414</sup> See also Hammad Munshi in *R v Sultan Muhammed and Aabid Hassain Khan* [2009] EWCA Crim 2653.

<sup>415</sup> <http://www.bbc.co.uk/news/uk-34423984>, 2 October 2015.

<sup>416</sup> *The Times* 16 October 2015 p.4.

become the next generation of foreign terrorist fighters, which may pose a future security threat to Member States.<sup>417</sup> In such cases, difficulties may arise in proving that children have a formed political purpose, though the ideologies of many adult FTFs are far from sophisticated. Coming back to the consideration of the public interest in prosecution, doubts might arise from the dangers of making matters worse through incarceration compared to the attractions of education and rehabilitation for this highly impressionable (and therefore 'reformable') group as well as the policy prioritisation of protecting rather than punishing vulnerable communities. The prosecution of children should not be ruled out. But it would be worthwhile to accord more explicit weight to the UN Convention on the Rights of the Child 1989, Article 3, by which the best interests of the child should be the primary consideration in all actions concerning children. At present, children's rights are not acknowledged by counter-terrorism criminal laws or procedures,<sup>418</sup> even though the protection of children's rights requires the protection of both 'jihadi bride' and 'jihadi warrior'.<sup>419</sup>

16. Before closing the issues of criminal law and criminal procedure, two further ideas have been raised. The first is that serious atrocities committed by foreign terrorist fighters in Iraq/Syria should be signalled not just by terrorism offences but by international crimes such as crimes of genocide, crimes against humanity and war crimes, deriving from the Rome Statute 1998 (as translated into domestic effect by Part V of the International Criminal Court Act 2001).<sup>420</sup> The International Criminal Court (ICC) Prosecutor, Fatou Bensouda, has raised several difficulties regarding the ICC investigating Islamic State as an entity: it is not an entity which can be referred to the International Criminal Court, and Iraq and Syria are not parties to the Rome Statute.<sup>421</sup> In any event, a referral to ICC in 2014 was vetoed by Russia and China, and the UK government expects that any further attempt would likewise be blocked.<sup>422</sup> But the ICC prosecutor was of the view that personal jurisdiction could be asserted against FTFs, primarily as the responsibility of national authorities, since 'Some of these individuals may have been involved in the

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<sup>417</sup> Europol, *TE-SAT 2016* (The Hague, 2016) p.7. See also Bloom, M. and Horgan, J., 'The Rise of the Child Terrorist; (2015) *Foreign Affairs* 9 February; Benotman, N. and Malik, N., *The Children of Islamic State* (Quilliam, London, 2016).

<sup>418</sup> More general statements do exist. The Children and Young Persons Act 1933, s.44, requires the courts to have regard to the welfare of a young person, and CPS Guidance on Youth Offenders ([http://www.cps.gov.uk/legal/v\\_to\\_z/youth\\_offenders/](http://www.cps.gov.uk/legal/v_to_z/youth_offenders/)) reminds Crown Prosecutors that they must consider the interests of a youth, amongst other public interest factors, when deciding whether a prosecution is needed and makes reference to the United Nations 1989 Convention on the Rights of the Child and the United Nations 1985 Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

<sup>419</sup> van Spaendonck, R., 'To School or to Syria? The foreign fighter phenomenon from a children's rights perspective' (2016) 12 *Utrecht Law Review* 41, p.62. See also Institute of Race Relations, *Prevention and Children's Rights* (London, 2016).

<sup>420</sup> This proposal is underlined by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Sixth Annual Report (A/71/384, 13 September 2016)* para.51.

<sup>421</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>, 8 April 2015.

<sup>422</sup> Hansard (House of Lords) HL7816 3 May 2016, Baroness Anelay.

commission of crimes against humanity and war crimes.' In the case of the UK, war crimes have been considered by the CPS CTD in several cases, though no such prosecution has yet arisen.<sup>423</sup> Two such prosecutions have been mounted in Sweden, based on Facebook evidence. First, Mouhannad Droubi, a Syrian rebel who had lived in Sweden since 2013, was convicted of breaching the Geneva Conventions through the beating of a captured soldier in 2012. However, it later emerged that the victim was a fellow rebel who was being punished, and so there was a retrial resulting in conviction for aggravated assault (and an increase in sentence from five to seven years).<sup>424</sup> Second, Haisam Omar Sakhanh, resident in Sweden since 2013, awaits trial for participation in the execution by rebel forces of seven men in Idlib in 2012.<sup>425</sup> Prosecution for international crimes should remain under active consideration to mark the seriousness of these wrongs, and the CPS has indicated that it is alive to that possibility.<sup>426</sup> Those crime would certainly be more appropriate than the use of other extraordinary offences such as treason.<sup>427</sup> Treason might be viewed as 'a badge of honour'<sup>428</sup> and would entail major interpretive and procedural problems which were identified for reform as long ago as 1977.<sup>429</sup>

17. The final issue is whether there are any gaps in available offences. Several ideas have been proffered, though none received universal support.

- (a) One such candidate involves the designation of lands controlled by Islamic State (Daesh) as forbidden zones of travel and to make any visit (or intention to visit) a criminal offence, thereby avoiding the need to plot the specific actions of a suspect at a distance of over 2,000 miles and in circumstances where correspondent policing and legal systems are wholly absent. One senior police officer that suggested such an offence would be 'incredibly helpful'. This device has been implemented in Australia by section 119.2 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.<sup>430</sup> A defence of 'legitimate purposes' is afforded, but these 'are limited to

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<sup>423</sup> See further *R v Zardad* [2007] EWCA Crim 279; *R v Blackman* [2014] EWCA Crim 1718.

<sup>424</sup> <http://www.bbc.co.uk/news/world-middle-east-31639378>, 26 February 2015 (Södertörn District Court); <http://www.thelocal.se/20160511/syrian-jailed-in-sweden-over-facebook-beating-video>, 11 May 2016 (Huddinge District Court).

<sup>425</sup> Chivers, C.J., 'Syrian asylum seeker linked to mass killing is arrested in Sweden' [http://www.nytimes.com/2016/03/15/world/europe/syrian-asylum-seeker-linked-to-mass-execution-is-arrested-in-sweden.html?\\_r=0](http://www.nytimes.com/2016/03/15/world/europe/syrian-asylum-seeker-linked-to-mass-execution-is-arrested-in-sweden.html?_r=0), 14 March 2016.

<sup>426</sup> For guidelines, see [http://www.cps.gov.uk/publications/agencies/war\\_crimes.html](http://www.cps.gov.uk/publications/agencies/war_crimes.html).

<sup>427</sup> HC Deb vol 586 col 482 16 October 2014.

<sup>428</sup> *The Times* 18 October 2014 7, Lord Macdonald.

<sup>429</sup> See Law Commission, *Codification of the Criminal Law Treason Sedition and Allied Offences* (Working Paper 72, London, 1977); Lord Goldsmith, *Citizenship: Our Common Bond* (2009) at <http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf> para.56. Compare Goodell, J.A., 'The revival of treason: why homegrown terrorists should be tried as traitors' (2016) 4 *National Security Law Journal* 311

<sup>430</sup> Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria; Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2015 – Mosul District, Ninewa Province, Iraq. An area ban also was also instituted by the Danish Criminal Code (as amended by the Act 642 of 8 June 2016) art.114j.



providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.<sup>431</sup> On balance, this offence would not be worthwhile for the UK. First, the exceptional defences place the burden of proof on the honest and worthy to show entry into the prohibited area for a legitimate purpose.<sup>432</sup> As for FTFs, they will also cite aid purposes, so the ultimate burden of proof will still demand evidence not just of presence but also of training, logistical support, or involvement in fighting. Yet, these activities are viewed by prosecutors as already covered by specific and serious offences. Thus, the main effect will be to catch ‘jihadi brides’ rather than jihadi fighters, a category which is probably more in need of counselling than imprisonment. A final problem is that the area controlled by Islamic State (Daesh) is fluid, so the notion of a fixed territory will require constant reformulation.

