NATIONAL SECURITY BILL
REVISED EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM
ON INTRODUCTION TO THE HOUSE OF LORDS

October 2022

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the National Security Bill. It has been prepared by the Home Office and Ministry of Justice. On introduction of the Bill in the House of Commons, the then Home Secretary (the Rt Hon Priti Patel MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill were compatible with the Convention rights. Upon introduction to the second House, the Lords Minister shall make a statement under section 19(1)(a) of the Human Rights Act 1998 that in their view, the Bill's provisions are compatible with the Convention's rights.

2. The purposes of the Bill are to:
    a. bring together a suite of measures to help protect national security, the safety of the public and the nation's interests from hostile activities of foreign powers;
    b. provide security and law enforcement services with updated and new tools, powers and protections to enhance our ability to deter, detect and disrupt state actors who target the UK;
    c. Strengthen the resilience of the UK political system against covert foreign influence and provide greater scrutiny of the activities of specified foreign powers or entities.
    d. prevent the exploitation of civil legal aid and civil damages systems by convicted terrorists by preventing funds from being given to those who could use them to support terror.

3. Following the publication of the Law Commission's report of their review of the protection of official data in September 2020, the Government launched a consultation on legislation to counter hostile activities by foreign states in May 2021, which closed in July 2021. While the consultation responses were not informative on significant issues in policy development, they did address some detail in the provisions and inform handling strategies and the Government published a response in July 2022. No further scrutiny (such as PLS) has been conducted on the Bill as a whole.

4. The Bill includes the following measures:

a. A modernised approach to the offence of espionage in the Official Secrets Acts 1911-1939 (OSAs 1911-39) which includes an offence of obtaining or disclosing protected information for, on behalf of, or with the intention to benefit, a foreign power with a purpose prejudicial to the safety or interests of the UK (SOIOTUK).
b. Expands espionage to include 'trade secrets' where a person, acting for, on behalf of, or with the intention to benefit, a foreign power and without authorisation (e.g. in breach of the confidence under which the trade secret is held), obtains or discloses a trade secret.
c. Introduces new offences of assisting a foreign intelligence service, where a person provides material assistance to a foreign intelligence service (FIS) in carrying out UK-related activity and obtaining, accepting, retaining or agreeing to accept a material benefit from a foreign intelligence service.
d. Updates the offence of entering and inspecting places which are used for the purposes of defence or for other purposes where access should be restricted in order to protect national security ('prohibited places'), including additional police powers and an accompanying compliance offence to support the enforcement of the two new prohibited places offences.
e. Creates a new police cordon power to impose a cordon around military aircraft crash sites to temporarily protect the site against trespass/harmful activity, and a supporting offence of failing to comply with a lawful order.
f. Introduces the new offence of sabotage where a person, with a purpose prejudicial to the SOIOTUK conducts activity for, on behalf of, or with the intention to benefit a foreign power, which they intend will, and which does, cause damage to an asset.
g. Introduces the new 'foreign interference' offence, where a person engages in illegitimate conduct for, on behalf of, or intending to benefit, a foreign power and the intended effect of the activity is to interfere with the exercise of Convention rights, to affect public functions, to manipulate whether or how a person uses public services or participates in political or legal processes, or to prejudice the safety or interests of the United Kingdom.
h. Increases the penalty for electoral offences when committed for, or on behalf of, or with the intention to benefit a foreign power.
i. Replaces the offence of acts preparatory to espionage under section 7 of the OSA 1920, with a new offence to include harmful preparatory conduct that is undertaken with the intention that the acts amounting to the principal offences in the Bill will be committed, or foreign power threat activity.
j. Introduces a new aggravating factor in sentencing where the offence is linked to a foreign power.

k. Introduces new police powers to support the investigation of foreign power threat activity, including new search power and arrest powers, a court order for the purpose of requiring a person to disclose information relating to an investigation into the identification of relevant property or its movement or use, court orders requiring that financial institutions provide customer information or information relating to a specified person's accounts, a new pre-charge detention regime and power to obtain and retain biometric material.
l. Amends the definition of protected material within Schedule 3 to the Counter-Terrorism and Border Security Act 2019 to remove confidential business material from the scope of that definition.
m. Disapplies the extra-territorial provisions of the offences of encouraging or assisting crime at schedule 4 of the Serious Crime Act 2007 when activity is carried out for the functions of the intelligence services or armed forces.
n. Introduces a new Prevention and Investigation Measures regime, which gives the power to impose a suite of restrictive measures on an individual where the Secretary of State reasonably believes that the individual is involved in foreign power threats activity, with an accompanying criminal offence for failure to comply with or for contravening a measure.
o. Introduces the Foreign Influence Registration Scheme to deter foreign power use of covert arrangements, activities and proxies. It does this by requiring registration of certain activities that foreign powers direct, as well as where those activities are directed or carried out by entities established overseas or subject to foreign power control.
p. Makes provision to ensure damages awards against the Crown reflect misconduct of the claimant of a terrorist nature.
q. Makes provision to ensure damages are not used to fund terrorism.
r. Makes civil legal aid available to those subject to prevention and investigation measures.
s. Narrows the range of circumstances in which individuals convicted of specified terrorism offences are eligible to receive civil legal aid.
t. Ensures that the new data sharing and data processing powers are available to enforce the restriction on access to civil legal aid for those convicted of specified terrorism offences.
u. Clarifies how civil legal aid is available for Terrorism Prevention and Investigation Measures (TPIMs) proceedings heard on judicial review principles.

5. At Commons Committee stage, the Government introduced a number of amendments, that have now been added to the Bill. The largest proportion of these amendments were for the purposes of introducing a Foreign Influence Registration Scheme (FIRS) to the Bill. At Commons Report stage, a number of further amendments were made to the Bill, mainly to update the FIRS.

6. We consider that the amendments made at both Commons Committee and Report stages are all compatible with the Convention rights, but this Memorandum provides further detail on the Foreign Influence Registration Scheme and other amendments, where ECHR rights may be engaged.

7. The Government considers that clauses or Schedules which are not mentioned in this memorandum do not give rise to any human rights issues.

Foreign power condition and prejudice to the safety or interests of the UK

8. The new offences in clauses 1, 2, 12, 13 and 14 only apply where the foreign power condition is met. This is defined in clause 29. It requires that either the conduct in question, or a course of conduct in respect of which their conduct forms a part, is carried out for or on behalf of a foreign power and the person knows, or ought reasonably to know, that to be the case, or the conduct is intended to benefit a foreign power. This condition limits the ambit of these offences. It is the Government's view that for the most part conduct carried out on behalf of a foreign power will not involve the exercise of rights under the Convention. The foreign power condition was amended at Report in the Commons to clarify that where conduct is treated as carried out for or on behalf of a foreign power because of financial assistance of a foreign power, the financial or other assistance provided by the foreign power must be for the purpose of the conduct in question (or the course of conduct of which it forms part). Where the foreign power condition is met by a person carrying out wholly legitimate activities no offence will be committed. The specific offences and measures to which the foreign power condition applies, set out explicitly that the foreign power condition must be met in addition to other thresholds for conduct to amount to an offence or lead to the imposition of a measure.

9. Similarly, clauses 1, 4 and 12 only apply to conduct that is for a purpose that is prejudicial to the SOIOTUK (this concept also applies partially to clause 3 and 13). The concept of a purpose that is prejudicial to SOIOTUK comes from section 1 of the Official Secrets Act 1911, which uses the phrase "safety of interests of the state" and was considered by the Courts in Chandler v DPP [1964] AC 763 HL to mean the objects of state policy determined by the Crown on the advice of Ministers. Whilst this has been updated to refer specifically to the UK for clarity, the intention is to retain the meaning and extent. The Law Commission considered the term and recommended we maintain it in the Bill.

10. Limiting this term by specifying certain conduct or including an explicit threshold risks creating loopholes that sophisticated hostile actors could exploit. Any decision to prosecute will follow the

usual process involving the Crown Prosecution Service, Direction of Public Prosecutions and the Attorney General. The Home Secretary, for example, cannot make the decision to prosecute.

11. Moreover, each offence under this legislation includes conditions that must be met in order for the offences to be committed. The combination of the conditions we apply to measures in this Bill mean that not only are the offences themselves proportionate, but an appropriately high bar also has to be met to bring a prosecution. The ambit of those offences is thus limited in a way that assists in restricting their application to circumstances where, if there is any potential interference with qualified Convention rights, it will be justified.

12. Together, these limitations are ways the offences seek to focus on the hostile acts of foreign powers and other conduct prejudicial to the UK, without criminalising legitimate behaviour. Further detail is given below.

Obtaining or disclosing protected information (clause 1)

13. The offence in clause 1 deals with obtaining and disclosing protected information, access to which is restricted, or where it is reasonable to expect it is restricted, for the purpose of protecting the safety of interests of the UK. The offence is only committed if the person's conduct is for a purpose that they know or ought reasonably to know is prejudicial to the SOIOTUK and where the foreign power condition is met. The foreign power condition (see clause 29) is that the conduct must be either carried out for, or on behalf of, a foreign power, or be intended to benefit a foreign power.

14. Criminal offences that prevent the disclosure of information could be seen as restricting rights under Article 10 ECHR (freedom of expression). However, the Government considers that for the most part hostile activities by foreign states such as disclosing protected information to a foreign power with a purpose that the person knows (or should know) will harm the UK are not within the ambit of Article 10 at all, as they are not an exercise of the right to freedom of expression. Conversely, the offence does not cover disclosures of information with no foreign power link and so should not cover the types of activity to which Article 10 gives most protection to such as legitimate journalism, political expression or genuine whistleblowing activity (though other criminal offences may apply).

