

TERRORISM PREVENTION AND INVESTIGATION MEASURES (TPIM) BILL

ECHR MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the TPIM Bill. The memorandum has been prepared by the Home Office. The Home Secretary has signed a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
2. This Bill repeals the Prevention of Terrorism Act 2005 (“the PTA”) which provides for the control order regime and replaces that regime with terrorism prevention and investigation measures (TPIMs). The restrictions that may be placed on individuals under the new system are less stringent than those available under control orders. The new system also has a greater range of safeguards, including a time limit and a higher threshold for imposing the restrictions. The control order regime operated compatibly with the ECHR. The TPIM regime, with its greater safeguards, will also be compatible with the ECHR and indeed TPIMs will be less intrusive on the human rights of the individuals subject to them than control orders are.
3. This memorandum deals only with those clauses of, and Schedules to, the Bill which may give rise to ECHR issues.

Provision in relation to TPIMs

4. The Bill contains a power for the Secretary of State to impose TPIMs on an individual (by means of a TPIM notice) if the following conditions are met:
 - (a) The Secretary of State reasonably believes that the individual is or has been involved in terrorism-related activity (as defined in clause 4) (“condition A”);
 - (b) Some or all of that activity is “new terrorism-related activity” (“condition B”);
 - (c) The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for TPIMs to be imposed on the individual (“condition C”);
 - (d) The Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity, for each of the specified measures to be imposed on the individual (“condition D”);
 - (e) The court has given permission for the TPIMs to be imposed, or the Secretary of State reasonably considers that the urgency of the case requires TPIMs to be imposed without such prior permission (in which case the TPIM is referred to the court within 7 days for confirmation) (“condition E”).

5. The Bill sets out the types of measures that may be imposed under a TPIM notice. Details of the measures Secretary of State may impose are contained in Schedule 1. These measures fall under the following headings:
 - (a) A requirement for the individual to remain overnight in the specified residence (including a residence provided to the individual by the Secretary of State in an appropriate locality) or restrictions on the individual's movements overnight.
 - (b) A restriction on the individual travelling outside the UK (or outside Northern Ireland or the mainland).
 - (c) A restriction on entering a specified area or place.
 - (d) A requirement to comply with directions concerning the individual's movements for a maximum of 24 hours.
 - (e) A restriction on the use of or access to specified financial services.
 - (f) A restriction on the transfer of property and a requirement to disclose information about specified property.
 - (g) A restriction on the possession or use of electronic communications devices including in relation to devices of others within the residence.
 - (h) A restriction on association or communication with other persons.
 - (i) A requirement in relation to work or studies.
 - (j) A requirement to report to a police station.
 - (k) A requirement for the individual to allow photographs to be taken.
 - (l) A requirement to co-operate with arrangements to allow the individual's movements, communications or other activities to be monitored.
6. A TPIM notice lasts for one year but may be extended for one further year.
7. No new TPIM notice may be imposed on the individual after that time unless the Secretary of State reasonably believes that the individual has engaged in further terrorism-related activity since the imposition of the notice (clause 3(2) and (6) and clause 5).
8. Under clause 9 of the Bill, the High Court, or in Scotland, the Court of Session¹ automatically reviews the TPIM notice following the service of such a notice. The Court must review whether the conditions A to D were met when the TPIM notice was imposed – and continue to be met at the time of the hearing.
9. The individual has the right to request the variation or revocation of the TPIM notice and the Secretary of State has the power to revoke the notice, to vary the notice, to extend it (once, as mentioned above) or to revive a notice following its revocation or expiry (for the unexpired portion of the year for which it was originally made) (clauses 12 and 13). The Secretary of State may also make a new TPIM notice following the quashing of a TPIM notice or a direction by the court to revoke the notice – but only for the period of time for which the quashed or revoked notice would have lasted. The individual has a right of appeal against any of the decisions of the Secretary of State in relation to these matters. The individual also has the

¹ The rest of this memorandum refers to the "High Court" – but this should be read as referring to the Court of Session where the hearing is in Scotland.

right of appeal against any decision on a request for permission made in connection with a measure in a TPIM notice (clause 16).

10. The Secretary of State, when making her decisions, and the High Court, in conducting its review of those decisions during the automatic review hearing or on an appeal, may make use of closed evidence (that is, evidence which is withheld from the individual and their legal adviser because its disclosure would be contrary to the public interest). The procedure for the use of closed evidence, including the appointment of a special advocate to act in the individual's interests in relation to such proceedings will be contained in Rules of Court made under Schedule 4 to the Bill. This system will be the same as that currently used in control order and Special Immigration Appeals Commission proceedings.
11. There are various powers of search and entry in Schedule 5 which support the TPIM regime. There are also powers to take fingerprints and non-intimate samples from individuals subject to a TPIM notice and to retain that data (and DNA profiles derived from such samples) in Schedule 6 to the Bill.
12. Breach of a measure in a TPIM notice, without reasonable excuse, is a criminal offence, carrying a maximum penalty of 5 years' imprisonment (clause 21).