- (b) Another foreign precedent which has attracted some interest is the French offence of visiting repeatedly websites which contain information about the commission of terrorism or glorify terrorism (Art. 421-2-6, para.1, 2C).<sup>433</sup> However, given the justifiable concerns about expressive rights engendered by the passage of the offences in the TA 2006, sections 1 and 2, as well as the variable motives for accessing jihadi websites, some legitimate, some not, this precedent is unattractive.<sup>434</sup> The emphasis should remain on preparatory actions and not preparatory thoughts, for which, if any counter-action is required, social and educational responses should prevail, some delivered through Prevent (below).
- (c) Membership of a terrorist group is the basis for an offence used in some European jurisdictions. Its advantage compared to the barely used TA 2000, section 11, is that the group may be much more amorphous and localised than the formal notion of a proscribed organisation under UK legislation. The idea is reflected, for example, in article 140a of the Netherlands Criminal Code (participation in an organisation which

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<sup>431</sup> Criminal Code Act 1995 (Cth), s.119.2(3).

<sup>432</sup> The offence is said to ‘conflict with the right to a fair trial, in particular the respect for the presumption of innocence’ by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Sixth Annual Report (A/71/384, 13 September 2016)* para.50. However, the position is not clear-cut since the offence draws liability from positive determination of the fact of presence rather than negative silence. Compare *Heaney and McGuinness v Ireland*, App no 34720/97, 2000-XII and *Quinn v. Ireland*, App no 36887/97, 21 December 2000, with *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 and *Sheldrake v Director of Public Prosecutions; Attorney General’s Reference (No 4 of 2002)* [2004] UKHL 43.

<sup>433</sup> This amendment was inserted by Loi 2014-1353 of 13 November 2014, art.6.

<sup>434</sup> There are many more prosecutions in France for terrorism glorification (Penal Code art 421-2-5) and apology (Loi sur La Presse of 29 July 1881, Art.24, para.6): Chalkiadaki, V., ‘The French “war on terrorism” in the post- Charlie Hebdo era’ (2015) 1 *eu crim* 26, 30.

has as its purpose the commission of terrorist offences),<sup>435</sup> and its invocation against FTFs is running at about the same level as art.46 (preparation to commit a serious offence). Such a formulation might help to address the apparent sidelining of membership offences under the TA 2000. However, the likely targets would be low level sympathisers, especially women, and so the same criticisms as for a 'presence in area' offence again arise. Another response might be resort to offence in the Serious Crime Act 2015, section 45: participation in the criminal activities of an organised crime group. It is not necessary for all of the acts or omissions comprising participation to occur in England and Wales (so long as at least one of them does). However, the 'gain or benefit' expected from criminal activity may not fit so well with terrorism activities, albeit that the terms are not limited to financial benefit. In so far as there are any jihadi 'godfathers',<sup>436</sup> then that offence might be relevant, but such resident individuals have not emerged from Islamic State (Daesh), which is more reliant on generalised online instructions. In addition, the existing offence of directing terrorism under the TA 2000, section 56, might apply.

- (d) Probably the fullest set of terrorism crimes are in France, where Article 421-2 of the Penal Code includes offences based not only on preparation (article 421-2-6) but also associations (article 421-2-1 – the notorious *association de malfaiteurs en relation avec une entreprise terroriste*) and lifestyle (article 421-2-3). Article 421-2 offences are also made subject to individual terrorism enterprises under article 5 of the Loi no.2014-1353 of 13 November 2014. The prevalence of the TA 2006, section 5, suggests it delivers sufficient flexibility to cover these variants, while 'lifestyle' can again be handled under the TA 2000, section 56.

## Non-criminal justice aspects

18. Most of the non-criminal justice responses to foreign terrorism fighters are not within the remit of the Independent Reviewer of the Terrorism Legislation, and so this part of the chapter will be relatively truncated, especially since those aspects which are within the remit often remain dormant. Nevertheless, since most FTFs are not prosecuted, it is important to examine the realistic alternative responses.

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<sup>435</sup> This offence was relied on in the *Context case (Prosecutor v Imane B)*, Hague District Court, 10 December 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102> para.18.32, where documentary evidence was found of a structured group.

<sup>436</sup> See Walker, C., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) para.5.33.

19. The underlying and most important response involves intelligence gathering, risk assessment and surveillance by the police and the security agencies.<sup>437</sup> Their work is necessarily limited by resources, but those resources have more than doubled since 2001.<sup>438</sup> Their work was underlined by a speech of Andrew Parker, Director of the Security Service, on 28 October 2015.<sup>439</sup>

‘We are seeing plots against the UK directed by terrorists in Syria; enabled through contacts with terrorists in Syria; and inspired online by ISIL’s sophisticated exploitation of technology. ... With our partners, we have thwarted six attempts at terrorist attacks in the UK in the last year, and several plots overseas. It may not yet have reached the high water mark, and despite the successes we have had, we can never be confident of stopping everything.’

More than 150 travellers were disrupted in 2015, some by chance but many through intelligence work.<sup>440</sup>

20. As for the application of non-criminal specialised terrorism legislation to FTFs, the following counter-measures address freedom of movement.

- (a) Part I of the CTS Act 2015 is designed to prevent FTFs from travelling abroad to engage in hostilities in Iraq and Syria, as well as to manage those British FTFs who seek to return home. Section 1 provides that when a constable has reasonable grounds to suspect that a person is attempting to leave the UK for the purposes of involvement in terrorism-related activity abroad, powers to require production of, search for, inspection of, and retention of, that person’s travel documents (meaning a passport and tickets) may be applied.<sup>441</sup> The powers were applied 24 times in 2015.<sup>442</sup> Thus, these powers have been a useful adjunct to port controls and have worked without notable problems.

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<sup>437</sup> See Byman, D., ‘The Homecomings: what happens when Arab Foreign Fighters in Iraq and Syria return?’ (2015) 38 *Studies in Conflict & Terrorism* 581, 590.

<sup>438</sup> See Walker, C. and Staniforth, A., ‘The amplification and melding of counter-terrorism agencies: from security services to police and back again’ in Masferrer, A., and Walker, C., (eds.), *Counter-Terrorism, Human Rights And The Rule Of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar, Cheltenham, 2013).

<sup>439</sup> ‘A modern MI5’ (<https://www.mi5.gov.uk/news/a-modern-mi5#sthash.krgV7bE6.dpuf>), paras.19, 22, 23.

<sup>440</sup> HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) paras.2.6, 2.36.

<sup>441</sup> See further CTS Act 2015, Sched 1, paras. 2, 15; Counter-Terrorism and Security Act 2015 (Code of Practice for Officers exercising functions under Schedule 1) Regulations 2015, SI 2015/217; Home Office, *Code of Practice for Officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents* (London: 2015).

<sup>442</sup> HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) para.2.11.

