



Analysis

Criticism of UK Terrorism Prevention and Investigation Measures mounts as government retains power to forcibly relocate suspects

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In another U-turn on civil liberties, the government is introducing emergency legislation that will allow it to impose on terrorist suspects many of the draconian restrictions they had promised to do away with

The coalition government is to retain the power to force individuals suspected, but never convicted, of involvement in terrorism to leave their home for government owned accommodation in a different part of the country. It had pledged that relocation orders would not be included in Terrorism Prevention and Investigation Measures (TPIMs), the new system of social controls for terrorism suspects scheduled to replace control orders at the beginning of 2012. But in September 2011, the government published draft legislation for an 'enhanced' version of TPIMs that will allow for the imposition of more severe restrictions - including forcible relocation - in "exceptional circumstances." TPIMs have been widely condemned for being little more than control orders rebranded because they share the majority of the outgoing system's shortcomings. Both schemes operate outside the criminal justice system and infringe fundamental civil liberties. The government said that TPIMs would tone down the severity of restrictions imposed on suspects, but their 'enhanced' form will be virtually indistinguishable from control orders. Moreover, the creation of 'enhanced' TPIMs is symptomatic of an emerging trend whereby the government takes credit for abolishing draconian Labour government's counter-terrorism powers only to reintroduce them a few months later in an emergency capacity.

Control Orders

Britain is the only country in the common law world

to outlaw entirely the use of intercept evidence in court. Its intelligence services insist that the practice would compromise their sources (covert interception of communications, informers, foreign intelligence services etc.) and reveal many of their operational practices and capabilities, jeopardising national security in the process. In terrorism cases this rigid policy makes it extremely difficult to take suspects to court because most of the material amassed against them is obtained by MI5 and is therefore inadmissible. The government thus faces a legal quandary of its own making: it is unwilling to authorise the disclosure of evidence held on terrorism suspects, but is equally reluctant to let people it believes pose a security threat walk free.

Since March 2005, the solution has been control orders: a system of social controls which places suspects under virtual house arrest; with 16 hour curfews, electronic tagging, and strict limits on - among other things - freedom of movement, association and employment. It can also include a relocation order which forces people to leave their community for a different part of the country, away from their family and friends. Control orders are issued in closed court hearings that neither the defendant nor their lawyer is allowed to attend. Instead the government appoints a 'special advocate' to act on their behalf. Effectively this means that people are punished indefinitely, without charge or trial, on the basis of secret evidence that they are not permitted to hear or

contest. In this sense control orders operate outside the criminal justice system, bypassing due judicial process and undermining the fundamental democratic tenets of the presumption of innocence and the right to a fair trial.

The Liberal Democrats were scathing in their criticism of control orders in opposition and unequivocally advocated their abolition. The Conservatives were less consistent, tending to condemn control orders in the media but electing to abstain in parliamentary votes on whether to renew the system. Upon the formation of the coalition government in May 2010, one of the big questions was whether the Lib Dems would be able to hold sway on this issue within the government and withstand the considerable pressure exerted by the intelligence services and civil service ‘securicrats’ who were firmly wedded to the Labour government’s anti-terrorism laws.

Terrorism Prevention and Investigation Measures

The coalition announced a “rapid review” of “key counter-terrorism and security powers” in July 2010, and released its findings in January 2011. Home Secretary Theresa May told parliament that control orders would be replaced with Terrorism Prevention and Investigation Measures. She said that the new system would be less prohibitive and intrusive, and would be complemented by increased funding for police surveillance of suspects. The *Terrorism Prevention and Investigation Measures Bill* was introduced in May 2011, and having passed through the Commons is currently awaiting its second reading in the House of Lords. The Bill is expected to receive royal assent by the end of the year.

The government has strained to emphasise differences between the two systems, focussing on the application process in particular. A TPIM will be imposed only if the Home Secretary “reasonably believes that the individual is, or has been, involved in terrorism-related activity,” a higher threshold than control orders which require “reasonable suspicion.” [1] Each TPIM must also be approved in advance by the High Court and can last no longer than two years unless there is evidence that the individual has re-engaged in terrorism.