15. However, to the extent that the offence might engage Article 10, the Government considers any interference is justified under Article 10(2) in the interests of national security. This is first because the offence only applies to information restricted for the purpose or protecting the SOIOTUK and

second because the person committing the offence must know or ought to know that their conduct is prejudicial to the SOIOTUK.

16. The Government considers that limiting what can be captured under “protected information” to a level of categorisation or non-exhaustive list, such as specific security classifications, would risk creating loopholes within the provision which could significantly undermine the operational utility of the offence. The current definition of “protected information” would cover instances where information may have been mis-classified but would still be extremely harmful if shared widely, or instances where seemingly less sensitive information from within a Government building was obtained but could undermine the safety of the United Kingdom if disclosed to a hostile actor – this could include the floor plan to a Government building or an organisational chart of a team working within it. It is an important fact that even certain correctly classified official documents which do not include a higher classification level may be harmful if disclosed in certain ways– such as leaked information about a UK trade deal with another country disclosed for a purpose that prejudices the UK’s interests– so it is imperative that this breadth of information is also covered under the definition.

17. There are three tests that all need to be met in clause 1 (protected information, conduct with a purpose prejudicial to SOIOT UK, the foreign power condition). It is the combination of these tests that mean not only is the offence proportionate, but an appropriately high bar also has to be met to bring a prosecution.

Trade Secrets (Clause 2)

18. For a person to commit an offence under clause 2 their conduct must be unauthorised. The addition of ‘unauthorised’ conduct adds a layer of protection against capturing legitimate knowledge transfer, such as for example those which exist between academic institutions. This means that where for example a person makes an unauthorised disclosure of a trade secret to a foreign power, without the requisite knowledge that what they are doing is unauthorised, then an offence is not committed.

19. The Government does not consider that it is necessary to require an adverse impact to the UK’s national security in order for this specific espionage offence of obtaining a trade secret to be committed because there is an inherent harm to the interests of the UK in this type of unauthorised conduct taking place, as well as a clear link between economic prosperity and our national security.

20. The Government considers there are sufficient safeguards for whistle-blowers in the offences under clauses 1 and 2 which negate the need for a Public Interest Defence.

21. As stated by the Law Commission during oral evidence to the committee for this bill, these safeguards and conditions that relate to the purpose of the person committing the offence take them outside of the realm of leaks and into the realm of espionage. For the offence of obtaining or disclosing protected information, the activity has to be for a purpose that the person knows, or should know, is prejudicial to the safety or interests of the UK. If an individual uses lawful and appropriate whistleblowing routes, their conduct would not meet this bar.

22. For the offence of obtaining or disclosing trade secrets, the activity has to be unauthorised. Using lawful and appropriate whistleblowing routes would not meet the bar of unauthorised activity. Moreover, there is a damage element to the offence in Clause 2(2)(b) meaning that a disclosure that cannot be damaging if confidentiality is breached would not fall within the offence.

Assisting a Foreign Intelligence Service (Clause 3)

23. There are two offences within clause 3. The first is committed where a person engages in conduct that they intend will materially assist a foreign intelligence service in carrying out UK-related activities (activities taking place within the UK or those taking place outside the UK that are prejudicial to the safety or interests of the UK). The second offence is, following an amendment by the Government at Report in the Commons, committed where a person engages in conduct that it is reasonably possible may materially assist a foreign intelligence service in carrying out UK-related activities, and that person knows, or ought reasonably to know, that to be the case. There is a defence available where the conduct if in compliance with a legal obligation arising under UK law (other than an obligation under private law, such as in a contract), the conduct is for the purposes of exercising public functions, or the conduct is in accordance with an agreement or arrangement to which the UK, or a person acting on its behalf, is a party.

24. While it is possible that the offence could be committed by a person who actually does not know that what they are doing could assist a foreign intelligence service in carrying out UK-related activities, this would only be the case where they ought reasonably to know that to be the case, for example where they wilfully turned a blind eye.

25. The construction of the offence does not require the prosecution to prove that the activities of a foreign intelligence service taking place in the UK are prejudicial to the UK's safety or interests. This would create an unnecessary evidential hurdle in bringing a prosecution, as it is implicit that

any foreign intelligence service activity that the UK, or a person legitimately acting on its behalf, has not agreed to (whether formally or informally) is harmful to the UK's interests. Requiring the prosecution to prove this to be the case in the context of the relevant individual conduct as an additional requirement may require sensitive or damaging information to be disclosed to meet the evidential threshold, thereby damaging the effective operation of the offence.

26. If a person was seeking to assist a foreign intelligence service of a foreign power in a way that would not generally be thought to prejudice the UK's safety or interests, that activity should be in accordance with an agreement or an arrangement to which the UK is a party (e.g., to cross-border cooperation on criminal matters), noting that no particular formality is required for that element of the defence to be satisfied.

27. As the provision is constructed to avoid legitimate conduct being caught, the Government considers that Articles 8 and 10 are not engaged, however, to the extent that the offence might engage Articles 8 or 10, the Government considers any interference is justified under Article 8(2) or 10(2) in the interests of national security noting that for the offences to be committed the relevant material assistance must relate to activities of foreign intelligence services that the UK does not (formally or informally) agree to, or to activities taking place outside the UK that are prejudicial to the UK's safety or interests.

Prohibited Places (clauses 4 to 11)

28. The purpose of the prohibited places offences is to provide protection to sites, particularly defence establishments, vulnerable to espionage or sabotage. In this way, they must be considered in the context of those activities. Consequently, these offences do not seek to interfere with freedom of assembly and, as a general principle, in particular do not seek to restrict legitimate protest.

29. Protest activity at a prohibited place could, if all relevant conditions were met, potentially constitute a prohibited places offence. For example, a protest that sought to blockade a military airbase. However, the Government considers that any interference with Article 11 (freedom of assembly) would be justified in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime. The clause 4 offence requires that the protesters know, or reasonably ought to know, that their protest activity is for a purpose that is prejudicial to the SOIOTUK, so being rationally connected to those public interests. The clause 5 offence cannot be committed by being in the vicinity of a prohibited place, e.g. a protest outside the perimeter of a military airbase. It is also only committed where the person's conduct is unauthorised and they

know, or ought reasonably to know, that their conduct is unauthorised. Accordingly, activity by protesters at a prohibited place where they do not know that they are in a location where their presence or activity requires authorisation, and have no reasonable basis to know that they are in such a location, would not constitute an offence. For example, a person on a public footpath that cuts across a prohibited place, such as a military base, does not commit the clause 5 offence whether they are walking their dog or conducting a protest since it is authorised for members of the public to use the footpath. Noting the particular sensitivity of the prohibited places sites, the Government considers that the measures are proportionate, even if there is some risk that otherwise lawful protests could be prevented. The supporting police powers can only be used to restrict protest activity if specific conditions are satisfied – in particular, where the restriction is reasonably suspected to be necessary to protect the SOIOTUK.

30. The meaning of "prohibited place" includes, under subsection (1)(a) of clause 7, Crown land used for UK defence purposes; for the extraction of any metals, oils or minerals for use for UK defence purposes; or for the purposes of the defence of a foreign country or territory. The protection of such sites is essential to SOIOTUK, ensuring the effective operation of our armed forces, and those of our allies; safeguarding our military capabilities; and ensuring the safety of defence strategy, military intelligence and essential wartime supplies and services. Inevitably, given the footprint of these activities, a range of sites across the UK is caught. However, where those sites are publicly accessible, a member of the public will not commit the offence under clause 5 by being on that land as their presence will be authorised. Equally, the clause 4 offence will only be committed if the purpose of their activity in relation to the site is one that they know, or ought to know, is prejudicial to SOIOTUK. The range of protest activity that could, therefore, be affected is limited. It is important that the police have the powers under clause 6 to restrict the public's activity in relation to these sites in certain situations, being those in which a constable has a reasonable belief that it is necessary to exercise a power to protect SOIOTUK. For example, this might be ordering protesters to leave land that is ordinarily accessible to the public or directly outside the entrance to a site if that protest activity is preventing its effective functioning, such as its ability to conduct military operations or the continued flow of supplies to an airbase which maintains important defence capabilities for the UK.

31. The Government therefore considers that these clauses are compatible with Article 11.

Police power to order a person to leave an area adjacent to a cordon

32. Clause 9 provides for a power for a constable to designate an area if they consider it expedient to do so for the purposes of securing an aircraft, or part of an aircraft, used for military purposes or

equipment relating to such an aircraft. The designation of a cordoned area is a temporary measure that will be used only in specific circumstances that arise rarely. The police powers in relation to that cordon area at clause 11 include a constable giving an order for a person to leave an area adjacent to the cordon immediately. It is a criminal offence for a person to fail to comply with such an order.

33. It is conceivable that the power may, therefore, be available to direct a person to leave public or private land which they are able to lawfully occupy. Whilst this power is not subject to a test, to be lawful any such order must be result from a necessary and proportionate exercise of the power at clause 11 following a lawful designation of the cordoned area under clause 9. It is essential that these powers be available to the police to ensure that sensitive information and equipment is secured and not susceptible to retrieval, interference or inspection by hostile actors. For example, aircraft crashes are rare and it cannot be predicted when and where they might occur; where the incident involves a military aircraft, the Government considers it imperative that any intelligence and sensitive technology contained on that aircraft can be recovered without impediment. As such, it may be reasonably necessary to require that people leave an area outside a cordoned area to prevent disruption to the securing of the aircraft and recovery operation or hostile reconnaissance from outside the perimeter. In most cases, however, it is expected that the perimeter of the cordon will cover the area necessary to achieve this.

34. The designation of a cordoned area under clause 9 is subject to strict limits on its duration under clause 10. A cordon will only ever be in place as a temporary measure and so any potential for interference with the enjoyment of land located in adjacent area is necessarily short-lived, being justified as necessary and proportionate means of protecting the public interest in securing sensitive military assets against hostile actors who could threaten the UK's defence and national security. What's more, it is a defence for a person charged with the offence of not complying with an order under clause 11 to prove that they had a reasonable excuse for their failure to comply, such as needing to enter their own property where that does not fall within the cordoned area itself. It is also important to remember that, although such events are rare, dangers to public safety will often be found at sites where an aircraft has crashed.