- (b) These measures in Part I add to existing measures which have already been applied to interdict outgoing FTFs. These include the Home Secretary's prerogative power to cancel a UK citizen's passport. The Home Secretary announced in 2013 that passports will be denied to, or removed from, British citizens 'whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest'.<sup>443</sup> There were 23 exercises in 2015 alone, compared to just 17 from 1947 to 2013.<sup>444</sup> Supplementary powers to stop, search and seize, and varying between ports and elsewhere, were added by the Anti-Social Behaviour and Police Act 2014, section 145 and Schedule 8.<sup>445</sup> At ports, the powers are wider but paradoxically less threatening because they add little to existing powers under the Immigration Act 1971 (Schedule 2, paras.2, 3). The extra powers allow for police and customs and not just immigration officers to check documents, extend the regime to British citizens, allow for search and seizure even when no terrorism or immigration issue can be invoked, and allow scrutiny within the Common Travel Area. Their narrow focus will probably deflect any challenges under Articles 5 and 8 of the European Convention.<sup>446</sup> The powers are more novel outside of ports. If the document is a false document, then arrest for an offence under the Identity Documents Act 2010, section 4, might follow. But Schedule 8 applies in narrow circumstances — to search for passports only (not other travel documents) which have been cancelled because of undesirable activities and provided the Home Secretary has also specifically authorized searches for that passport. In those circumstances, a constable may arrest on reasonable belief of possession.
- (c) Another measure related to travel documents was the issuance in August 2015 of guidance to parents or guardians to request the cancellation of the passport of a child under 16 at risk of radicalisation.<sup>447</sup> No statistics are available on the extent of application of this administrative measure. However, it is occasionally a tactic on the part of adults under suspicion, especially returnees, to surrender passports so as to reduce risk and thereby the application of more formal powers.

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<sup>443</sup> Hansard (House of Commons) vol 561 col 68ws 25 April 2013. See *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin); Gower, M., *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (SN/HA/6820, House of Commons Library, London, 2015).

<sup>444</sup> HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) para.2.9.

<sup>445</sup> See Walker, C., *The Anti-Terrorism Legislation* (3<sup>rd</sup> ed., Oxford University Press, Oxford) chap.5.

<sup>446</sup> See Home Office, *Supplementary Memorandum on the European Convention on Human Rights* (London, 2013).

<sup>447</sup> <https://www.gov.uk/government/publications/cancelling-the-passport-of-a-child-at-risk-of-radicalisation>.

(d) Alongside powers to interdict suspected outgoing FTFs, the CTS Act 2015 seeks to interdict incoming FTFs with a system of Temporary Exclusion Orders (TEOs) in sections 2 to 15 and Schedules 2 to 4.<sup>448</sup> Much criticism of this system arose from the Prime Minister's emphasis on 'exclusion' in his announcement on 1 September 2014.<sup>449</sup> However, by 14 November 2014, when he spoke to the Australian Parliament, he had watered this down to a power to 'stop British nationals returning to the UK unless they do so on our terms'.<sup>450</sup> Thus, the measures now embody a mode of regulated re-entry and residence rather than some variant of exile redolent of the Eastern Bloc. There may be several practical difficulties standing in the way of effective enforcement. One is that some would-be FTFs will actually return on the terms of the sending state by way of deportation. The second problem is the complexity of detection, at least until arrival at a UK port. For example, in *R v Bhatti*,<sup>451</sup> the defendant was convicted of assisting an offender, namely, his FTF relative, Imran Mohammed Khawaja<sup>452</sup> who returned to the UK and was sentenced to 17 years for terrorism offences. He had sought to avoid detection by picking up Khawaja in Bulgaria by car. The main policy objection to TEOs is that they represent a disincentive to return and thereby encourage the adoption of terrorism as a way of life. Discouraging voluntary return might be counter-productive, though the threats posed by Islamic State (Daesh) are much more drastic than those under the CTS Act 2015.<sup>453</sup> The TEO provisions came into force on 12 February 2015, but no TEO has as yet been issued. In conclusion, TEOs were originally formulated to impose the dire consequence of exile, but the version now in place reflects a sounder policy. Whether the scheme will deliver the effective management of suspects depends on the cooperation of other countries (which is by no means assured) and on the quality of de-indoctrination schemes (considered below). Certainly, TEOs should not be threatened in a way which ever discourages or blocks the path home of a returnee. It seems more likely that the circumstances of return will remain a matter of independent circumstances rather than the use of TEOs.

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<sup>448</sup> See Blackbourn, J. and Walker, C., 'Interdiction and indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 *Modern Law Review* 840.

<sup>449</sup> HC Deb vol 585 col 26.

<sup>450</sup> House of Representatives, Australian Parliament, *Parliamentary Debates*, 12710-12715, 14 November 2014.

<sup>451</sup> [2015] EWCA Crim 764.

<sup>452</sup> See *R v Imran Khawaja*, *The Times* 7 February 2015 7 (Woolwich Crown Court): conviction for preparation of terrorism, attending a terrorist training camp, and receiving weapons training.

<sup>453</sup> The threat of punishment was mentioned in the case of Kadiza Sultana who was reported killed in a Russian bombing: <http://www.bbc.co.uk/news/uk-37053699>, 12 August 2016.

- (e) Deprivation of citizenship has also been used 33 times since 2010 on public interest grounds.<sup>454</sup> As far as FTFs are concerned, these powers are increasingly applied when the traveller is abroad in order to prevent return.<sup>455</sup>
- (f) Finally, a notification or Foreign Travel Restriction Order under the CTA 2008 can also curtail foreign travel of those convicted of a relevant terrorism offence. In *R v Brooks and Keeler*,<sup>456</sup> the defendants were found guilty of failing to inform the police of their intention to leave the UK contrary to a notification order imposed on Brooks following a conviction for inciting and funding terrorism in 2008. Both had been deported from Hungary, having left via Dover in the back of a lorry without passports. It should be emphasised that they were assumed not to be travelling for terrorism purposes but to be on their way to relatives in Turkey. Aside from this case, there is an absence of recently published information on these powers of notification and foreign travel restriction under the CTA 2008 which should be remedied.
- (g) Under Schedule 1, para.2 of the Terrorism Prevention and Investigation Measures Act 2011, the Secretary of State can impose restrictions on an individual leaving a specified area or travelling outside that area, and the specified area can comprise the whole of the United Kingdom. The Secretary of State may impose a requirement not to leave the specified area without permission, or to give notice, or to give up any travel document. The possibility of a TPIM being applied to FTFs is downplayed by the police, because it is primarily of use against persons who pose a domestic threat and because it is an expensive option. The security agencies also view the device as resource intensive and highly intrusive, so while it is a valuable tool, it will not be used often. Absconding has been a past problem, though the reintroduction of relocation under the Counter Terrorism and Security Act 2015, section 16, is supposed to reduce that risk. It follows that the overall use of TPIMs is very modest – just one was in force as at 31 May 2016.<sup>457</sup> However, their potential is demonstrated by the TPIM issued against EB, who was suspected of attack planning in the UK having visited Syria in 2013.<sup>458</sup>

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<sup>454</sup> <https://www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>. See Anderson, D., *Citizenship Removal Resulting in Statelessness* (Home Office, London, 2016).

<sup>455</sup> *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 1410; *M2 v Secretary of State for the Home Department* SC/124/2015, 22 December 2015; *SI v Secretary of State for the Home Department* [2016] EWCA Civ 560.

<sup>456</sup> Central Criminal Court, 8 January 2016.

<sup>457</sup> Hansard (House of Commons) HCWS92 14 July 2016, John Hayes.

<sup>458</sup> *Secretary of State for the Home Department v EB* [2016] EWHC 1970 (Admin).

