Counter-Terrorism and Security Bill

House of Commons Committee Stage Briefing on Selected Amendments

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JUSTICE is concerned that little justification has been provided to justify the treatment of this Bill as fast-track legislation. The limited time available – and the short programme planned for this Bill's passage – will seriously limit the ability of Parliament to conduct effective scrutiny of the proposal's impact on individual rights in practice.

JUSTICE has a number of substantive concerns about the scope of the Bill. In this briefing, we focus on two issues: (a) police powers to seize passports (Clause 1) and (b) the Temporary Exclusion Order (Clauses 2-11).

Passports

- **The introduction of a police power to seize passports or other travel documents – including the documents of foreign travellers – has the potential to seriously impact on the rights of individuals in practice. The Government's explanation that these measures are necessary is scant and safeguards against arbitrary application, few.**
- **JUSTICE considers that the Government has not made the case for these new powers. We consider that, without evidence to support the case for change, Clause 1 and Schedule 1 stand part of the Bill.**

Temporary Exclusion Orders

- **The Government's plan to create an administrative power to bar British citizens and others with a right to return from entering the UK deserves close scrutiny. If the primary goal of our counter-terrorism policy is to protect the public, does forcing individuals to choose freedom in exile over controlled return serve this purpose in practice? The UK cannot dump our would-be terrorist suspects on other countries without consequence. If other countries were encouraged to take this approach, it is highly likely that the Secretary of State would routinely seek deportation. If we are aware that an individual is a risk, we know where they are and that they are seeking to return to our jurisdiction, would public safety and global security be better served by encouraging their return with a view to full investigation and prosecution of any relevant criminal offences?**
- **Again, little justification has been offered to justify what will operate as an administrative power of exile. We consider that these provisions cannot be justified, nor can adequate safeguards be introduced to address our substantive concerns about the power being proposed. The provisions should be removed from the Bill.**
- **An alternative amendment – on Notification and Managed Return Orders – proposes an alternative less draconian option which would put the Secretary of State on notice that an individual planned to enter the UK, enabling the full use of existing counter-terrorism powers to address any security risk. Ministers must explain to Parliament why this alternative would not adequately meet their intention to control return to the UK of individuals suspected of being involved in terrorism-related activity (NC 5).**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law.

2. We have produced this short briefing to inform the final part of the House of Commons Committee Stage debate. We will produce more detailed briefing in advance of Report Stage. Where we do not comment on an issue in the Bill, this should not be read as approval.

Background

3. The UK undoubtedly faces a serious threat of terrorism, and one that poses severe practical challenges to our police and prosecutors. But the fight against terrorism requires not only measures which are effective but also measures that are compatible with our most basic principles.

4. The primary goal for the operation of any counter-terror policy must be effective investigation and prosecution of terrorism offences. We regret that in this Bill the Government proposes to further expand the operation of the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs) and to introduce new ancillary administrative powers as an alternative to prosecution. We are concerned that new measures – such as excluding an individual from UK territory – will run counter to the goal of securing the prosecution of individuals in practice.

5. We regret that the Secretary of State appears to have taken a "pick and mix" approach to the recommendations of the Independent Reviewer of Terrorism Legislation in this Bill. While clarification of the burden of proof necessary before someone is subject to a TPIMs Order is positive, we regret the decision to expand the controls to which a person may be subject (see below). However, each of the new measures proposed in this Bill helps to further illustrate an overarching problem identified by the Independent Reviewer: the breadth of the definition of terrorism and terrorism-related activity used in the United Kingdom. As the Reviewer told the Joint Committee on Human Rights:

> *"We're playing a guessing game with the Bill but I said in July that I thought that the definition of terrorism was far too broad. I identified three specific areas where it seemed that there was an unanswerable case for reducing it. ... The third is what I call the penumbra of terrorism, which includes concepts such as "terrorist activity" and "terrorism-related activity". It seemed that every time a new Act came along, that penumbra got broader."* (Q 29, 26 November 2014)

6. The new powers in this Bill attach to a suspicion of "terrorism-related activity" with no consideration that an overbroad definition may lead to the application overbroad draconian administrative powers to a far wider section of the population than might be considered proportionate to meet a genuine risk to our security.