Sabotage (clause 12)

35. The new sabotage offence covers activities that result in damage to any asset; this would include loss of or reduction in access or availability to land and buildings. On the face of it, therefore, the offence might also interfere with Article 11 (freedom of assembly) by capturing a peaceful protest that restricted access to a military base. However, the offence requires the foreign power

condition to be met, which means that either the activity is carried out by or on behalf of a foreign power or the person intends to benefit a foreign power. Second, the purpose of the conduct must be prejudicial to the SOIOTUK. In those circumstances, an individual involved in a protest for a common cause would not be caught by the offence.

36. As any contravention of the offence requires that the foreign power condition be met and be for a purpose prejudicial, the Government considers that any interference with Article 11 would be justified in the interests of national security, territorial integrity or public safety or for the prevention of disorder or crime. Accordingly, the Government considers the sabotage offence to be compatible with Article 11.

37. The offence of sabotage includes circumstances in which damage is caused to one's own property. The Government considers that 'peaceful' enjoyment of possessions does not extend to freedom to damage a person's own property where the other elements of the offence are met. Therefore, the offence does not engage Article 1 protocol 1 as the criminal offence only manifests at the point at which the property is used for 'non-peaceful' means; the offence does not prevent that person otherwise dealing freely with their property. Even if the offence did engage Article 1 Protocol 1, the Government considers that the offence meets the legitimate aim of criminalising damage that prejudices the SOIOTUK where there is a foreign power link.

Foreign Interference (clauses 13-14 and Schedule 1)

38. Article 10 arguably does not protect expression that amounts to a criminal offence or that involves coercion. That being so, the risk of interference with freedom of expression arises in the limited sense that the offence seeks to criminalise conduct that involves deception of some kind. However, in order for a person to face prosecution for such conduct , two further conditions must be met: first the foreign power condition must be met in respect of the conduct (that is to say that the person must be carrying out the conduct for or on behalf of a foreign power, or the person must intend hat the conduct will benefit a foreign power); secondly, the person must intend that their conduct, or a course of conduct in which they are participating, will have one or more of the following effects: interfering with the exercise of fundamental rights or affecting public functions, manipulating whether or how a person makes use of public services or participates in political or legal processes, or prejudicing the safety and interests of the United Kingdom.

39. The Government considers that any expression forming part of that conduct is not expression that is entitled to the protection of Article 10, in that the Article does not protect expression by or on behalf of a foreign power that is intended to affect the public functions of another State, or to

manipulate whether or how the public in another State makes use of public services there. And nor does Article 10 protect expression by or on behalf of a foreign power that is intended to manipulate whether or how a person participates in a political or legal process in another State. Of particular relevance in that regard are Article 16 (restrictions on political activity of aliens) and Article 17 (prohibition of abuse of rights).

40. Should any such interference be established, this will be in pursuit of the legitimate aims: principally the interests of national security but also the protection of the rights of others. Some might ask whether there is any risk that the general Foreign Interference offence might cause people to engage in pre-emptive self-censorship in order to avoid the risk of prosecution, particularly in respect of political speech or journalism. However, the Government considers that the need for the foreign power condition to be satisfied will mean that any interference in political speech will be justified under Article 16. As to journalism, the Government considers that the offence is such that a professional person acting on advice will be able to understand what is and what is not permissible, and that the offence is therefore sufficiently foreseeable so as to avoid inhibiting public interest journalism.

Obtaining etc material benefits from a foreign intelligence service (clause 15)

41. The offence of obtaining etc a material benefit from a foreign intelligence service makes it an offence for a person to obtain, accept or retain a material benefit that is not an excluded benefit for themselves or to benefit another person, where that benefit is provided for or on behalf of a foreign intelligence service and where the person does, or should, know that to be the case. It is also an offence to agree to accept a material benefit that is not an excluded benefit (for themselves or another) that is provided for or on behalf of a foreign intelligence service where the individual does, or should, know that to be the case.

42. The provision is constructed to exclude legitimate activity, so it is not an offence to receive reasonable payment for the provision of otherwise lawful goods or services. The defence available in clause 3 (assisting a foreign intelligence service) is also available in this provision. The defence would be available where, for example, a person receives the benefit in accordance with an agreement or arrangement to which the UK, or a person legitimately acting on its behalf, is a party. As in clause 3, there is no particular formality required in this provision.

43. As the provision is constructed to avoid legitimate conduct being caught, the Government considers that the ECHR is not engaged. However, to the extent that the offence might engage

Article 8, the Government considers any interference is justified under Article 8(2) in the interests of national security.

Power of Search (clause 21 and Schedule 2)

44. The Bill includes powers of entry, search and seizure, which replace the power currently in section 9 Official Secrets Act 1911 so as to apply to certain offences within the Bill.

45. The powers include:
    a. the power to issue a warrant to authorise entry to relevant premises and search of those premises and any person found there, seizing any material – but for "excepted material" - that is likely to be evidence that a relevant offence has been, or will be, committed;
    b. the power for a judge to make an order requiring the production of excluded and special procedure material where specified conditions are satisfied;
    c. the power for a judge to make a warrant authorising entry to relevant premises and search of those premises and any person found there for excluded and special procedure material that is likely to be evidence that a relevant offence has been, or is about to be, committed, where specified conditions are satisfied; and
    d. the power for a police officer of the rank of superintendent or above to give authority equivalent to the warrant in urgent cases.

Article 8

46. It is accepted that these powers of entry, search and seizure will prima facie interfere with an individual's rights under Article 8 ECHR when exercised. However, that interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society.

47. These powers require that there be a reasonable suspicion that an offence under the Bill or foreign power threat activity is being, or is about to be, undertaken. Accordingly, the powers have a clear and rational connection to the pursuit of a legitimate aim in protecting national security and public safety as well as preventing crime or disorder.

48. The safeguards in place for the exercise of these powers, including judicial scrutiny, will ensure that the powers are exercised proportionately, going no further than is necessary to achieve their legitimate ends. Accordingly, the Government considers that these provisions are compatible with Article 8 ECHR.

Article 10

49. The powers will enable the police, on application for a production order or warrant, to obtain excluded and special procedure material. (paragraph 2 onwards, Schedule 2). This will include journalistic material and as such Article 10 is engaged. However, the safeguards in place for the exercise of these powers, namely prior judicial approval, will ensure that the powers are exercised proportionately, going no further than is necessary to achieve their legitimate ends.

50. There may arise cases of great emergency where immediate action is necessary, and as such it will be possible under the powers at paragraphs 10 and 24 for a superintendent of police to give like authority to a warrant. There is a similar power in terrorism legislation and, in the limited circumstances described, it is essential that the police can search for and seize material that is of substantial value to an urgent state threats investigation. It is important to note that this includes cases in which it is reasonably suspected that a relevant act is about to be committed. Such cases are unusual and the authorising officer must be satisfied not only of the need for immediate action in great emergency but also that the conditions which would ordinary apply for a warrant are met. The Secretary of State must also be notified as soon as reasonably practicable.

51. There is a risk that such a search may result in confidential journalistic material being seized. Accordingly, and in light of *R (Miranda) v Secretary of State for the Home Department EWCA Civ 6,* the Government has included sufficient safeguards – which were not present under the Section 9(2) OSA 1911 power – to ensure compatibility with Article 10 ECHR in protecting journalistic sources in particular. If the use of the power under paragraph 10 or 24 results in the seizure of confidential journalistic material, a constable (or the Procurator Fiscal in Scotland) must apply for warrant to retain that material as soon as reasonably practicable after seizure. This introduces an important and prompt judicial check soon after seizure in a case where operational imperatives demand urgent action. To grant the warrant, a judge (or sheriff in Scotland) must be satisfied not only that a relevant act has been or is about to be committed but also that there are reasonable grounds to believe that the confidential journalistic material is likely to be of substantial value to the investigation and that it is in the public interest for the material to be retained having regard to the benefit likely to accrue to the investigation. Moreover, conditions on the retention and use of the confidential journalistic material may be imposed under the warrant and, if the warrant is not granted, the confidential journalistic material must be returned or destroyed.

Disclosure orders (clause 22 and Schedule 3), Customer information orders (clause 23 and Schedule 4) and Account monitoring orders (clause 24 and Schedule 5)

Article 6

52. The right to remain silent and not incriminate oneself are an essential part of the right to a fair trial/procedure as protected by Article 6. There is express provision in the relevant Schedules that information obtained as a result of the orders cannot be used in evidence in criminal proceedings against that person, except in explicit limited circumstances (see paragraph 8 of Schedule 3; paragraph 7 of Schedule 4; and Paragraph 6 of Schedule 5). It is considered that these provisions provide a robust safeguard against the use of this power in a way that results in self-incrimination and therefore the provisions are compatible with Article 6.

53. Given there is a wider range of information that can be obtained under a disclosure order, there is provision to ensure that it cannot be used to obtain legally privileged material (paragraph 3(1) and paragraph 12(1) of Schedule 3).

Article 8

54. It is accepted that these information-gathering powers will *prima facie* interfere with an individual's rights under Article 8 ECHR when exercised. However, that interference will be justified under Article 8(2) as being in accordance with the law and necessary in a democratic society.

55. The orders are only available in relation to investigations into foreign power threat activity, the meaning of which is set out in the Bill. The powers are intended to be used to investigate criminal activity on behalf of a foreign power are clear and therefore there is a clear rational connection to the pursuit of the legitimate aim in protecting national security and public safety as well as preventing crime or disorder.