(h) By way of comment on the foregoing, the set of powers relating to travel documents seems comprehensive. These powers are also worthwhile in terms of more limited intrusion on rights than other executive measures<sup>459</sup> and dealing with risk in a more manageable way than for European Union countries within the Schengen arrangements.<sup>460</sup> But they are piecemeal, and some lack clear grounds or processes. The potential overlap and therefore redundancy of the prerogative powers was considered by the High Court in *R (XH and AI) v Secretary of State for the Home Department*<sup>461</sup> in the context of two applicants whose passports were withdrawn to prevent travel to join Islamic State (Daesh). The High Court rejected claims that the prerogative powers in regard to passports had been displaced by the Terrorism Prevention and Investigation Act 2011 or that they are inherently unfair. Nevertheless, further challenges seem inevitable, and a fuller review and restatement of the law on passports is long overdue.<sup>462</sup> As for TPIMs, it appears that the potential of this device is not being fully exploited. Other jurisdictions are now emulating executive control schemes to deal with the risks posed by FTFs. For example, administrative measures akin to TPIMs are being sought in the Netherlands under the pending Bill issued in 2015, *Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding* (Temporary Law Administrative Measures Combating Terrorism).<sup>463</sup> As for the UK, the challenge seems to be to simplify processes and reduce costs of TPIMs rather than to augment powers. Lord Carlile once posited a ‘Travel Restriction Order’, similar to the orders under CTA 2008, but for persons who have not been convicted.<sup>464</sup> The government doubted the utility of another distinct and narrow system,<sup>465</sup> but the scale of the FTF phenomenon is probably overwhelming for current TPIMs to make much impression. Whether it is feasible or worthwhile to devise a system of ‘TPIMs-lite’, based on proof of completed travel for terrorism related activity but entailing only very limited interventions, such as

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<sup>459</sup> See *Beghal v DPP* [2015] UKSC 49.

<sup>460</sup> In the Netherlands, a special ID card is proposed under the pending Bill 34359-2, *Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding* (‘Temporary law administrative measures combating terrorism’).

<sup>461</sup> [2016] EWHC 1898 (Admin).

<sup>462</sup> Reform was promised by *The Governance of Britain*, (Cm.7170, London, 2007) para.50 and (Cm.7342, London, 2008) para.247; *The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report* (London, 2009) para.38.

<sup>463</sup> Bill 34359-2. Note also in France, *Loi 2014-1353 renforçant les dispositions relatives à la lutte contre le terrorisme* of 13 November 2014, chap.III, which strengthens provisions on house arrest and associations.

<sup>464</sup> Lord Carlile, *Fifth Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act* (Home Office, London, 2010) para 27.

<sup>465</sup> *Government Reply* (Cm.7855, London, 2010) p 4.

attendance at appointments and notification of travel, should be considered further in the light of further research into foreign precedents.<sup>466</sup>

21. The next application of non-criminal specialised terrorism legislation to foreign terrorist fighters arises through the Prevent programme under CONTEST, a notion which is encouraged by UNSCR 2178<sup>467</sup> and which has become a statutory duty under the CTS Act 2015. Part V of that Act is entitled, 'Risk of being drawn into terrorism', but its measures can be applicable not only to would-be FTFs but also to returnees who are not being prosecuted (the majority). At the outset, three factors limit the coverage of Prevent in this chapter. One is that the Prevent duty (whether statutory or otherwise) is not formally subject to the oversight of the Independent Reviewer of Terrorism Legislation or any other such audit. Second, Prevent covers an expansive field, ranging from the de-indoctrination of selected individuals through to initiatives in education systems all the way to broad notions of community resilience, integration, and harmony.<sup>468</sup> The third factor is that it has excited deeply held reactions. One common ascription is 'Toxic', a view not accepted by all interviewees, commentators<sup>469</sup> or even affected families,<sup>470</sup> but one which will have to be considered as part of the current review of CONTEST. The more positive experiences (including with FTFs) in countries such as Denmark, Germany, and the Netherlands, where the equivalents to Prevent are more embedded in, and directed by, the communities in which they operate, should be considered in that review.<sup>471</sup> Some initial distance from the counter-terrorism and policing labels might encourage resort to advice and assistance.<sup>472</sup> Therefore, the remarks which follow will be narrowly confined to practices and possibilities relating to foreign terrorist fighters.

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<sup>466</sup> French powers of house arrest and administrative restrictions were applied to Adel Kermiche, who killed a priest in his church while on morning release from house arrest after release from custody following his arrest for trying to travel to Syria: <http://www.bbc.co.uk/news/world-europe-36900233>, 26 July 2016. The French Prime Minister Manuel Valls stated that 'His placement under judicial supervision with house arrest under electronic monitoring, initially ordered by a magistrate specializing in jihadism, was confirmed in an appeal court by three judges, equally experienced. It is a failure, it must be recognized.' (trans): Chapuis, N. and Pascual, J., 'Manuel Valls: "Il y a une ligne infranchissable, l'Etat de droit"' *Le Monde* 29 July 2016.

<sup>467</sup> 'Countering Violent Extremism in Order to Prevent Terrorism' is demanded in arts.15-16.

<sup>468</sup> See Home Office, *Prevent Strategy* (Cm.8092, London, 2011); Bartlett, J. and Miller, C., 'The edge of violence' (2012) 24 *Terrorism & Political Violence* 1; Thomas, P., *Responding to the Threat of Violent Extremism—Failing to Prevent* (Bloomsbury Academic, London, 2012); Huq, A.Z., 'The social production of national security' (2013) 98 *Cornell Law Review* 637; Rights Watch UK, *Preventing Education?* (London, 2016).

<sup>469</sup> See Khan, S., *The Battle for British Islam: Reclaiming Muslim Identity from Extremism* (Saqi, London, 2016).

<sup>470</sup> See House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933), Oral evidence 10 March 2015.

<sup>471</sup> See Vermeulen, F. and Bovenkerk, F. (eds), *Engaging with Violent Islamic Extremism: Local Policies in Western European Cities* (Eleven, The Hague, 2012); Bertelsen, P., 'The Aarhus Model' in Hofmeister, W., *From the Desert to World Cities: The New Terrorism* (Konrad-Adenauer-Stiftung, Singapore, 2015); Hemmingsen, A-S., *An Introduction to the Danish Approach to countering and preventing extremism and radicalization* (Danish Institute for International Studies, Copenhagen, 2015); Berczyk, J., 'Returning from the Islamic State' (2015) 6 *per Concordiam* 12. A contrast may be made with France: Hellmuth, D., 'Countering jihadi terrorists and radicals the French way' (2015) 38 *Studies in Conflict and Terrorism* 979.

<sup>472</sup> See <https://www.nspcc.org.uk/fighting-for-childhood/news-opinion/protecting-children-from-radicalisation/>. Compare House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933) para.19.



22. At the outset, various interviewees from the police and prosecution emphasised that prosecution has priority if sufficient evidence can be established. At the same time, the data reveals that Prevent, in the form of Prevent Safeguarding interventions such as at schools<sup>473</sup> or, intended for more serious risks, a referral to the Channel Programme,<sup>474</sup> is a more likely prospect. Since the advent of the CTS Act 2015, there has occurred a large increase in referrals, mainly from education institutions. Prevent Case Management (Gateway) meetings, which is where initial referrals are screened, have classified 551 referrals as Islamic foreign travel/fighter related during the financial year 2015/16, out of a total of 7052 referrals (7.8%).<sup>475</sup> A referral to Channel tends to mark the end of activity within a police investigation, and even critics of Prevent more often than not voiced the opinion that Channel achieved more positive and effective engagement than general work under Prevent. However, any resetting of policy priorities should be based on firm evidence. More work is required on the nature of the intervention by refining the programmes for FTFs, perhaps through exploring what has been found to be best practice amongst relevant providers. It is equally necessary to assess the effectiveness of outcomes of Prevent initiatives.<sup>476</sup> One other reform might be to involve prosecutors and health experts<sup>477</sup> in the processes so that the correct approach can be more broadly considered.
23. These recommendations regarding the refinement of the nature and delivery of Channel are particularly crucial when applied to returnee FTFs. The consideration of Channel has not always been systematic in the past. The Intelligence and Security Committee took the view that ‘Prevent was not given sufficient priority’ in the handling of cases of the murderers of Lee Rigby, Michael Adebolajo and Michael Adebowale.<sup>478</sup> Save for persons subject to TPIMs,<sup>479</sup> enrolment is not compulsory and has been refused by FTFs,<sup>480</sup> which raises again the very limited usage of TPIMS and whether reformulation of a ‘lite’ version might be worthwhile. Despite these difficulties and

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<sup>473</sup> See Department for Education, *The Prevent duty: Departmental advice for schools and childcare providers* (London, 2015).