Once in effect, however, a TPIM will be little different to a control order. All of the latter’s most controversial characteristics will be carried over in some form: curfews, electronic tagging, and restrictions on freedoms of association, employment and movement. And like control orders, TPIMs will continue to operate outside the law, punishing people without charge or trial. The one positive,

definitive change promised under the new system was an end to relocation orders; what Lord Macdonald, who provided independent oversight of the counter-terrorism review, described as “a form of internal exile, which is utterly inimical to traditional British norms.” [2] But this power is now being restored, albeit in an emergency capacity. The government published a draft *Enhanced Terrorism Prevention and Investigation Measures Bill* on 1 September which will allow additional restrictive measures to be imposed on suspects for 90 days “should exceptional circumstances arise.” The Bill itself is not unexpected - the counter-terrorism review made it clear that emergency powers would be introduced - but its scope is more severe than many anticipated. It stipulates:

[The Bill] permits the Secretary of State to require the individual to relocate to Home Office-provided accommodation in another part of the country without his or her consent, and to require him or her to observe a curfew which may fall at any time during the day (whereas the power to confine an individual to his or her residence under the 2011 Act is limited to an “overnight” period).[3]

It also includes tighter restrictions on movement, telephone and internet access (a minimum level of access will no longer be specified “so a total ban on access to devices can be imposed”) and association (someone given a normal TPIM will be required to seek prior permission from the Secretary of State before meeting with “a number of specified individuals,” but its ‘enhanced’ form can require them to seek permission before meeting literally anyone). [4] Typically an ‘enhanced’ TPIM will require parliamentary approval, but on 1 September the Home Secretary tabled an amendment to the *Terrorism Prevention and Investigation Measures Bill* that would allow for their imposition on a temporary basis at the government’s discretion if parliament is not sitting.

Although disappointing, the restoration of relocation orders and other severe restrictions is not surprising. Throughout 2011 the control order regime has operated exactly as it did under the Labour government. If the coalition truly believed that control orders were overly draconian and in need of repeal they could have lessened the restrictions being imposed on recipients without waiting a year for TPIMs to receive parliamentary approval. The Joint Committee on Human Rights argued exactly this following the publication of the counter-terrorism review in January 2011: that the continued imposition of some sanctions could no longer be justified, and that the government should review urgently all existing control orders to ensure that they are compatible with the principal findings of its

review. [5] Instead the government has continued to utilise all of the powers afforded to them by control orders precisely as before, and has even been to court to defend its right to do so. In May and July 2011, the High Court ruled in separate cases that the government was justified in banning terrorism suspects from living in London despite the clear infringement this posed to their right to respect for private and family life afforded by Article 8 of the European Convention on Human Rights. Both men, identified only as 'CD' and 'BM,' had argued that forcing them to live apart from their wife and children was unjustifiable. [6]

Criticism of TPIMs

The decision to revive relocation orders has been widely condemned as another U-turn on civil liberties by a government that trumpets so vociferously its commitment to restoring "the rights of individuals in the face of encroaching state power." [7] Liberty argues that should the *Enhanced Terrorism Prevention and Investigation Measures Bill* be passed "any substantive difference between control orders and TPIMs would entirely evaporate." [8] Amnesty International UK branded the new system "a cheap make-over." [9] There has also been back-bench opposition. Conservative MP David Davis said that the 'enhanced' Bill "seems to be at least as ill thought out as control orders, if not more so" because the purpose of relocation orders is supposed to be to prevent "exceptional circumstances" from occurring in the first place. They would now only be imposed in response to an emergency, which leads Davis to ask: "How can they be preventative if they can only be passed after the event?" [10] Tom Brake, co-chairman of the Lib Dem backbench committee on home affairs, said that he could not "envisage the extraordinary circumstances that would apply in which relocation powers would be acceptable" and warned the government that backbenchers would vote against their introduction unless fully satisfied of their necessity. [11] The Labour Party, which still advocates control orders and has relentlessly criticised any perceived weakening of anti-terrorism powers, described the emergency legislation as a "shambolic process" and accused the government of "putting political deals and fudges ahead of national security." [12]

In his independent report on the counter-terrorism review, Lord Macdonald highlighted in particular the damaging consequences of the incongruity between control orders and the criminal justice system. He argued that this allows "controlees [to] become warehoused far beyond the harsh scrutiny of due process" which in turn leads to terrorist activity going unpunished: "a serious and continuing failure

of public policy." [13] Further, despite the government's insistence that their priority has always been to prosecute terrorism suspects in the criminal courts, control orders actively undermine their capacity to do so. The security service acts as "lead agency" in these cases and "has their own priorities, which are very likely to be protective rather than prosecutorial in nature." [14] It is near impossible for police to build a case against a suspect who has been forced to live in isolation and banned from using a telephone or the internet. For Macdonald this is particularly damaging:

I have no doubt that were a regime of restrictions against terrorist suspects to be linked to a continuing criminal investigation into their activities, many of the constitutional objections to such a regime would fall away. It is precisely because the present control order system stands apart from criminal due process that it attracts such criticism.[15]