Fast-track legislation and Parliamentary scrutiny

7. JUSTICE is concerned that the proposals in this Bill are rushed and ill-considered. The Bill and its Explanatory Notes were published on Wednesday 26 November 2014, following a speech by the Home Secretary to the Royal United Services Institute on 24 November 2014. It will have its Second Reading on 2 December 2014, three working days after its publication. JUSTICE understands that the Government intends to "fast-track" the Bill through the House of Commons during December. While there is a general election in May, if there is a genuine cross-party support for reform, it is difficult to understand the rush to legislate. Parliament may wish to test the Minister's stated reasons for expediency, set out in the Explanatory Notes:[1]

8. We regret that the time for consideration of the Bill and its provisions has been extremely short.[2]

(a) Seizure of Passports and Travel Documents (Chapter 1)

[1] EN, paras 20-40

[2] A fuller explanation of our concerns can be found in our briefing for Second Reading of the Bill. http://www.justice.org.uk/data/files/resources/384/JUSTICE-Briefing-CTS-Bill-December-2014-FINAL.pdf

JUSTICE considers that the Government has failed to provide any clear justification for the broad powers to seize passports and other travel documents proposed in Clause 1 and Schedule 1 of the Bill. We would support Amendments 27 and 28 which would remove these proposals from the Bill.

Background

9. Clause 1, together with Schedule 1, would enable police (and other authorised persons, who may include customs officers) to seize passports and other travel documents of any British person or foreign national "suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity". Officers are granted associated search powers, and the power to use reasonable force ancillary to the powers of seizure. It will be a criminal offence to refuse to comply.

10. Documents can be held for up to 14 days (or 30 days on application to a magistrate), where an officer has "reasonable grounds to suspect" that a person has the "intention of leaving the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom". Documents may only be retained during this period while a) the Secretary of State considers whether to cancel the person's passport; b) a charging decision is being taken; and c) the Secretary of State is considering making a TPIM Order. After 72 hours, the seizure and retention of documents will be subject to review by a senior police officer with at least the rank of chief superintendent. After 14 days, the police may extend their retention of the documents to 30 days but must persuade a magistrate that they (and the Secretary of State, and any other persons relevant) are acting 'diligently and expeditiously'.

11. There is no limit on how often this power may be used against a single individual. The Bill provides a very narrow restriction against repeat use. If used more than twice in six months, retention is limited to 5 days rather than 14. This restriction may have little effect on the impact on an individual. Planned travel booked and paid for becomes impossible. Within the scope of this Bill, these powers could be exercised repeatedly, or without restriction four times a year, against a single individual, without any charge or any other action. In effect, these measures could operate as a *de facto* travel ban, without any of the, albeit limited, procedural standards which might accompany the making of a travel restriction associated with a TPIM Order.

12. The impact of this decision on the individual concerned is clear: if travel documents are seized at a point of departure, not only will free movement be restrained, but it is likely that the individual will suffer any financial and other non-pecuniary loss associated with that immediate restriction. A missed meeting, a cancelled holiday, a lost opportunity to see your family, a fruitless expense; it is easy to imagine the personal impact of having your own passport confiscated at the boarding gate. In practice, this may engage a range of individual rights in domestic and EU law. For example, the right to respect for private and family life (Article 8 EHRC) is likely to be engaged in most cases if an individual is prevented from travelling.

13. The first question for Parliament must be whether these proposals pose a proportionate and necessary interference with those rights, serving a legitimate aim. JUSTICE is concerned that the Explanatory Notes explain the Government's view that existing powers are inadequate, but provides little consideration of how those measures fall short.[3] It explains, in this connection, that while the Royal Prerogative permits the Home Secretary to remove a individual's passport (subject to current litigation before the courts) that there is a "gap in existing powers" as this power cannot be used to "disrupt immediate travel" nor can it be used against foreign citizens. However, it makes no assessment of why – or how often - a need to disrupt "immediate" travel will be necessary, and, in that regard why existing powers to disrupt travel more generally are inadequate.

14. Beyond the disputed prerogative power on passports, given that the Government has the power to impose a travel restriction in connection with a TPIM Order and a broad range of powers in connection with offences ancillary and preparatory to terrorism which might lead to arrest and charge for criminal activity in the UK, Parliamentarians might wish to ask how likely or feasible it may be that police and intelligence services will have somehow failed to act, but on arrival at a port or an airport a reasonable suspicion of a terrorism-related activity might crystallise? Parliamentarians may wish to consider whether and in what circumstances the Government may expect that seizure of a passport might be preferable to arrest before an individual reaches the airport.