<sup>474</sup> See Home Office, *Channel: Protecting vulnerable people from being drawn into terrorism. A guide for local partnerships* (London, 2012).

<sup>475</sup> Source: Metropolitan Police Counter Terrorism Command.

<sup>476</sup> This point was underlined by the House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933) para.9.

<sup>477</sup> See House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933) para.34. An undocumented police study of 500 Channel referrals revealed that 44% of subjects were assessed as being likely to have vulnerabilities related to mental health or psychological difficulties: ‘Police study links radicalisation to mental health problems’ *The Guardian* 20 May 2016. However, the figure raises doubts about the accuracy of referrals since most terrorists are not mentally ill: Horgan, J., *The Psychology of Terrorism (Political Violence)* (2nd ed., Routledge, Abingdon, 2014)

<sup>478</sup> Intelligence and Security Committee, *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (2014-15 HC 795) para.216.

<sup>479</sup> See CTS Act 2015, s.19.

<sup>480</sup> *R v Junnead Ahmed Khan*, Central Criminal Court, *The Times* 2 April 2016 p.9: K was convicted under TA 2006, s.5, for preparing to attack US servicemen in East Anglia. He had been referred to Channel but refused to cooperate.

uncertainties, Channel probably represents a more suitable response than the imposition of hostile conditions for returnees:<sup>481</sup>

‘The difference between the other contemporary and historical foreign fighter groups and the jihadis is not one of mobilization or effectiveness, but of persistence. Win or lose — and the majority have lost — most other foreign terrorist fighters demobilized at the end of their conflicts and reintegrated, sometimes with state or international assistance. ... the primary factor that accounts for the persistence of the jihadis was not one endogenous to their movement, but rather the policies of their home and host states that prevented reintegration and created cohorts of stateless actors that perpetuate in weakly-governed conflict zones elsewhere.’

It follows that a suitable reintegration programme is vital. A blue-print is beyond this chapter. But just as there has been attention paid to disengagement programmes (the success of which is judged by tools such as the Extremism Risk Guidance 22+) for prisoners who have been convicted of terrorism offences,<sup>482</sup> so the resettlement and reintegration needs of returnee FTFs must be considered, and Channel represents the most likely setting for their delivery. An effective programme should encompass education, housing, welfare, employment, and psychological treatment as well as security arrangements (such as travel and location). Families should also be assisted as potential elements of reinforcement of reintegration as well as potential further risks. Some have also suggested utilising returnees in Prevent work, but the value of this idea was doubted by most interviewees on the basis that their stories often involve confusion and failure, so they hardly present positive role models. Those who would denounce the inevitable expense and compassion for society’s most incompassionate and hostile members should compute alternatively the very expensive costs of security measures if the risks from a returnee cannot be lowered by other means (such as prosecution or TPIMs) which mostly it cannot.

24. The need for special protection of children who are FTFs or at risk of becoming so or being detrimentally affected by fighters has already been found in this survey to be inadequately recognised. However, this shortcoming does not apply when the state intervention arises through child care proceedings in the family courts which have been applied to approximately 50 children from 20 families.<sup>483</sup> In response, the family courts have resorted to two legal powers.<sup>484</sup> One set of powers derives from the common law ‘inherent jurisdiction’ of the Family

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<sup>481</sup> Malet, D., ‘Foreign Fighter Mobilization and Persistence in a Global Context’ (2015) 27 *Terrorism & Political Violence* 454, 455.

<sup>482</sup> See Silke, A. (2014). ‘Risk assessment of terrorist and extremist prisoners’ in Silke, A. (ed.), *Prisons, Terrorism and Extremism* (Routledge, Abingdon, 2014); Garton, G., *Radicalisation in prisons in England and Wales* (House of Commons Library 07487, London, 2016).

<sup>483</sup> HM Government, *CONTEST: Annual Report for 2015* (Cm.9310, London, 2016) para.2.36.

<sup>484</sup> See further Department for Education, *Working together to safeguard children* (London, 2015).

Division of the High Court relating to wardship. The second set arises under the Children Act 1989 which sets out in detail what care authorities and the courts should do to protect the welfare of children. It imposes on local authorities the 'duty to investigate ... if they have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm' (section 47). The Children Act 1989 defines 'harm' as ill-treatment (including sexual abuse and non-physical forms of ill-treatment) or the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural) (section 31). The relevance to terrorism risk relates to what are called public law cases which are brought by local authorities or an authorised person (currently only the NSPCC has authorised person status under section 31). Public law matters include measures such as: care orders, which transfer parental responsibility for a child concerned to the local authority; supervision orders, which place a child under the supervision of their local authority; and emergency protection orders, which seek to ensure the immediate safety of a child by taking them to a place of safety or by preventing removal from a place of safety. In contrast to the position under criminal and administrative laws relating to counter-terrorism, whereby security is often the dominant consideration,<sup>485</sup> in child proceedings, 'the child's welfare must be the court's paramount consideration' (Children Act 1989, section 1). These two jurisdictions have been applied to families affected by FTFs and can involve orders which affect both the children (including removal from the parents) and the parents (including passport removal and an all-ports alert; injunctions against removing the children from the jurisdiction and requiring them to live at a specified address; the monitoring of the parents and the children by a combination of unannounced visits by the local authority, regular reporting to the police or local authority and, in the case of the parents, electronic tagging; and swearing on the Quran that they will abide by the order).<sup>486</sup>

25. In the light of such cases, guidance on both wardship and child protection proceedings was issued in the form of *Radicalisation cases in the Family Courts: Guidance issued by Sir James Munby President of the Family Division* on 8 October 2015.<sup>487</sup> The emphasis is upon administrative arrangements. In particular, advice is given to assign senior judges; to ensure coordination between agencies; and to encourage the disclosure of sensitive information by the police.

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<sup>485</sup> See TPIM Act 2011, Sch.4; Civil Procedure Rules, r.80.2.

<sup>486</sup> *Tower Hamlets v M* [2015] EWHC 869 (Fam); *Re M* [2015] EWHC 1433 (Fam); *In re X and Y* [2015] EWHC 2265 (Fam); *Re X and Y (No 2)* [2015] EWHC 2358; *Tower Hamlets v B* [2015] EWHC 2491 (Fam); *Re Z* [2015] EWHC 2350 (Fam); *A Local Authority v M* [2016] EWHC 1599 (Fam); *Re K* [2016] EWHC 1606 (Fam). See further Edwards, S., 'Protecting schoolgirls from terrorism grooming' (2015) 3 *International Family Law* 236; Downs, M., and Edwards, S., 'Brides and martyrs' (2015) 45 *Family Law* 1073; Rozenberg, J., 'Violations of the mind' (2015) *Law Society's Gazette* 23 November p.23.

<sup>487</sup> <https://www.judiciary.gov.uk/publications/radicalisation-cases-in-the-family-courts/>.