56. Judicial scrutiny will ensure that the powers are exercised proportionately, going no further than is necessary to achieve their legitimate aims. Accordingly, the Government considers that these provisions are compatible with Article 8 ECHR.

Power of Arrest and Detention (clause 25 and Schedule 6)

Article 5

57. In order to effectively investigate and disrupt hostile activities of foreign powers against the UK, the Bill introduces powers to assist investigating authorities in disrupting and investigating foreign power threat activity. The Government considers that the power of arrest and subsequent

detention is lawful; it falls under Article 5(1)(c), to bring a person before a competent legal authority on reasonable suspicion of committing an offence. In addition, the Bill provides for the ability to keep an individual in detention for the purposes of determining a deportation order, which falls within the power under Article 5(1)(f). Whilst the power provides for a longer period of detention than that provided for in the Police and Criminal Evidence Act 1984 ('PACE'), the Government considers that the ability to detain up to 48 hours initially and subsequent judicial approval for a period up to a maximum of 14 days is justified and a proportionate deprivation of liberty given the likely complexity of investigations involving foreign power threats. The nature of this threat means that offending behaviour is likely to be complex and sophisticated, using methods to evade detection and involving specially trained individuals. Investigating agencies need sufficient tools to be able to understand and disrupt that threat.

58. The Government considers that the power of arrest and subsequent detention contains sufficient safeguards against arbitrary use such that it meets the necessary requirements as to be "prescribed by law" for the purposes of Article 5(1). In particular:

    a. The power may be exercised only where the constable has reasonable grounds to suspect that an individual is involved in the commission of offences with a foreign power link (Clause 25(1)). 'Reasonable suspicion' is a concept used in Article 5, is widely understood and applied by police authorities;
    b. A judicial authority must approve detention beyond 48 hours (Schedule 6, Part 6). This meets the requirement at Article 5(3) as set out in subsequent case law for there to be prompt, independent judicial consideration which reviews the merits of detention and provides the power to release;
    c. Regular reviews of detention are conducted and the reviewer, who is independent of the investigation, must consider that the investigation is being conducted diligently and expeditiously (Schedule 6, part 5). The reason for postponing any such review must be recorded in writing in the presence of the detained person.

59. Paragraph 41(3) of Schedule 6 makes provision for the person in detention and their representative to be excluded from a hearing of an application for further detention. Paragraph 42 provides that information can be withheld from the person or their representative and they can be excluded from the hearing determining this. Article 5(2) and 5(4) provide for the right to know the reasons for the arrest and nature of charge and the right to take proceedings by which the lawfulness of the person's detention may be decided speedily. However, there may be circumstances in which interference with this right is justified, for example for national security reasons, protecting investigative techniques or preventing the alerting of other suspects.

60. In *Sher & Others v The United Kingdom*[1] the court considered similar provisions under the Terrorism Act 2000 and stated that the procedure set out in that legislation, which enabled the court to exclude the applicants and their lawyers from any part of a hearing *"was conceived in the interests of the detained person, and not in the interests of the police. It enabled the court to conduct a penetrating examination of the grounds relied upon by the police to justify further detention in order to satisfy itself, in the detained person's best interests, that there were reasonable grounds for believing that further detention was necessary. The Court is further satisfied that the District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants"*[2]. Given the sensitive nature of investigations into hostile activities by foreign powers, it is considered that there may be circumstances in which it is not appropriate to disclose to a detainee or their legal representative the information on which an application for a warrant for extended detention is made. The likely complexity and evolving nature of investigations into hostile activities by foreign powers, including identification of other individuals, links to a foreign power and the reliance on sensitive intelligence, mean that the Government considers interference with Article 5 will be justified in the circumstances of a particular case, as determined by the judge, and in accordance with the reasons set out in the Bill.

61. The Bill also includes emergency powers to extend the 14 day detention period to 28 days whilst Parliament is dissolved subject to subsequent affirmative approval. This provision is needed in circumstances where the threat is so extreme that additional detention periods may be required and Parliament is not available to approve emergency primary legislation. The Government consider such circumstances are possible but the need for such extended detention powers and its compatibility with Article 5 would require consideration at the time. Even were the maximum detention period extended, application for extended detention in individual cases would require consent of the DPP or Lord Advocate and approval by a senior judge.

Article 6

62. Article 6 applies to circumstances in which a person is questioned about their suspected involvement in an offence and therefore is engaged in respect of the police powers of detention.

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[1] 5201/11

[2] At paragraph 153.

63. Paragraphs 8 and 16 of Schedule 6 permit a police officer to direct that the detained person may not consult the solicitor of their choice. Paragraphs 9 and 15 of Schedule 6 permit a delay in the exercise of the rights to have a person informed of the individual's arrest and the right to consult a solicitor. In exceptional circumstances, limiting access to legal advice is justified. Such restriction must be set out in law, assessed on the particular circumstances of the case and be of temporary nature[3]. The Government considers that the application of the reasons set out in the Bill for delaying the right provide sufficient certainty as to the circumstances in which the interference with Article 6 may be justified. This analysis also applies to the power to restrict access to a particular legal representative, with it being clear in that provision that it does not prevent a detainee from accessing legal advice entirely.

64. The justification set out above for Article 5 in relation to the right to exclude an individual or their representative from proceedings and to withhold certain information applies to the rights guaranteed by Article 6.

Retention of Biometric Material (clause 25 and Schedule 6 Part 4)

65. The collection and retention of biometric data was addressed in the Protection of Freedoms Act 2012 in response to the ECtHR decision in *S and Marper v the UK*[4]. In that ruling, the court held that it was necessary to have clear and detailed rules governing scope and application of measures as well as procedures to ensure sufficient guarantees against arbitrariness and that blanket and indiscriminate retention of persons suspected but not convicted of offences represented a disproportionate interference into Article 8 rights.

66. Schedule 6 sets out clearly the circumstances in which biometric data may be collected, used and retained. Further, there are a number of safeguards included in the provisions which help protect against the powers being arbitrarily exercised and ensure the principle of legality is satisfied.

67. The Government considers that the Article 8 intrusions can be justified as a proportionate means to achieving the legitimate ends of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others. Investigations into hostile activities by foreign powers are complex and it will often be difficult to reach the evidential threshold for charging given the nature of the intelligence available; retention of biometric data allows the police to use it in in future investigations or to assist with investigative leads. The gravity

[3] *Ibrahim and others v the United Kingdom*
[4] 30562/04; 30566/04

of the risk posed justifies the automatic retention of biometric data and the safeguards replicate those contained in PACE and the Terrorism Act 2000 (TACT), which are considered to have struck a fair balance as being no more than necessary to accomplish the objective.

68. In *Gaughran v UK*[5] indefinite retention of biometric data was found by the European Court of Human Rights to be disproportionate and in breach of Article 8. However, the Government considers that the Data Protection Act 2018 (DPA), which came into force in May 2018, adequately addresses the issues raised by that judgement; the case was brought before the Courts prior to the DPA coming into force, so the DPA was not factored into the judgement. In particular, the DPA requires periodic reviews of the retention of personal data, including biometrics, for law enforcement purposes (DPA 2018, Part 3, Chapter 2, Section 39). The DPA also provides for oversight by the Information Commissioner. UK public authorities (which includes law enforcement agencies) must ensure that their practices on data retention are consistent with data protection obligations and the ECHR.

69. The power to retain biometric data on national security grounds is available up to 5 years; this mirrors equivalent provisions in PACE and TACT. The Government considers that the longer retention period and therefore increased intrusion is necessary given the likely pattern of behaviour of those involved in hostile activities by foreign powers including involvement over a number of years. The Government considers it is therefore a justified intrusion into Article 8 rights.

Border Security and Confidential information (clause 27)

70. The Bill includes an amendment to Schedule 3 to the Counter-Terrorism and Border Security Act 2019, in order to change the definition of "protected material" so that confidential business material is no longer included within that definition. This has the effect that it will no longer be necessary to seek prior authorisation from the Investigatory Powers Commissioner in order to retain and examine copies of confidential business material which is seized under the hostile activity port stop powers in Schedule 3 to the Counter-Terrorism and Border Security Act 2019.

71. Whilst accessing confidential material may prima facie represent an Article 8 interference, as it is only confidential business material which is affected by this change, and not confidential personal records acquired or created in the course of a business, it is the Government's view that there is no Article 8 interference by this amendment.

[5] 45245/15)

Offences under Part 2 of the Serious Crime Act 2007 (SCA) (clause 28)

Article 2

72. The amendment to the SCA would only apply when activity was considered necessary for the proper exercise of any function of the intelligence agencies or armed forces. It does not protect those who act outside of those functions and it has no impact on other criminal law offences or the UK's international obligations in relation to Article 2.

Article 3

73. The amendment to the SCA will have no impact on the UK's obligations under Article 3. The Government opposes any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law, including so-called extraordinary rendition. Neither does the Government does participate in, solicit, encourage or condone the use of torture.

74. The Government is clear that torture, mistreatment and arbitrary detention are contrary to international human rights law. The Government takes all allegations of complicity in arbitrary detention, torture or mistreatment very seriously. There is clear guidance and training for UK personnel dealing with detainees who are held by others. The Government published new and improved guidance in 2019 "The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees", the use of which is overseen and reported on by the independent Investigatory Powers Commissioner. The Principles ensure that the United Kingdom continues to lead the field internationally in terms of providing guidance to personnel on intelligence sharing in a manner that protects human rights.

75. The Principles make clear, "in no circumstance will UK personnel ever take action amounting to torture." The Principles is overseen by the Investigatory Powers Commissioner, who reports annually on its application and compliance by the security agencies.

76. The amendment in clause 28 to the offences in the Serious Crime Act 2007 does nothing to alter the UK's compliance with Article 3. The amendment only applies in circumstances when activity is necessary for the proper exercise of the functions of the UK intelligence agencies or armed forces. In no circumstances would proper functions include torture contrary to the UK's obligations and the amendment would not apply where an individual was working beyond those functions.