15. The safeguards proposed against such arbitrary action are few:

[3] EN, paras 45 – 52.

a. This power will attach to any suspicion of "terrorism-related activity", including, for example, conduct which "facilitates" or "gives encouragement to" the preparation or instigation of terrorism and which "gives support or assistance to individuals who are known to be involved" in that facilitation or encouragement. Does the Minister accept that the breadth of this definition will create a wide range of circumstances in which this power might apply, heightening both the risk that it might be applied arbitrarily and the need for safeguards?

b. There is limited consideration in the Bill, or the accompanying Explanatory Notes, of the treatment of the individual concerned after their documents are taken. The Bill purports to grant the Secretary of State a delegated power to *"make whatever arrangements he or she thinks appropriate in relation to that person"* during the period of seizure while the individual is unable to leave the UK.

   An exceptionally broad power, this perhaps alludes to a concern acknowledged in the Government's Human Rights Memorandum, that leaving an individual at a port or an airport, unable to leave the UK (and perhaps unable to enter the UK if they are in transit) may leave them at a risk of destitution without support (engaging the duties of the UK under Articles 3 and 8 ECHR). However, Parliament is provided with no further information on how the individual is to be treated after his documents have been seized or how those individuals might secure redress and compensation in circumstances where the powers are exercised improperly.

c. Police must have "reasonable grounds" to suspect that an individual is planning to travel for the purposes of "terrorism-related activity" before these powers become available. This standard of proof appears to be the primary safeguard against abuse. However, if reasonable, intelligence-led, grounds exist to suspect an individual at the point where they have turned up at a point of departure, shouldn't steps have already been taken to restrain their activities, perhaps through the imposition of a TPIM Order, including a relevant travel restriction?

d. If a lower standard of suspicion is applied in practice – one suggestion has been made that heading to the Middle East with camping gear might be

sufficient grounds to suspect someone of terrorism-related activity – there is a real risk of this power being applied arbitrarily and with discriminatory effect. The impact of Schedule 7 of the Terrorism Act 2000 – which applies a no-suspicion standard - has been applied most consistently against a small group of minorities, with criticism surrounding arbitrary application at ports and airports by officers and customs officials widespread.[4]

e. Yet, there is no provision for substantive review of the decision to seize, beyond an internal police review. The outcome of the internal review need not even be documented ('need not be in writing'). Even after 14 days, a magistrate has no power to consider whether the seizure is lawful, only whether the inquiries for which the documents are held are being pursued diligently. In practice, there will be limited opportunities for an independent check on the grounds which trigger the exercise of the seizure power.

f. The only means to challenge the legality of a seizure will be by way of judicial review. Access to judicial review is increasingly difficult, with limitations on access to legal aid and new proposals to further curtail the jurisdiction of the court in the Criminal Justice and Courts Bill. In any event, after-the-event review is unlikely to provide significant redress to an individual subject to an on-the-spot bar on travel. That this safeguard is likely to be of little value in practice, suggests that, if the power is justifiable, that it must be drawn narrowly, targeted appropriately and duly circumscribed to protect against injustice. On the contrary, the gateway proposed in the Bill is broad with few safeguards against abuse.

16. **New Clause 8 would, by removing the restriction on police bail for terrorist offences, enable individuals to be arrested and their passport retained as a condition of police bail, provided sufficient grounds exist to suspect the individual of an offence. While there are many problems with the use of overlengthy and largely unsupervised police bail, there is little reason when it is available in principle for most other serious offences, it should be barred in connection with terrorism offences. Its use in this context would see individuals under suspicion treated as part of the ordinary criminal process, rather than subject to the**

[4] See for example, the report by the EHRC published in December 2013 on its use and the Government response: http://www.bbc.co.uk/news/uk-politics-25714613. When these powers were amended in the Anti-Social Behaviour Crime and Policing Act 2014, concern was expressed about the arbitrary application of Schedule 7 in Parliament.

equivalent of an administrative travel ban with little safeguard against arbitrary application.

(b) Temporary Exclusion Orders (Chapter 2) ("TEO")

New Clause 8

JUSTICE urges members to consider the scant justification for TEO offered by the Government and commends the Notification and Managed Return Order proposed as New Clause 5 as a less draconian means to meet the Home Secretary's ends.