26. This foray by family law into the realms of counter-terrorism remains in its infancy, and several uncertainties remain unresolved, as indicated by the foregoing *Guidance*, such as which agency should take the lead. The affected agencies feel unease for different reasons – some social workers feel drawn uncomfortably into policing, the police feel they lack control and may be reluctant to share sensitive information, while the Home Office has raised objections to the costs of enforcement when it involves electronic tagging. Another apprehension is that the family law versions of counter-terrorism can turn out to be more draconian both in outcome and process than even counter-terrorism legislation as authorised by TPIMs. The final problem concerns the demarcation between family law and counter terrorism legislation (including Prevent) – on what basis should one or another jurisdiction be invoked? It may involve happenstance as to whether the authorities depict behaviour either as evidence of vulnerability (and so invoke family law) or evidence of immaturity or gullibility (which is the province of Channel) or evidence of wickedness and dangerousness (and so worthy of prosecution). The *Guidance* does not unravel these tensions, and so there is a need for a fuller policy review and statement by the Home Office.
27. Finally, remotely piloted aerial vehicles (drones) have been used to kill British FTFs allegedly posing an immediate threat to UK security. Most have been killed by US drone strikes.<sup>488</sup> The UK government applied its own weaponry on 21 August 2015 against Reyaad Khan (the main target) and fellow Briton Ruhul Amin, who were killed while driving in a vehicle near Ar-Raqqa. The justification given by the Prime Minister was based on the self-defence of the UK (UN Charter, article 51).<sup>489</sup> However, the notice given to the UN Security Council also mentioned a justification in terms of the collective self-defence of Iraq.<sup>490</sup> The nuances of these justifications, the applicability of international human rights law and international humanitarian law, as well as the processes have all been expertly considered by the Joint Committee on Human Rights in its report, *The Government Policy on the Use of Drones for Targeted Killing*.<sup>491</sup> A response is awaited from the government.

## Scotland and Northern Ireland

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<sup>488</sup> Up to 17 are estimated to have been killed by 2015 (see <https://www.thebureauinvestigates.com/2015/09/07/raf-drone-strike-syria-deaths-means-at-least-10-britons-now-killed-by-drones-in-wests-war-on-terror/>); since then reported deaths have included Mohammed Emwazi (2015), Junaid Hussain (2015), and Rowan Kamal Zine El Abidine (2016). For overall figures, see Director of National Intelligence, *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities* (<https://www.dni.gov/index.php/newsroom/reports-and-publications/214-reports-publications-2016/1392-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities>, 2016). For US procedures, see US Presidential Guideline, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities* ([https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download), 2013).

<sup>489</sup> Hansard (House of Commons) vol.599 col.25 7 September 2015 David Cameron.

<sup>490</sup> S/2015/688, New York, 8 September 2015.

<sup>491</sup> (2015-16 HL 141/HC 574).

28. Few FTFs have been resident in Scotland, and no prosecutions have occurred.<sup>492</sup> The main focus has been on Prevent activities. Though relevant Scottish authorities are covered by the legal duty to engage in Prevent work under the CTS Act 2015,<sup>493</sup> there are two significant variants from practices elsewhere. First, organised crime and counter terrorism are allied objectives and are joined together in the key Police Scotland unit. This alliance is said to save money and also allows for the synergy of activities (especially relevant to Irish paramilitarism in Scotland) in terms of intelligence sharing and action against arms acquisition and training. No doubt, the mooted idea of the National Crime Agency taking the lead for counter-terrorism (and thereby joining it to organised crime work) should consider this precedent. Second, the Channel Programme does not operate in Scotland, but there is an alternative. The 'Prevent Professional Concerns' (PPC) system is a multi-agency programme which works with referred individuals. PPC meetings involve representatives from the usual agencies - local authority, social work, mental health, and police.
29. As for Northern Ireland, there have been no TPIMs or TEOs issued to date. A single prosecution is pending of a returnee from Syria, Eamon Bradley, who is alleged to have joined Jaysh al Islam, for terrorism training (TA 2006, section 8), weapons training (TA 2000, section 54) and possessing explosives with intent to endanger life (Explosive Substances Act 1883, section 3).<sup>494</sup> The usual difficulties are associated with this prosecution, including delay in the court process in particular lengthy committal procedures and sensitivity over the disclosure of surveillance capabilities. There are no Northern Ireland specific policies or guidance statements on prosecution.
30. The Prevent strategy does not apply in Northern Ireland, even after the reforms under the CTS Act 2015.<sup>495</sup> This gap requires a response from the Home Office about how the risks of Northern Irish FTFs, especially returnees, might be addressed beyond the possibility of prosecution, such as through Channel. The idea is not wholly alien, for, in another context, some elements of the Prevent ideology are reflected in the Fresh Start Panel's *Report on the Disbandment of Paramilitary Groups in Northern Ireland*,<sup>496</sup> which was set up pursuant to *A Fresh Start: The Stormont Agreement And Implementation Plan*.<sup>497</sup> The policy followed an earlier assessment of the activities of paramilitary groups that had concluded that individual members, or former

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<sup>492</sup> One publicised case is that of Alan Duncan, who fought with Kurdish groups: Campsie, A., 'Alan Duncan: Why I left Scotland to fight for Kurds in Iraq and Syria' *Press and Journal* <https://www.pressandjournal.co.uk/fp/news/aberdeen/555385/alan-duncan-left-scotland-fight-kurds-iraq-syria/>, 21 April 2015.

<sup>493</sup> See HM Government and Scottish Government, *Prevent duty guidance: for Scotland* (2015).

<sup>494</sup> *Irish News* 25 March 2016 p.8.

<sup>495</sup> HC Deb vol 589 col 1340 16 December 2014.

<sup>496</sup> (Northern Ireland Office, Belfast, 2016).

<sup>497</sup> (Northern Ireland Office, Belfast, 2015) Section A para. 4.1.

members, of paramilitary groups ‘continue to engage in criminal activity’.<sup>498</sup> The Fresh Start Panel sought to ‘create conditions in which groups would transform, wither away, completely change and lose their significance’.<sup>499</sup> Some of their analysis of the reasons for involvement in paramilitarism has resonance with Islamist extremism involvement:

‘There are numerous factors that lead some young people to consider joining paramilitary groups. These include problems at home, educational underachievement and unemployment. However, these factors alone do not directly lead to young people becoming involved with paramilitary groups; other, more complex, factors are also at play, such as a quest for identity, resentment generated by stigmatisation and exclusion from decision-making, and frustration with the lack of opportunities for productive engagement.’<sup>500</sup>

Wide-ranging proposals include initiatives in education to law. The former include mention of a proposed programme for young men at risk which ‘should be a collaboration between government departments and restorative justice partners to combine restorative practices and peer mentoring with targeted support in respect of employment, training, housing, health and social services’<sup>501</sup> – a Belfast Channel? The Northern Ireland Executive has responded through its policy statement, *Tackling Paramilitary Activity, Criminality and Organised Crime: Executive Action Plan*.<sup>502</sup> It includes the idea of an initiative led by the Probation Board and focused on young men who have offended (a threshold distinct from Channel) and are at risk of being drawn into crime and paramilitarism.<sup>503</sup>

## Recommendations and Conclusions

31. The recommendations of this chapter are as follows:

- (a) The narrower term, ‘foreign terrorist fighter’, should be preferred to ‘foreign fighter’, since it is based on UN precedent and avoids other complications around foreign state fighting or private company fighting. The term, ‘foreign terrorist fighter’ (FTF), should also be clarified by specifying the different risk categories of those within the chosen terminology so as to provide a better picture of the phenomenon and risk threat. (para.7(a))

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<sup>498</sup> *Paramilitary Groups in Northern Ireland: An assessment commissioned by the Secretary of State for Northern Ireland on the structure, role and purpose of paramilitary groups focusing on those which declared ceasefires in order to support and facilitate the political process* (Northern Ireland Office, Belfast, 2015).

<sup>499</sup> *Ibid.* para.1.5.

<sup>500</sup> *Ibid.* para.2.19

<sup>501</sup> *Ibid.* para.4.38.