Article 13

77. The ability of individuals to secure effective remedy for alleged violations of the Convention would remain. This would include criminal proceedings for an offence under the SCA should the action not have been necessary for the proper functions of the intelligence agencies or armed forces. In addition, other criminal offences would still be available, such as secondary liability or misconduct in public office. The amendment to the SCA would not affect the ability for individuals to seek civil remedies, such as through a damages claim or judicial review.

Prevention and Investigation Measures (PIMs): Part 2 Notices (clauses 37-61 and Schedules 7-12)

Article 5

78. Part 2 of the Bill introduces a new Prevention and Investigation Measures regime, which gives the power to impose a suite of restrictive measures on an individual where the Secretary of State reasonably believes that the individual is involved in foreign power threats activity, with an accompanying criminal offence for failure to comply with or for contravening a measure. A Part 2 notice may include a requirement under which the individual may be required to remain in their residence for a specified number of hours. This has been reviewed extensively by the courts in the context of control orders (and since then in the context of TPIMs) and it has been found that the principle of imposing a curfew on an individual under civil preventative measures does not breach Article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty. In particular, there is a duty on the Secretary of State (under section 6 of the Human Rights Act 1998) to act compatibly with the Convention rights in determining the length of the curfew and any other measures to be imposed under a Part 2 notice. Further, the Secretary of State may not impose measures unless they are necessary, and she is obliged to keep the necessity of the Part 2 notice and each measure in it under review[6]. Further, one of the conditions which must be met in order for the court to impose a PIM, is that the Secretary of State must reasonably consider that the individual measures applied are necessary to prevent or restrict the individual's involvement in foreign power threat activity, and she is obliged to keep the necessity of the Part 2 notice and each measure in it under review. This covers not just the imposition of the measure but the exact terms of the measure and therefore, in the case of the residence measure, the number of hours an individual must reside in their

[6] See duty of continuing review in Clause 40

residence. In addition to this the Court must agree, at both the permission hearing and review hearing for the PIM, to the number of hours, set by the Home Secretary, that the individual subject to the residence measure must remain in their residence.

79. Clause 60 (legal aid for foreign power threat activity prevention and investigation measures) engages Article 5 as it makes available civil legal services provided to an individual in relation to a Part 2 notice, which could include a requirement amounting to a deprivation of liberty for the purposes of Article 5. The Government is satisfied that this addition to the legal aid scheme is compatible with the requirement under Article 5(4) that the State provide legal assistance where this necessary to enable a detained person to make an effective application for release.

80. The Government therefore considers that the provisions in the Bill allowing for the imposition of a period of confinement to the residence, together with the provisions allowing for other restrictions on the individual, are compatible with Article 5.

Article 6

81. The Bill makes provision for the Secretary of State to apply to the court (on an *ex parte* basis) for permission not to disclose certain material, and the court must give permission where it considers that the disclosure would be contrary to the public interest, but must consider requiring the Secretary of State to provide a gist of such material to the individual.

82. Closed proceedings are only used to the extent strictly necessary in the interests of national security or public order, as the information dealt with during such closed sessions is information which the court permitted the Secretary of State not to disclose because it is necessary to withhold it in the public interest. A special advocate may be appointed to act in the interests of the individual in relation to the closed proceedings.

83. Paragraph 5 of Schedule 10 to the Bill reflects the "read down" in accordance with section 3 of the Human Rights Act 1998 as required by case law[7]. The result is that although Part 2 proceedings may make use of closed evidence, where the court concludes that there is material

[7] *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46, where the majority found that although the protections and special advocate procedure for using the closed material procedure in control order proceedings were highly likely to safeguard the individual from significant injustice, they could not be guaranteed to do so in every case. The majority decided that the relevant provisions of the Prevention of Terrorism Act 2005 and the Rules made under it (requiring the court to give permission for the withholding of evidence) should be "read down" in accordance with section 3 of the Human Rights Act 1998 as if the words "except where to do so would be incompatible with the right of the controlled person to a fair trial" were added (paragraph 72).

that it is necessary to disclose in order to meet the requirements of a fair trial – even where its disclosure is contrary to the public interest – that material must (at the Secretary of State's discretion) either be disclosed or withdrawn from the case.

84. Case law has also held that in order for control order proceedings to be fair,

> "*the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations".* ."[8]

85. In each Part 2 notice case, the court will determine the level of disclosure required to comply with the individual's right to a fair hearing in accordance with Article 6.

86. In light of the above, the Government considers that the provisions in the Bill relating to court review, appeals and the use of closed proceedings are compatible with Article 6.

Article 8

87. Part 2 Notices can include measures providing for restrictions on movement, communications and association and measures requiring monitoring and reporting which all engage Article 8, as well as restrictions on dealing with money or other property, and a requirement to undertake a polygraph test, which may engage Article 8.

88. Any interference with Article 8 rights caused by imposition of these measures will be in accordance with the law because there will be clear provision in primary legislation about the circumstances in which Part 2 notices may be imposed and provision about what type of measures may be imposed. The interferences with Article 8 rights caused by the measures will be in pursuit of a legitimate aim; a Part 2 notice may only be imposed where the Secretary of State reasonably considers it is necessary in connection with the protection of the UK from activity which comprises threats from foreign powers and the Secretary of State must also reasonably consider that each measure is necessary for the prevention or restriction of the individual's involvement in foreign power threat activity. These purposes pursue the legitimate aims of national security, public safety, the prevention of crime and the protection of rights and freedoms of others.

89. The interferences with these rights will also be proportionate. There are numerous safeguards in place to ensure that Part 2 notices will only be imposed where, and to the extent, that they are

[8] Secretary of State for the Home Department v AF and another [2009] UKHL 28 ("AF (no.3)", Paragraph 59.

necessary and proportionate and to ensure that the individual's rights are protected. The range of measures and safeguards in place are similar in breadth and scope to those in the TPIM Act and none of the types of obligations that may be imposed under a TPIM have been found to be incompatible with Convention rights.

90. It is therefore the Government's view that Schedule 7 to the Bill is compatible with Article 8.

91. Article 8(1) is prima facie engaged in cases of search and seizure under the powers for entry and search (and associated powers of seizure and retention) provided by Schedule 11 to the Bill. The Government considers, however, that any interference with that right will be justified under Article 8(2). The powers pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at ensuring that Part 2 notices (the purpose of which are related to the prevention of threats from foreign powers) are properly enforced, including uncovering evidence of any breach of a Part 2 notice would facilitate a criminal prosecution.

92. The powers are also necessary in a democratic society, that is they are proportionate to the aim pursued and meet a pressing social need. The powers in Schedule 11 may only be exercised in defined circumstances and are no more than necessary for achieving the legitimate aims mentioned above.

93. It is therefore the Government's view that Schedule 11 to the Bill is compatible with Article 8.

94. Schedule 12 to the Bill makes provision in relation to the taking of biometric material from individuals subject to a Part 2 notice. Such material may be taken with or without consent. Prints, samples or information derived from samples may be checked against specified databases and information, to check whether there is a match with the person's data on existing DNA and fingerprint databases. This may allow the police to confirm the person's identity and to determine whether the person has previously had their biometrics taken and whether those biometrics have been found at a previous crime scene.

95. Schedule 12 also makes provision in relation to the retention and destruction of such material and about the uses to which retained material may be put. The storage and retention of fingerprints and DNA samples and profiles constitutes an interference with Article 8. The ECtHR conclusions in relation to the retention of such material post-acquittal and in relation to suspected but not convicted persons are set out above.

96. Persons subject to a Part 2 notice are believed to be or have been involved in foreign power threat activity – but have not (necessarily) been convicted of a criminal offence. The Government is satisfied that the purposes of the prevention and detection of crime[9] and the interests of national security are legitimate aims in accordance with article 8(2). The Government is also satisfied that the provisions are proportionate due to the criteria for exercise of the power and the several safeguards that are built into its exercise.

97. The Government therefore considers that the provision in Schedule 12 to the Bill is compatible with article 8 of the ECHR.

Article 10

98. Measures providing for restrictions on communications and association engage Article 10. For the reasons given above in relation to measures which engage Article 8, it is considered that these measures are compatible with Article 10.

99. The Bill makes provision for the making of an anonymity order by the court in respect of an individual who is subject to a Part 2 notice or against whom the Secretary of State proposes to impose a Part 2 notice.

100. Case law has established that the press and journalists enjoy the rights which article 10 confers[10]. An anonymity order will interfere with the article 10(1) rights of the press to report the identity of the individual subject to a Part 2 notice, meaning that the press may be restricted from reporting a complete account of an important public matter.

101. The article 10 rights of the press can be subject under article 10(2) to restrictions, including the 'rights of others' under article 8 of the ECHR which are also engaged by the issue of publication of the identity of the individual. Making provision for an anonymity order may also be justified in accordance with article 10(2) in respect of Article 2 or 3 rights, which obliges states to have a structure of laws in place to help protect people from assaults or attacks on their lives.[11] The availability of an anonymity order is a way in which the article 2 or 3 rights of an individual subject to a Part 2 notice may be protected in appropriate circumstances.

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[9] *Marper* is authority for this.
[10] In Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury [2010] UKSC 1, paragraph 33.
[11] Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury [2010] UKSC 1, paragraph 27.

102. Case law has clarified that the availability of such orders was not incompatible with Convention rights – rather the exercise of the power involved a balancing by the court of competing rights and the court has noted that the protection of article 2, 3 and 8 rights positively demanded the availability of such an order[12].

103. The Government therefore considers that the provision for anonymity orders in paragraph 6 of Schedule 10 to the Bill is compatible with Article 10 of the ECHR.