New Clause 8 would substitute the Government's proposal for a TEO with a Notification and Managed Return Order. Triggered by the same suspicions as a TEO, the Secretary of State would make a NMRO which would require carriers travelling to the UK to notify her should any named individual seek to travel to the UK. This would enable the Secretary of State to take steps using existing counter-terrorism powers to control the terms on which that individual enters the UK. Arrest, investigation and charge in connection with existing terrorism offences to the use of the Terrorism Prevention and Investigation Measures ("TPIMs") regime; a range of options would be open to the Secretary of State to control any risk posed by an individual on return, once notice is given. Clear powers of stop and search at points of entry, for the purposes of counter-terrorism investigations already exist. While New Clause 8 mirrors the provisions of the proposed TEO in length and the procedure for its operation; the key feature here is notification, which then enables existing broad national security measures to be used against identified individuals.[5]

This proposal – by avoiding the situation where, in practice, an individual is deprived of his right to return to his country of abode, avoids many of the legal problems identified by members and by JUSTICE and others at Second Reading. Meanwhile, it would enable the Secretary of State to address any security risk posed by any individual on entry to the UK, by putting her on notice of his or her arrival. Rather than give an individual the choice of exile and freedom or return and restriction, this approach combines existing counter-terrorism controls with a professed need to address a known or suspected risk to national, and global, security. If an individual is known to be a risk, an NMRO sends a message that the UK will

[5] Liberty have prepared more detailed briefing on the proposed alternative order: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Committe%20Stage%20Briefing%20on%20the%20Temporary%20Exclusion%20Order.pdf

use all measures available to prosecute any criminal offences and to address any substantive risks to the UK's national security.

Background

17. Chapter 2 of the Bill creates a procedure whereby any individual outside the United Kingdom, including a British citizen, may be subject to a Temporary Exclusion Order (TEO) barring their entry into the UK except subject to conditions set by the Secretary of State. Any TEO may last for up to 2 years and can be renewed, seemingly without limit.[6] When a TEO is in place, an individual may only return to the UK if granted a "Permit to Return" (PTR). A PTR will only be issued if the individual concerned may only return to the UK under its terms, which may include conditions under the direction of the Secretary of State. Those conditions may mirror some of the TPIM conditions including reporting to a police station, compulsory attendance at interview and keeping the police informed of your place of residence at all times.

18. These proposals were originally trailed in August this year as a commitment to bar individuals from the UK fighting in Syria from returning to the UK.[7] This prospect of effective exile is now termed "controlled" or "managed" return. It has been suggested that in the interim, the Government may have taken advice and considered that exile of British citizens overseas may violate our international law obligations, or at least damage our international relations with third countries. These proposals will only apply to individuals who have a right to abode, including British citizens. Cancelling a passport or other right to return while someone is outside the country will have a serious impact on their individual rights in practice. The extent of that impact will depend on the individual circumstances of any case, but Article 8 and the right to private and family life will clearly be engaged. In some circumstances, Article 3 ECHR may also apply. Notably, if individuals are in countries where a regime is known or suspected to use torture, targeting them as a known terror suspect and/or as an individual with a desire to return to the UK.[8]

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[6] See Clause 3(8).

[7] http://www.dailymail.co.uk/news/article-2737724/Terror-attack-UK-highly-likely-warns-Home-Secretary-Theresa-May-threat-level-raised-severe.html

[8] The evidence considered by the Intelligence and Security Committee on the knowledge and understanding of the UK about the treatment of Michael Adebolayo (one of the killers of the Fusilier Rigby) while in detention in Kenya provides an illustrative example. See ISC Report, paragraph 466.