<sup>502</sup> (Belfast, 2016).

<sup>503</sup> *Ibid.* p.15.

- (b) The variant policies against FTFs, which engage especially the Pursue and Prevent elements of CONTEST, should form a specific segment of the CONTEST Annual Report. Relevant headings might include (with associated counter-measures for each aspect): motives and triggers; preparations for travel; activities abroad; and return to the UK. (para.7(b))
- (c) A policy restatement could also trigger further reflection on kindred laws against enlistment in foreign armies and neutrality laws (para.7(c))
- (d) In all policies and laws, consistency with established policies (such as CONTEST) and with national and international norms of constitutionalism must also be achieved. (para.7(d))
- (e) There is, and should be, no policy surreptitiously to allow jihadis to travel to Islamic State (Daesh) or even expressly to permit the exit of those who have surrendered their passports. (para.11)
- (f) Statistics of relevant policing powers should also be compiled and published in the FTF report proposed above. (para.12)
- (g) There should be a review of the absence of a power to grant police bail under section 41 and whether, without it, section 41 remains a viable or necessary power. (para.12)
- (h) Rates of prosecution should also be compiled and published in the FTF report proposed above. (para.14(a))
- (i) Clear advice as to the prospects and consequences of prosecution is recommended by way of action from the Counter Terrorism Division (CTD) of the CPS as a warning to potential FTFs. A standing statement of this kind should be recorded on the CPS website. (para.14(c))
- (j) The *Kahar* judgment has dealt with sentencing under section 5 of the TA 2006. But a more comprehensive approach to offence choice and sentencing for the range of terrorist offences remains desirable. As the Court of Appeal hinted, this task should be undertaken by the Sentencing Council. (para.14(d))

- (k) As for foreign fighting in Iraq and Syria for unofficial armed groups, the CPS and Attorney General should clarify the public interest in prosecuting these categories of fighters and should publicise their views as a warning to travellers. (para.15(a))
- (l) As for the treatment of minors who become involved in foreign fighting in Iraq and Syria, the prosecution of children should not be ruled out. But more explicit weight should be accorded to the UN Convention on the Rights of the Child 1989, Article 3, by which the best interests of the child should be the primary consideration in all actions concerning children. (para.15(b))
- (m) Prosecutions under the International Criminal Court Act 2001 should be undertaken, where appropriate, to mark the seriousness of the offences but not for treason. (para.16)
- (n) No major gaps exist in the catalogue of potential offences applicable to FTFs. Offences based on area presence, visiting repeatedly websites, membership of a group, associations or lifestyle involve problems in terms of formulation or the direction of impact, while the breadth and flexibility of existing offences, especially section 5 of the Terrorism Act 2006, covers the condemned activities. (para.17)
- (o) There is an absence of recently published information on the powers of notification and foreign travel restriction under the CTA 2008 which should be remedied. (para.20(g))
- (p) The prerogative powers on passport withdrawal have withstood recent challenge. Nevertheless, further challenges seem inevitable, and a fuller review and restatement of the law on passports is long overdue. (para.20(h))
- (q) As for TPIMs, it appears that the potential of this device is not being fully exploited. Whether it is feasible or worthwhile to devise a system of 'TPIMs-lite', based on proof of completed travel for terrorism related activity but entailing only limited interventions, such as attendance at appointments and notification of travel, should be considered further in the light of further research into foreign precedents. (para.20(h))
- (r) As for the Prevent programme under CONTEST, it can be reported that more positive experiences have been attained in countries such as Denmark, Germany, and the Netherlands, where the equivalents to Prevent are more embedded in, and directed by, local communities. Those experiences should be considered in the ongoing review of CONTEST. (para.21)



- (s) Even critics of Prevent more often than not voiced the opinion that Channel achieved more positive and effective engagement than general work under Prevent. However, more work is required on the nature of the intervention by refining the programmes for FTFs, perhaps through exploring what has been found to be best practice amongst relevant providers. It is equally necessary to assess the effectiveness of outcomes of Prevent initiatives. One other reform might be to involve prosecutors and health experts. (para.22)
- (t) A suitable reintegration programme is vital for returning FTFs. An effective programme should encompass education, housing, welfare, employment, and psychological treatment as well as security arrangements (such as travel and location). Families should also be assisted as potential elements of reinforcement of reintegration as well as potential further risks. (para.23)
- (u) Child care proceedings in the family courts for children who are FTFs or at risk of becoming so or being detrimentally affected by fighters are being developed, but several uncertainties remain unresolved which cannot all be settled by the guidance issued by the Family Division in 2015. There is a need for a fuller policy review and statement by the Home Office. (para.26)
- (v) Experience from Scotland should give rise to further consideration of policing synergies between organised crime and counter terrorism work. (para.28)
- (w) The Prevent gap in Northern Ireland requires a response about how the risks of FTFs, especially returnees, might be addressed other than by prosecution, such as through Channel arrangements. (para.30)

32. Five further points remain.

33. One is that much effective activity has already been undertaken against FTFs. Therefore, the recommendations herein should not be viewed as harsh criticism. The security of the UK and its residents has so far been managed in a way which has avoided the kind of mass attacks perpetrated elsewhere in near neighbours in Europe. Furthermore, that record has been achieved with resort to ‘panic’ legislation or derogation, demonstrating again that a well-considered, comprehensive, and permanent anti-terrorism code remains the appropriate model which Lord Lloyd advocated in 1996.<sup>504</sup>

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<sup>504</sup> *Inquiry into Legislation against Terrorism* (Cm 3420, London, 1996).

34. Second, aspects of existing laws, especially Prevent, so require further repair work. Much can be learnt from neighbours in Denmark, Germany and the Netherlands.
35. Third, cooperation with European agencies and beyond (above all, especially Turkey, which remains the key point of transition)<sup>505</sup> is vital and is said to be generally improving. The implications of Brexit were mentioned by many respondents as a future issue, but at this stage of the process, it is impossible to gauge the outcome of Brexit. Certainly, some aspects of cooperation within the EU are highly relevant to FTFs and will need to be addressed as part of the Article 50 negotiations. Prominent amongst these are the organisational relationships with Europol and Eurojust<sup>506</sup> and the continued reliance on processes such as the European Arrest Warrant. At the same time, cooperation within the European Union is of mutual benefit, especially as the United Kingdom maintains some of the most extensive and most sophisticated counter-terrorism measures in the world. In addition, existing cooperation is often based on bilateral relationships or on multilateral relationships beyond the European Union, such as the Five Eyes arrangements<sup>507</sup> or the Club of Berne.<sup>508</sup> No doubt, these vital issues associated with Brexit will be the subject of future inquiries by the Independent Reviewer of the Terrorism Legislation.
36. The agenda for combating FTFs is far wider than the issues presented here. The wider agenda includes the need to deal with the generation of funding by Islamic State (Daesh).<sup>509</sup> Ultimately, it also involves the political and military decisions which will decide the fate not only of Islamic State (Daesh) but also of Syria and beyond.
37. Fifth, the threat of FTFs remains clear and present, as evidenced by mass attacks in neighbouring jurisdictions, as well as fluid and persistent. Past campaigns of terrorism suggest that the threat will not end even with the collapse of Islamic State (Daesh), since a core of FTFs remain serial risks.<sup>510</sup> The task is therefore to continue to shape counter terrorism arrangements for the long term and consistent with constitutionalism, as has been the endeavour since the advent of the TA 2000.

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<sup>505</sup> Europol, *TE-SAT 2016* (The Hague, 2016) p.28.

<sup>506</sup> See Eurojust, *Improving Information and intelligence exchange in the area of counterterrorism across the EU* (7445/15, The Hague, 2015).