Article 11

104. As noted above, measures providing for restrictions on communications and association will engage Article 11. For the reasons given above in relation to measures which engage Article 8, it is considered that these measures are also compatible with Article 11.

Article 1 Protocol 1

105. Schedule 11 to the Bill confers powers of entry and search, together with associated powers of seizure and retention, in connection the enforcement of Part 2 notices. Article 1, Protocol 1 will be engaged where these powers are used to seize property.

106. Property seized under the new powers may be retained only for as long as is necessary and so the ECHR consideration relates to the control of use of property under Article 1, Protocol 1. The Government considers that the test for justification of a control of use of property is made out: the control will be in accordance with the law, it will be for the general interest and will be proportionate to the aim pursued.

107. The powers of seizure are to seize anything which (a) contravenes a Part 2 notice, (b) would assist in detecting the location of an individual who had absconded or (c) may threaten or harm any person (corresponding to the search power) or (d) which constitutes evidence of any offence. The powers are therefore (a) aimed at the prevention or detection of crime (in particular the breach of a Part 2 notice) (b) in the interests of national security and public safety, and (c) in association with criminal proceedings, since the material seized could be used to prosecute an offence.

108. The powers of seizure are proportionate because:

[12] There have been more recent cases focusing on anonymity orders in other contexts in which the Article 10 interest in identifying individuals was balanced against competing Convention rights of those individuals, for example, *Justyna Zeromska-Smith v United Lincolnshiire Hospitals NHS Trust [2019] EWHC 552 (QB)*

a. The articles seized could otherwise be used for the purposes of foreign power threat activity (which the measures in the Part 2 notice are designed to prevent or restrict).
b. The seizure could result in evidence (that would otherwise be missed or subsequently destroyed) being available for use in a criminal prosecution for an offence.
c. Anything seized may only be retained for so long as is necessary in all the circumstances.
d. The PACE and PACE NI Codes of Practice will be amended to extend to these powers. The Codes make provision for additional safeguards, including for records to be made of any articles seized and for such records to be provided to the persons from whom the articles were seized.
e. The other safeguards referred to above apply.

109. It is therefore the Government's view that the provision in Schedule 11 to the Bill is compatible with Article 1, Protocol 1.

Damages Provisions (clauses 82-86 and Schedule 15)

Article 6

110. Article 6(1) provides that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

111. Clauses 82 to 85 (damages in national security proceedings) engage Article 6(1) as they introduce a procedure for raising before a court matters relevant to the determination of claims for damages against the Crown in proceedings relating to national security. The procedure requires that the Crown makes an application and the court has discretion as to whether to admit it. Where admitted, the court will consider whether the reduction of damages to reflect the misconduct of the claimant of a terrorist nature is appropriate. The burden of proving that misconduct will lie with the Crown.

112. Those new procedures will operate together with the existing safeguards in the rules of court, including the closed material procedures under Part 82 of the Civil Procedure Rules 1998. Any further rules considered necessary will themselves have to be compatible with Article 6(1).

113. Clause 86 and Schedule 15 (freezing and forfeiture of damages) engage Article 6(1) as they create a procedure for the provisions applying to the new power to freeze or forfeit damages awards where there is a real risk those sums may be used to fund terrorism. Those provisions

identify the procedural requirements before the court may make those orders. In addition, the determination of the issues will be subject to the existing safeguards in the rules of the court in which the damages claim is considered and any new rules of court will need to be compatible with Article 6(1).

114. The Government is therefore satisfied that the provisions are compatible with Article 6(1).

Article 1 of Protocol 1

115. Article 1 of Protocol 1 ("A1P1") protects a person's right to the peaceful enjoyment of their possessions.

116. Clause 86 and Schedule 15 engage A1P1 as they apply to an entitlement to damages in civil claims, as determined by a court. Of Schedule 15, paragraph 1 applies to a first freezing order which will last for 2 years. Under paragraph 2, it may be extended for a further 2 years. Paragraph 3 applies to forfeiture. The test in each case is whether there is a real risk that the funds, if paid to the claimant, will be used for terrorism.

117. The Government accepts that the provisions reflect an interference with A1P1 rights, being the rights of claimants to damages, as will have been found by the court seized of the issue. The interference arises as, prior to payment, the court, on considering the test referred to above, may order a restriction on payment of those damages to the claimant.

118. It is arguable, particularly in relation paragraph 3 of Schedule 15 (forfeiture), whether the interference is one of control or deprivation.

119. However, there is also an argument that that issue does not need to be resolved. For example, in *Denisova and Moiseyeva,*[13] the conclusion was that "*the Court considers that there is no need to resolve this issue because the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance issues that follow."*

120. The Government recognises the interference but considers the provisions pursue a legitimate aim and do so proportionately. The aim is of course prevention of terrorism, which is legitimate.

[13] Denisova and Moiseyeva v Russia (Application no. 16903/03).

121. As to the proportionality, the risks from terrorism are some of the most serious a society will face, including loss of possibly many lives, protecting against which may justify significant interferences with other rights, including permanent loss of property. For example, the Anti-terrorism, Crime and Security Act 2001 also adopts forfeiture with respect to terrorism.[14]

122. With respect to sanctions which arguably involved far more sweeping restrictions on enjoyment of possessions and less culpability on the part of the sanctioned person than are proposed in this Bill[15], the European Court of Human Rights ruled that:

> *"....the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequence are justified in the general interest for the purpose of achieving the objective pursued."* [16]

123. As to the test a court will be required to apply, namely that there is *real risk* that damages paid to the claimant will be used for terrorist purposes, it is very similar to that in other statutory provisions that also interfere with A1P1 rights or create criminal offences.[17]

124. In addition, these provisions include a number of safeguards, arguably greater than those in other similar legislative provisions. For example, two freezing orders will have to be granted before forfeiture is possible. In addition, the court will be able to consider all parts of the awards separately and only withhold damages where there is no mechanism (such as payment to solicitors or directly to care providers) to reduce the risk below the threshold, and the court can tailor the award to the personal circumstances of each claimant.

125. For those reasons the Government considers that these provisions are a lawful interference with the A1P1 rights of the claimant.

Foreign Influence Registration Scheme (FIRS) (Clauses 62 – 81)

Article 6

126. FIRS requires persons to register foreign activity arrangements or foreign influence arrangements and makes it an offence to carry out unregistered activity. Further, clause 73

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[14] Schedule 1.
[15] Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others C-84/95, 30/7/96, [22]-[26].
[16] Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland (45036/98) (2006) 42 EHRR 1, [149]
[17] Sections 14 and 16 of the Terrorist Act 2000.

includes provision for the Secretary of State to issue an information notice requiring provision of certain information from a person who the Secretary of State reasonably believes is party to, or has acted pursuant to, a registerable arrangement. Providing false information is also an offence under clause 75. The effect of these provisions is that a person may be obliged by law to provide information to the Home Office that might incriminate the entity or an individual by reference to the criminal offences in the Bill.

127. An aspect of the protection given by Article 6 is that it protects the right against self incrimination. That is it protects a person against the use of evidence in criminal proceedings that has been obtained by coercion or oppression, against the will of the defendant. There is therefore a question of whether the obligations in the Bill to provide information to the Secretary of State under FIRS are contrary to Article 6 on the basis they are provided against the free will of a person.

128. The limits of the right against self incrimination under Article 6 and the extent to which provision of information on compulsion is compatible with an Article 6 right to not incriminate oneself have been considered by the Courts in the leading case of *Saunders*[18], and domestically in a number of cases including. *RvS&A*[19] which followed it.. They established that the right not to incriminate oneself, although at the heart of fair procedure under Article 6, is primarily concerned with respecting the will of a person to remain silent when questioned. It does not extend to the use in criminal proceedings of material which may be obtained through the use of compulsory powers but which has an existence independent of the will of the subject, such as documents, correspondence, biometric samples, for example.

129. The Government considers that the same principles apply here. The information which would be sought under clause 73 is information about the political influence activity or foreign activity arrangements and should be independent of the will of the subject. Further, the clauses require only the disclosure of information to the Secretary of State. The extent to which any such material might subsequently be used in a prosecution is a separate matter where the usual provisions on the exclusion of evidence would apply in any event. As such the Department considers that these clauses are compatible with Art 6 ECHR.

Article 8

[18] Saunders v UK 43/1994/490/572
[19] R v S&Anor [2008] EWCA Crim 2177

130. FIRS requires the provision of personal data to the Home Office upon threat of criminal sanction. A power at Clause 77 also provides for the publication of information provided under the scheme should the Secretary of State so wish. The power is subject to the affirmative procedure. Should Regulations be passed which provide for the publication of registered information, personal data shall appear on a scheme website, such that an individual named on the registration may be identifiable and associated with registerable activity. The scheme shall also retain the data collected by the scheme.

131. The Government is of the view that FIRS may engage Article 8 of the ECHR which provides that everyone has the right to respect for his private and family life, his home and his correspondence. The Court has established that private life is a broad concept and the collection of information by officials of the state about an individual without his consent will interfere with the right to private life[20].

132. An interference in the person's Article 8 ECHR rights may be open to legal challenge on the basis that the interference does not further a legitimate aim, and that it is not necessary. Such challenges are conceivable in circumstances where a person is of no national security concern and objects to the processing of their data, as well as where the benefits of processing the data are outweighed by the losses suffered by the person as a result.

Justification

133. The Government is of the view that there are good arguments that there is limited opportunity for any interference with Article 8, and any interference that may occur is justifiable under Article 8(2) of the ECHR, and necessary in a democratic society both in the interests of national security and for the protection of the rights and freedoms of others.

134. It is questionable whether there is any interference with a person's Article 8 rights in circumstances where anyone in an arrangement with a foreign entity to carry out political influence activity shall be consenting to provide their personal information to the Government by entering into that arrangement. Therefore the gathering of information by the Government is done with the subject's consent and can be avoided by the subject not entering into such an arrangement.