19. We regret that the Government's Human Rights Memorandum insists that as the individual concerned will be out of the country; neither the HRA 1998 nor the UK's obligations under the ECHR will apply. We consider that this analysis is seriously flawed. During debate on the Immigration Bill and removal of citizenship outside the UK, the JCHR succinctly explained why the removal of citizenship, and in this case, the making of a TEO is an exercise of legal jurisdiction over an individual, which takes engages our obligations under the ECHR:

> *The Government's invocation of the Court's case law concerning the extra-territorial application of the Convention overlooks the important fact that the very act of depriving a naturalised citizen of their citizenship is itself an exercise of jurisdiction over that individual. Professor Goodwin Gill, in his memorandum, describes it as "wishful legal thinking to suppose that a person's ECHR rights can be annihilated simply by depriving that person of citizenship while he or she is abroad [...] the act of deprivation only has meaning if it is directed at someone who is within the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or her rights.*[9]

20. Again, Parliament must first ask whether these measures will be effective to serve the aim of enhancing our national security and preventing terrorist activity. If we suspect that an individual is concerned in illegal activity and is a danger to the interests of the UK; shouldn't the first priority be to secure his return, arrest and prosecution? Internationally other countries are grappling with the intelligence implications of individuals who seek to return after fighting in Syria and Iraq. The approach of the Danish Government to return has been widely reported, focusing on return as an opportunity for rehabilitation and reintegration, with associated intelligence benefits.[10] We understand that this programme integrates the consideration of whether an individual should be charged with a criminal offence in connection with their activities overseas. Parliamentarians may wish to ask the Government if they have considered how likely it will be that, given the choice, individuals will submit to conditions on return or instead choose to remain outside the country and at large, perhaps becoming further integrated within any network they may have in the host country, and beyond the view of our intelligence services?

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[9] Para 44 – 46. http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf

[10] See, for example, http://www.independent.co.uk/news/world/europe/denmark-offers-rehabilitation--not-punishment--to-returning-jihadis-9893218.html

21. There are a number of detailed questions which Parliament may wish to consider at Committee, to which we will return in greater detail:

    a. To make a TEO, the Secretary of State must "reasonably suspect" that an individual is involved in terrorism-related activity outside the United Kingdom. This replicates the test originally applied to control orders, replaced by the test now applicable to TPIMs ("reasonably believes"). A test far below the ordinary civil standard of proof, which this Bill will apply to TPIMs. Parliamentarians may wish to ask why this standard is proposed, given that a TEO will give an individual an option of freedom in exile or return to submit to some of the conditions which may be imposed under a TPIM Order.

    b. This is likely, in practice to be a purely administrative exercise. There is no provision for express provision for review or judicial oversight. Judicial review is available, but likely to be difficult to access. Legal aid is unlikely to be available and in any event, the individual will be out of the country and his opportunity to take advice and instruct representatives limited. In any event, the Justice and Security Act 2013 will permit the operation of a closed material process in any challenge, with the result that the individual concerned may never fully understand the reasons for the Secretary of State's suspicion.

    <u>New Schedule 1 (NS 1)</u> would provide for a statutory right to appeal against any TEO, subject to a statutory closed material procedure ("CMP") more akin to that applied to TPIMs. New Clauses 9 and 10 would operate to require the Secretary of State to apply for the permission of the court to make a TEO except in cases of "urgency".

    JUSTICE is concerned that in practice, these safeguards will be of little value to individuals who are subject to restriction while outside the country. Despite the fact that they would be subject to the ordinary restrictions associated with a CMP – they will, in fact, never know or be able to challenge the true case against them – these clients will be particularly disadvantaged in trying to secure advice and representation from abroad. It is difficult to see how, in practice, they might be able to influence the court asked to authorise a TEO or launch an effective

appeal. Nothing in these new purported safeguards would address any of the associated legal difficulties which arise in connection with the operation of a *de facto* power of administrative exile proposed in the TEO.

c. The Bill provides that any individual will be given leave to enter on expulsion or deportation. This appears to have been included in order to meet serious concerns about how this policy might engage the responsibilities of the UK to third states in international law. If an individual has been admitted on a UK passport, it is generally accepted that a third state can expect that the UK will accept their return. Parliamentarians may wish to consider how likely it is that, if a TEO is made, the grounds for the suspicion of the Secretary of State may give rise to grounds for deportation or expulsion in the third state? If another country were to choose to prevent its seemingly dangerous individuals from leaving Britain, how might the Secretary of State react? This issue perhaps illustrates why Parliamentarians might wish to subject the underlying rationale for this proposal and its compatibility with a counter-terrorism policy with prosecution at its heart. If we have reliable intelligence to support the making of a TEO, is it appropriate to risk "exporting" that risk? If we encourage other states to take a similar approach; will it lead to states operating a rolling exchange of risk, with exclusions and deportations from the UK being sought in response to other states' controls on return?

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