<sup>507</sup> See Walsh, P.F. and Miller, S., 'Rethinking "Five Eyes" security intelligence collection policies and practice post-Snowden' (2016) 31 *Intelligence & Security* 345.

<sup>508</sup> See Bonfanti, M.E., 'Collecting and sharing intelligence on foreign fighters in the EU and its member states' in de Guttery, A. Capone, F. and Paulussen, C. (eds), *Foreign Fighters under International Law and Beyond* (Asser Press, The Hague, 2016).

<sup>509</sup> See House of Commons Foreign Affairs Committee, *The UK's role in the economic war against ISIL* (2016-17 HC 121). But most individual FTFs are self-funded: Europol, *TE-SAT 2016* (The Hague, 2016) p.28.

<sup>510</sup> See *R v Rowe* [2007] EWCA Crim 635.

## **ANNEX 3**

## TERRORISM, TOLERANCE AND HUMAN RIGHTS

DAVID ANDERSON Q.C.  
UK Independent Reviewer of Terrorism Legislation

PACE EVENT #NOHATENOFEAR  
COUNCIL OF EUROPE, STRASBOURG  
11 OCTOBER 2016

For the last six years I have reviewed and reported on the operation of anti-terrorism laws in the United Kingdom, independently of Government but on a fully security-cleared basis. This, in six minutes, is what I have learned.

Those laws need, firstly to be strong. They have to identify and punish the extremists who espouse violence – the *thousands*, in my country, who are motivated by either residual grievances in Northern Ireland, by the extreme right wing or by militant Islam.

The threat of terrorism curtails normal activities, heightens suspicion and promotes prejudice. That is precisely what the terrorist intends. If the authorities are powerless to act against it, some will be tempted to vigilantism. By prevention and by punishment, strong laws can help reduce the fear and hatred that the terrorist seeks to generate.

But at the same time, those laws must not alienate or render cynical the rest of the population, in particular the innocent and peace-loving *millions* in the communities from which terrorists seek their support. This matters particularly for Muslims, because as a minority group in most of our countries, they are especially liable to feel targeted by measures, however well-intended, that may seem to be designed more for them than for others.

It is not easy to reconcile those two imperatives – though I believe it is possible.

But we would be fooling ourselves if we thought that laws against terrorism, however strong and however sensitive, can do any more than treat the symptoms. Islamist terrorism is a global phenomenon, responsible for the great majority of the 28,300 deaths from terrorism last year, three quarters of them in five countries: Iraq, Pakistan, Afghanistan, India and Nigeria.<sup>i</sup> And in the words of King Mohammed of Morocco, a direct descendant of the Prophet:

"Terrorists are taking advantage of some young Muslims – particularly in Europe – and of their ignorance of the Arabic language and of true Islam, to spread their distorted messages and misleading promises."<sup>ii</sup>

As Europeans, we have a responsibility not just to enforce laws against terrorism but to protect our own people – Muslims and Muslim converts – from the grievances and crises of identity that can render them vulnerable to the murderous ideology of Salafi jihadism.

The starting point, as it seems to me, must be tolerance: not the most inspiring of virtues, since it means putting up with things or with people whom we may not like. But if properly applied, a staging post to the higher objectives of trust and integration. An answer not just to terrorism but to the broader problem of how to live together.

But ***what should we tolerate, and what should we not?*** People resent newcomers who do not conform to their customs, but are unsure which of their own values they are allowed to defend, and which must give way to the perceived demands of multiculturalism or human rights. Too often, the wrong answers are found. Perhaps the newcomer will be told that he must fully assimilate to be accepted. Or, conversely, a blind eye may be turned to practices that ought never to be accepted.

I will suggest three principles to help answer that question – each of them founded on the universal democratic values that have been given shape, by collective inspiration over many years, in this city of human rights.

First, ***confidence in setting limits***. The European Court reminds us that democracy is founded on tolerance – but also on *pluralism* and *broad-mindedness*.<sup>iii</sup> So everyone has an absolute right to believe what they like, to change their beliefs, and to share them with like-minded people. But tolerance does not extend to expressions of religious belief that unjustifiably restrict the rights of others. That is so whether you are a Christian who wants his child to be beaten,<sup>iv</sup> or a political party which seeks to elevate the law of God over the law of man.<sup>v</sup> After all, as has often been said: “*Democracy is not a suicide pact*”.<sup>vi</sup>

This means that as Matthew Wilkinson of the Cambridge Muslim College has written, Islam must adapt to being “*one legitimate faith among many legally equivalent faiths*”, with the Shari’a existing as “*a code of personal religious conduct rather than constituting the legal framework for the whole or even part of society*”.<sup>vii</sup>

Secondly, ***confidence in applying the laws we have***. Radicalisers cannot be allowed, as they were in 1990s Britain, to incite murder, radicalise the young, finance violent jihad and train people for it. Failure to investigate or to prosecute corruption, forced marriage, female genital mutilation, sexual abuse and so-called honour crimes should never be excused, or tolerated, by misplaced respect for cultural difference. Certainly, we need to be alert to the risk of discrimination. But police or social workers should not have to fear accusations of racism when they investigate practices that are not tolerated by the law.<sup>viii</sup>

Police and others rightly value their links with the communities that they serve. But the vulnerable people in any community may be precisely those for whom so-called “*community leaders*” do not speak. Examples are the feminist Muslims, gay Muslims and ex-Muslims, described by Maajid Nawaz as “*minorities within minorities*”, who may be stigmatised and subjected to physical threats even in the West.<sup>ix</sup> Individual rights trump communal rights: these are people whom the law must protect.

My third principle is ***humility***: an acceptance that the battle for hearts and minds is an impossible one to direct. If the state seeks to control or monitor “*extremist activity*” that poses no direct threat to the life, wellbeing or property of others, it will attract resentment and suspicion. And if things get to that point, it may actually be worsening the problem it is seeking to cure.<sup>x</sup>

In short, “*the power of reason as applied through public discussion*” is preferable to “*silence coerced by law*”.<sup>xi</sup> The state may facilitate that discussion, even participate in it (thought its views are not likely to be the most influential) – but not close it down.

So human rights do not hamper the fight against terrorism and extremism: they underline its legitimacy. And by practising tolerance but knowing its limits, we may still hope to emulate what King Mohammed described as:

“the countless examples, in human civilisation, of success stories which show that religious interaction and coexistence produce open societies in which Love, harmony and prosperity prevail.”<sup>xii</sup>

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- i START country reports on terrorism in 2015, June 2016, Annex of statistical information.
- ii Speech on King and Revolution Day, 20 August 2016.
- iii E.g. *Handyside v UK* (1976), para 49; *Animal Defenders v UK* (2013), para 100.
- iv *R (Williamson) v SoS for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246.
- v *Refah Partisi v Turkey* (2003), paras 99, 123-4.
- vi See *Terminiello v City of Chicago* 337 US 1, 37 (1949), Justice Jackson.
- vii Matthew Wilkinson, *A Fresh Look at Islam in a Multi-faith World* (Routledge, 2015), p. 28.
- viii Alexis Jay, *Independent Inquiry into Child Sexual Exploitation in Rotherham*, 2014, 11.12; Sara Yasmin Anwar, “Grooming Gangs: Tackle the Crime, not the Community”, Huffington Post UK, 16 November 2014.
- ix Maajid Nawaz, *Islam and the future of tolerance: a dialogue* (Harvard, 2015).
- x D. Anderson, *The Terrorism Acts in 2014*, September 2015, chapter 9.
- xi Justice Brandeis in *Whitney v California* 274 US 357 (1927), pp 375-377.
- xii Speech on King and Revolution Day, 20 August 2016.



ISBN 978-1-4741-3887-1



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