135. It is accepted that there may be service providers or business people who are obliged to register due to the nature of their business (providing PR services to overseas clients, for

[20] X v UK No 9702/82, 30 DR 239 (1982)

example). Should it be established that the collecting and publishing of their personal information does interfere with their Article 8 rights, the Government considers that this is legitimate. The purpose of registering foreign influence arrangements is twofold: to secure transparency in political affairs and decision-making, and to protect national security by forcing the transparency of previously hidden foreign intervention in UK affairs or providing for a means of prosecution for those who continue to conceal the source of such influence.

136. The Government also considers there to be good arguments that FIRS is proportionate to the aims. Making the source of influence in UK political and democratic affairs publicly available will significantly aid the public in identifying where such influence may be motivated by interests outside our borders and not in the UK's interests, as well as potentially deter those who seek to conceal the sources of such influence. The information that will be required about persons and foreign principals will not go beyond what is necessary in order to achieve the underlying policy objective, without imposing judgment on those who appear on the register – those who register are supporting the aims of transparency and there should be no inherent damage to reputation of doing so. Regulations setting out the information that will be required during registration is in the process of being drafted.

137. FIRS shall sit within a framework of similar registers which are accessible to the public to provide transparency about influence in our affairs; such examples include the Companies House database and the Register of Consultant Lobbyists. There is therefore good precedent for public registers including personal information where these serve a legitimate public purpose.

138. Activity registered with the foreign influence part of the scheme is often likely to be lawful and may be driven by purely legitimate interests, and therefore much of the registerable activity may be of no interest to the security services. There are also a number of exemptions to registration. These are:

a. Individuals acting for a foreign principal or specified person in their official capacity as employees;
b. Individuals to whom privileges and immunities apply in international law as provided by, for example, the Vienna Convention on Diplomatic and Consular Relations;
c. Those in arrangements with international organisations;
d. Family members who are part of the household of members of diplomatic and consular staff where they are supporting these staff members' activities;
e. Provision of legal services;
f. Those providing essential services to a diplomatic mission or consulate e.g. catering or building services (foreign activity arrangements only);

g. Domestic and foreign recognised news publishers including those, such as a freelance journalist, in an arrangement for the purpose of publishing news-related material (foreign influence arrangements only);
h. Arrangements to which the UK or a person who is acting for the UK (such as a Crown Servant) is party and activity pursuant to a UK arrangement or agreement;
i. To protect the letter and spirit of the Belfast Agreement, registerable activities carried out for Ireland are not in scope of registration, nor are activities for, or by, Irish entities.

139. Notwithstanding these broad exemptions, in an attempt to reduce the registration of clearly benign and already transparent activity, registration of the remaining legitimate activity on a public register also serves a national security purpose; in deterring and disrupting state threat actors who seek to infiltrate UK political systems. This is because a wide application to include political influence activity directed by foreign entities will still assist in combatting state threats. Operational colleagues are clear that foreign powers routinely obfuscate their influence activities through proxies such as companies, organisations or charities, and so it is essential to the national security effectiveness of the scheme that activities directed by these entities are included. The similar scheme in Australia found that the distinction between State and non-State actors undermined the operational effectiveness of their scheme, and they advised us to take a necessarily wider approach. Consequently, the decision to construct a wide scheme has been driven by national security concerns even though there are obvious political transparency benefits too.

140. There shall also be limits to the information that is made publicly available. For example, it is not intended that all information registered with the scheme shall be published; only such information that allows the public to identify an individual or entity and the activity they are involved in shall be sufficient – there is no intention to publish an individual's usual residential address, for example. That information will only be available to the Home Office and security partners (who shall only be able to obtain the information via their usual powers). Draft Regulations shall be prepared which set out the extent of information to be obtained and published.

141. Additionally, registration itself doesn't prevent persons from doing anything at all. We consider that the domestic Courts and Strasbourg would be sympathetic to a regime that seeks to increase transparency to the public of foreign influence, particularly in circumstances where some states in particular seek to engage in invasive political tactics.

142. With regard to the fact that the *specified* foreign arrangement register will capture persons who are of no national security threat, the breadth of the scheme is a means of providing information to security partners that can help them identify the small percentage of those who

register who *are* a national security threat. Investigations into hostile activities by foreign powers are complex and it will often be difficult to reach the evidential threshold for charging given the nature of the intelligence available; retention of personal data allows the security services to identify where hostile activity may be, or about to be, taking place and seek to disrupt it at an early stage before harm has been caused. We do not consider that obliging some legitimate persons to register renders the scheme disproportionate – particularly as any person can avoid registering by not engaging in arrangements with certain specified foreign states or entities (which can only be specified if necessary to do so to protect the safety or interests of the UK).

143. In respect of the retention of personal data collected by the scheme, any such retention shall be conducted in accordance with the existing data protection regime in the UK (currently the Data Protection Act 2018), and as such the data shall not be retained for any longer than is necessary.

144. The Government considers that the Article 8 intrusions can be justified as a proportionate means to achieving the legitimate ends of national security and for the protection of the rights and freedom of others. The Government considers it is therefore a justified intrusion into Article 8 rights.

Article 10

145. Measures providing for restrictions on communications and publication engage Article 10. Case law has established that the press and journalists enjoy the rights which article 10 confers[21].

146. The risk of interference with Article 10 arises in the limited sense that the offences under the foreign influence tier of the scheme seek to criminalise activity such as communications or publishing (conducted for a UK purpose) where it has not been registered, where it has been directed by a foreign principal. However, in order for such activity to be registerable, certain conditions must be met: first it must be directed by a foreign principal; secondly, the activity must be for a political purpose in the UK, and thirdly the communication or publication must be to a limited section of UK public decision makers. In practice, then, the activities that are caught by the scheme are very limited and are only those activities which are by definition political influence.

<u>Justification</u>

[21] In Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury [2010] UKSC 1, paragraph 33.

147. The Government considers that these measures are compatible with Article 10.

148. Firstly, because a significant exemption for legitimate media activity shall remove the obligation to register from the majority of persons who would have a claim to Art 10 rights in this context. The media exemption works by exempting the following from the requirement to register foreign influence arrangements (Clause 66), the offence of carrying out political influence activities pursuant to unregistered foreign influence arrangements (Clause 69), and the prohibition against foreign principals carrying out unregistered political influence activities (Clause 70):

a. a recognised news publisher (as defined in s.50(5) of the Online Safety Bill), or
b. a person who makes a foreign influence arrangement with a recognised news publisher where one of the purposes is the publication of news-related material.

149. Additionally, the only journalistic-type activity that would be regarded as political influence activity for the purposes of this part of the scheme is where a public communication is not reasonably clear that it is made at the direction of a foreign principal. In practice, it is considered that where a public communication is made by or for a specific news outlet, then this shall be reasonably clear as it will appear below the outlet's banner or otherwise in the outlet's name. If the article has been directed by a foreign entity other than that which is publishing the article, then a byeline or other words to the effect that it has been so directed will suffice. This shall be set out in guidance.

150. PR activity could be caught by the scheme, as well as those reporting or publishing material not for a recognised news publisher. Should any such interference exist for those who remain registerable, the Government considers it necessary to require the registration of those persons in order to achieve the legitimate aim of transparency in political decision-making, and in the interests of national security. Some might ask whether there is any risk that the obligation to register might cause people to restrict their expression in order to avoid having to expose such activity via the register, particularly in respect of political speech or PR. However, the Government considers that the need for the activity to be both for a political purpose and to a specific UK decision-maker means that this is unlikely to arise, unless the activity is specifically of the type that should be exposed to the public at large, because the source of the influence has been deliberately obfuscated or concealed.

151. The Government therefore considers that FIRS is compatible with Article 10 of the ECHR.

Article 11

152. Measures that potentially require the registration of persons who gather to protest, having been directed to do so by a foreign entity or state, may engage the rights to freedom of assembly and association under Article 11. It is conceivable that a foreign entity such as an NGO or charity may organise, or direct others to organise, protests in the UK seeking to change Government policy or voting intention. This may be for an entirely benign or positive purpose, such as environmental protection or international aid.

Justification

153. As with the other rights discussed above, restrictions may be placed on the exercise of this right if necessary for national security or in the protection of the rights or freedoms of others. Further, Article 11 allows for the State to place lawful restrictions on the exercise of Article 11. Transparency around which foreign entities have organised and directed protests in the UK would be beneficial for the public and for our democratic institutions, as it would provide the public with an awareness of which entities are involved in seeking to impact our decision-makers.

154. It is considered that FIRS places no restriction on the ability of persons to protest, or organise to do so. The register is not a prohibition and the Government considers that there should be no impact upon individuals who appear on the register.

Article 14

155. Article 14 of the ECHR provides that the enjoyment of rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground, such as nationality. Article 14 therefore provides for a right not to be discriminated against in respect of the other rights laid down in the ECHR and its Protocols. It can be relied upon by both natural and legal persons. A measure can violate Article 14 taken in conjunction with another substantive article because it operates in a discriminatory way, even if the requirements of the substantive article are met.

156. The entities in scope of the new registration requirements are persons in an arrangement with overseas entities or foreign powers, overseas entities engaging in foreign influence activities in the UK, or specified foreign-state controlled entities. UK-registered entities, while subject to the requirement to disclose the same information about their arrangements with foreign principals or specified foreign powers or foreign-state-controlled entities, are not subject to the same requirements when they conduct registerable activity themselves. However, this is justifiable because there is no foreign direction to such activity.

157. However, it may be the case that foreign nationals based in the UK are more likely to be engaged by foreign powers or entities to conduct registerable activity in the UK, resulting in foreign nations being more likely to have to register their activity than UK nationals. Therefore the Government is of the view that if FIRS engages Article 8, Article 14 may also be in play because it's effect may be that a foreign national in the UK would be more likely to have to register generally than a UK national in equivalent circumstances. However, this is highly speculative and it is unclear whether this may actually transpire in practice.