He argues that any system of social controls imposed on terrorism suspects must be linked directly to criminal prosecutions. At present, control orders require the police only to assess regularly the quality of evidence held against suspects; a level of scrutiny Macdonald describes as "inadequate." TPIMs will improve on this slightly by imposing a statutory duty on chief police officers to ensure "that the investigation of the individual's conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review throughout the period the TPIM notice is in force." [16] But it could go much further. Macdonald suggested that restrictions should only be imposed on suspects if the Director of Public Prosecutions believes a criminal investigation into that individual is justified. This would "sharply highlight the need for the prohibitions positively to assist, rather than to hinder, the route to prosecution, conviction and imprisonment." [17]

The House of Lords Select Committee on the Constitution raised similar concerns in its report on the TPIM Bill published on 15 September. It branded TPIMs an "unsatisfactory" compromise and concluded: "It is not clear that the TPIMs Bill, as currently drafted, sufficiently addresses these [Macdonald's] concerns." [18] The Committee also highlighted the fact that the TPIM regime will be permanent, unlike control orders which required annual renewal by parliament, and questioned "whether it is constitutionally appropriate to place on a permanent basis such a scheme of extraordinary executive powers." [19]

An emerging trend

A common trend is emerging whereby the government scraps draconian counter-terrorism laws, promoting its commitment to civil liberties in the process, only to restore the powers within a matter of months in an emergency capacity. This happened with section 44 of the *Terrorism Act 2000* which gave police powers of indiscriminate stop and search. The government took credit for abolishing the much maligned law in July 2010, but then rebranded and reintroduced it six months later in the *Protection of Freedoms Bill*. [20] The government also took credit for reducing the maximum length of pre-charge detention for terrorism suspects to 14 days in

January 2011 (still the longest anywhere in the western world), but less than a month later introduced the *Detention of Terrorist Suspects (Temporary Extension) Bill* which will allow the government to revert to the 28 day limit in “exceptional circumstances.” [21]

The coalition government appears unwilling or unable to abandon the Labour government’s counter-terrorism legislation completely. Certainly the speed with which it has returned these powers to the statute books indicates that it does not believe them to be wrong in principle.

Footnotes

- [1] Terrorism Prevention and Investigation Measures Bill, clause 3:
http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0091/lbill_2010-20120091_en_2.htm#pb1-l1g1
- [2] Review of counter-terrorism and security powers - A report by Lord Macdonald of River Glaven QC, p.12
<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>
- [3] Enhanced Terrorism and Prevention and Investigation Measures Bill Explanatory Notes, p.4:
<http://www.homeoffice.gov.uk/publications/about-us/legislation/etpim-bill-docs/etpim-draft-bill?view=Binary>
- [4] *ibid*
- [5] Joint Committee on Human Rights report on Renewal of Control Order Legislation 2011:
<http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/106/10604.htm#a10>
- [6] Full judgment for each case: ‘CD’
<http://www.bailii.org/ew/cases/EWHC/Admin/2011/1273.html> and ‘BM’
<http://www.bailii.org/ew/cases/EWCA/Civ/2011/366.html>
- [7] The Coalition: our programme for government, p. 11:
http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf
- [8] Liberty website, 2.9.11
<http://www.liberty-human-rights.org.uk/news/2011/anyone-for-tpims-control-orders-with-a-twist-.php>
- [9] Amnesty UK website, 4.9.11:
http://www.amnesty.org.uk/news_details.asp?NewsID=19666
- [10] The Guardian, 1.9.11:
<http://www.guardian.co.uk/politics/2011/sep/01/exile-plan-terror-bungled-measure?INTCMP=SRCH>
- [11] BBC website, 5.9.11: <http://www.bbc.co.uk/news/uk-14797359>
- [12] The Telegraph, 2.9.11:
<http://www.telegraph.co.uk/news/politics/8737181/Emergency-powers-could-bar-terrorist-suspects-from-London-for-the-Olympic-Games.html>
- [13] Review of counter-terrorism and security powers - A report by Lord Macdonald of River Glaven QC, p.10:
<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>
- [14] *ibid*
- [15] *ibid*
- [16] Terrorism Prevention and Investigation Measures Bill, clause 10(5):
http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0091/lbill_2010-20120091_en_2.htm#pb4-l1g10
- [17] Lord Macdonald report, p.11
- [18] House of Lords Select Committee on the Constitution report on Terrorism Prevention and Investigation Measures Bill, p.5: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/198/198.pdf>
- [19] *ibid*
- [20] See Statewatch analysis: UK: Review of counter-terrorism powers fails to deliver definitive change:
<http://www.statewatch.org/analyses/no-135-uk-ct-powers.pdf>
- [21] Draft Detention of Terrorist Suspects (Temporary Extension) Bills:
<http://www.homeoffice.gov.uk/publications/counter-terrorism/draft-detention-terrorist-bills?view=Binary>