Justification

158. The Government considers that, at the moment, there is no evidence to suggest that foreign nationals are more likely than UK nationals to have to register with the scheme. However, if this does transpire to be the case, any discrimination will not serve to place any prohibition on conduct nor impose sanctions for carrying out such conduct.

159. Further, the Government considers that any different treatment contrary to Article 14, should it transpire, shall have an objective and reasonable justification; that is where it is in pursuit of a legitimate aim and proportionate to that aim[22]. The Government considers that the measures have a legitimate aim as set out in the discussions above. For a measure to be proportionate it must strike a fair balance between the rights and freedoms of the individual and the general interest, having regard to the requirements of a democratic society. States are not required to show that there was no alternative non-discriminatory means of achieving the same aim[23]. The Government's view is that requiring registration of those who are in an arrangement to carry out registerable activity in the UK, or who are themselves a foreign principal carrying out such activity, is a necessary way to achieve the objective of transparency.

160. Finally, as the policy is aimed at deterring, disrupting and prosecuting state threat actors and increasing transparency of foreign influence in UK political and democratic affairs, there is a clear link between the enforcement method (publishing certain registered information and prosecuting cases of non-compliance) and the ultimate aim of the policy.

Legal Aid Provisions (clause 60 and 87-89)

Article 6

[22] See *Case "relating to certain aspects of laws on the use of languages in education in Belgium" v Belgium ("Belgian Linguistics")*, App. No. 1474/62 et al; (1968) 1 E.H.R.R. 252 ("The Law", Part I(B), para. 10)
[23] *Rasmussen v Denmark*, App. No. 8777/79; (1984) 7 E.H.R.R. 371 (para. 41)

161. Article 6(1) provides that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

162. Clause 60 (legal aid for foreign power threat activity prevention and investigation measures) engages Article 6(1) as it makes available civil legal services provided to an individual in relation to a Part 2 notice, subject to the relevant means and merits tests and the applicable exclusions. This adds to rather than amends existing entitlement to legal aid and the Government is satisfied that this addition to the legal aid scheme is compatible with Article 6(1) in relation to legal aid provision.

163. Clause 87 (limits on convicted terrorists' access to Civil legal aid) engages Article 6(1) because it imposes a restriction on access to Civil legal aid by individuals convicted of specified terrorism offences, so that they are ineligible for civil legal aid for general case services unless they satisfy one of the applicable conditions.

164. Article 6(1) does not guarantee the right to free legal aid in civil proceedings and it is permissible to impose conditions on the grant of legal aid based on the financial situation of the litigation and his or her prospects of success. A grant of legal aid funding is required under Article 6(1) only where a lack of civil legal aid would deprive an individual of a fair hearing, having regard to what is at stake for the individual, the complexity of the law or procedure, and the individual's capacity to represent him or herself effectively: *Steel and Morris v. the United Kingdom* (2005) 41 EHRR 22.

165. For new legal aid cases, individuals subject to the restriction can continue to apply for Exceptional Case Funding (ECF) for any civil legal services including general case services, and the Government is satisfied that this safeguard will provide for access to civil legal aid in circumstances where it is necessary or appropriate in view of the risk that failure to do so would breach their human rights, including their rights under Article 6(1).

Article 7

166. Article 7(1) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

167. Clause 87 (limits on convicted terrorists' access to civil legal aid) will engage Article 7 because an additional administrative measure will be imposed on convicted terrorists for which the trigger is a criminal conviction, and the measure will apply retrospectively.

168. The Government takes the view that the restriction is an administrative measure and not a penalty for the purposes of Article 7(1), having regard to the relevant criteria that apply in assessing whether a measure is to be assessed as a penalty (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], nos. 1828/06 and 2 others, 28 June 2018 § 211).

169. Those criteria are:

a. Aim: the aim of the measure is symbolic, in that the purpose of the restriction is to reflect the significance of the bonds with the State and society that are broken by the commission of terrorist offences.
b. Nature: the measure is administrative in nature, imposing an additional condition on the grant of civil legal aid, and so can be distinguished from the punitive measures that have been considered penalties by the ECtHR.
c. Classification: the measure is classified as a civil measure rather than a criminal sanction under domestic law.
d. Procedure for adoption: the measure will be enacted by Parliament in primary legislation and administered on a case-by-case basis, subject to the continued availability of ECF.
e. Severity: the restriction is not indefinite and instead time-limited, and the safeguard of ECF remains available.

170. Moreover, the validity of administrative measures implemented as a reaction to the grave implications of terrorist acts has been recognised by the ECtHR in *Ghoumid v France* (2020) ECHR 492. The ECtHR found no violation of Article 8 when France revoked the French nationality of a group of dual nationals convicted of terrorist offences, recognising that the serious threat to human rights posed by terrorist violence provided a justification. Similarly, the Government considers that restriction is a proportionate response to terrorist violence targeted at the State and the democratic institutions that provide for the availability of civil legal aid.

Article 8

171. Clause 87 (limits on convicted terrorists' access to civil legal aid) will engage Article 8 in relation to both the retrospective and prospective application of the restriction to new civil legal aid cases, in circumstances where Article 8 rights are at issue and civil legal aid could be considered a requirement for the individual to be involved to a sufficient degree in relevant decision-making processes.

172. This includes immigration cases which fall outside the scope of the civil rights and obligations protected by Article 6(1), as the Court of Appeal has found that in practice there is unlikely to be any real difference between the test for Article 6(1) compliance and Article 8 compliance in the context of immigration cases, and so whether legal aid is required in a particular immigration case will depend on the same factors: *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622.

173. Individuals subject to the restriction can continue to apply for ECF, which will provide for access to civil legal aid in circumstances where it is necessary or appropriate in view of the risk that failure to do so would breach their human rights, including their rights under Article 8. The Government is therefore confident that Article 8 procedural obligations will be satisfied on case-by-case basis through the ECF application process

174. Clause 88 (data sharing gateway for limits on convicted terrorists' access to civil legal aid) will engage Article 8 as it will provide for the disclosure of the criminal conviction data relating to convicted terrorists by law enforcement data controllers to the Director of Legal Aid Casework. The Director will be authorised to seek this data in order to determine whether individuals are eligible to receive civil legal aid.

175. The Government does not consider that the disclosure of this criminal conviction data will amount to a violation of the right to respect for the offenders' private life. The ECtHR has recognised that margin of appreciation should be left to national authorities in striking a fair balance between the relevant conflicting public and private interests (*Avilkina and others v. Russia,* application no. 1585/09, ECHR 2013). In these circumstances, the disclosure of information will occur to achieve the legitimate aim of upholding a restriction set out in law, in order to ensure that convicted terrorists do not fraudulently access civil legal aid and that public confidence in the legal aid system is maintained.

Article 14

176. Article 14 enshrines the right not to be discriminated against in the enjoyment of the rights and freedoms set out in the Convention.

177. When taken with Article 7, Clause 87 (limits on convicted terrorists' access to civil legal aid) could engage Article 14 as conviction for a terrorist offence may arguably be considered an 'other status' for purpose of Article 14. However, the Government considers that no 'other status' is established because the restriction makes a distinction not between different groups of people, but on the basis of a particular type of offending, and Parliament's view of the gravity of that offending. This follows the reasoning in *R(Khan) v. Secretary of State for Justice* [2020] EWHC 2084 (Admin), in which the Divisional Court found that regarding difference in treatment between types of prisoners subject to determinate sentences, there is no 'other status' on the basis of conviction for a terrorist offence.

178. It may also be argued that conviction as an adult for a terrorist offence committed as a minor constitutes an 'other status' for the purpose of Article 14, since there would be a difference in treatment, in terms of length of the restriction, compared to individuals who also offended as minors but were convicted while still under the age of 18. In making a distinction on this basis, it could be asserted that application of the restriction gives rise to a distinguishable status.

179. Even if 'other status' was established in either instance, it would not be a suspect ground that would require very weighty reasons to justify differences in treatment, and it is considered that any difference in treatment is in pursuit of a legitimate aim and objectively justifiable.

180. In *Ghoumid v France* (2020) ECHR 492, the ECtHR accepted that the symbolic aim of demonstrating that terrorist acts break the bond of national loyalty was a legitimate aim which could justify very serious interferences with human rights, even though it carried no concrete benefit (such as cost savings) for the public. In *R(Khan) v. Secretary of State for Justice* [2020] EWHC 2084 (Admin), the High Court found that Parliament was justified in distinguishing serious terrorist offenders for reasons including the pernicious nature of the offending, and the restriction similarly seeks to distinguish serious terrorist offenders while retaining the safeguard of ECF.

Article 1, Protocol 1

181. Article 1 Protocol 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that no person shall be deprived of their possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

182. Clause 87 (limits on convicted terrorists' access to civil legal aid) potentially engages Article 1 of Protocol 1 as it is arguable that the retrospective application of the restriction could amount to unlawful interference with an assertible right to a benefit, because of the change in the conditions for eligibility will have occurred after an individual became theoretically eligible to receive civil legal services.

183. The Government considers that, firstly, eligibility for civil legal aid should not be considered equivalent to an assertible right to a benefit, because an individual's eligibility is assessed according to the relevant conditions at the time of each legal aid application, rather than at a set point in time as in the case of a pension, and is not available as of right but subject to those relevant conditions.

184. Secondly, even if equivalence was established, the interference is compatible with Article 1 of Protocol 1. Application of the restriction will be lawful once enacted; will service the public interest in the achieving its aim of preventing convicted terrorists from receiving public money; and will be proportionate interference because the safeguard provided by ECF scheme will prevent any individual burden from becoming excessive.