The measures

13. The measures that may be imposed on an individual under a TPIM notice will engage Convention rights. The measures include:
 - (a) restrictions on movement (a requirement to remain in the residence overnight; a requirement to reside in accommodation provided by the Secretary of State in an agreed area or in the individual's local area (or in the absence of such an area, in an appropriate area); restrictions on the individual's movements outside the residence overnight; exclusions from specified areas; foreign travel restrictions; a requirement to comply with directions lasting up to 24 hours given by a constable). These restrictions engage article 8 (right to respect for private and family life), article 11 (freedom of assembly and association) and possibly article 9 (freedom of thought, conscience and religion) (an excluded place may include a mosque.)
 - (b) restrictions on communications and association (limitations on the possession and use of electronic communications devices, including restrictions in relation to devices belonging to others in the residence; prohibitions from contacting specified individuals or descriptions of individuals without permission; notification requirements in relation to contacting other individuals; limitations or notification requirements in relation to areas of work and study). These restrictions will engage articles 8, 10 (freedom of expression) and 11 and possibly article 1 of the first protocol (protection of property).
 - (c) restrictions on dealing with money and other property (limitations on use of financial services; requirement to obtain permission for transfers of property). These restrictions may engage article 8 and (in relation to the loss of any interest on savings by a requirement that the individual

maintain only one bank account or the loss of a job in a prohibited area of work, such as public transport) article 1 of the first protocol.

- (d) requirements relating to monitoring (a requirement to furnish information about property; a requirement to wear an electronic tag; requirements to report to the police and electronic monitoring company; a requirement to allow a photograph to be taken by the police). These will engage article 8.

14. The Convention rights mentioned above are all qualified rights. Interference with those rights is permissible provided that it is (a) in accordance with the law; (b) in pursuance of a legitimate aim; and (c) proportionate.

15. The interferences will be in accordance with the law because there will be clear provision in primary legislation about the circumstances in which TPIMs may be imposed on an individual and about what type of measures may be imposed. These provisions are formulated with sufficient precision to enable a person to know in what circumstances and to what extent the powers can be exercised. The terms of the measures themselves will be drafted clearly in the TPIM notice.

16. The interferences with Convention rights caused by the measures will be in pursuit of a legitimate aim. A TPIM notice may only be imposed where the Secretary of State reasonably considers it is necessary in connection with the protection of the public from a risk of terrorism and she must also reasonably consider that each measure is necessary for the prevention or restriction of the individual's involvement in terrorism-related 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. In relation to any interference with rights under article 1 of protocol 1, this will (for the same reasons) be in the public interest and subject to conditions provided for by law and by the general principles of international law.

17. The interferences with these rights will also be proportionate. There are numerous safeguards in place to ensure that TPIMs will only be imposed where, and to the extent, that they are necessary and proportionate and to ensure that the individual's rights are protected. There are a greater, and more robust, range of safeguards than those in the control order regime, and none of the provisions in section 1 of the PTA concerning the types of obligations that may be imposed under a control order have been found to be incompatible with Convention rights. The measures that may be imposed in a TPIM notice are proportionate because of the following safeguards and limitations:

- (a) The High Court must give permission before the Secretary of State imposes TPIMs (other than in urgent cases, when the Secretary of State must refer the TPIM notice to the High Court within 7 days of serving it).
- (b) The Secretary of State may only impose TPIMs where she reasonably believes that the individual is or has been engaged in terrorism-related activity (this is a higher threshold than that under the control order regime, which requires that the Secretary of State reasonably suspects the individual's involvement in such activity).
- (c) The Secretary of State may only impose those measures on the individual she reasonably considers are "necessary" for purposes connected with

preventing or restricting the individual's involvement in terrorism-related activity. "Necessity" is a high test and the mischief against which the restrictions are aimed is so serious that interferences with qualified Convention rights caused by the measures in a TPIM notice may be justified (depending of course on the circumstances of the individual case).

- (d) The Secretary of State may only impose measures from a finite list of types of measure set out in Schedule 1. That Schedule provides details of the types of provision that may in particular be provided in the TPIM notice. For example, in relation to the electronic communications device measure, although restrictions may be placed on the individual's use and possession of such devices, provision is made (paragraph 7(3) of Schedule 1) that the Secretary of State must allow the individual to possess and use at least one mobile and one landline phone and one computer which connects to the internet. Similarly, although an overnight residence requirement may be imposed, paragraph 1(8) provides that the requirement must allow the individual to request permission to stay outside the residence on particular nights. (In a control order, the Secretary of State may impose *any* obligation she considers necessary for purposes connected to preventing or restricting the individual's involvement in terrorism-related activity, and the legislation includes a non-exhaustive list of examples of such obligations. The Bill therefore provides the Secretary of State with a much narrower discretion as to the obligations that she may impose.)
- (e) The Secretary of State is obliged under section 6 of the Human Rights Act 1998 to act compatibly with the Convention rights of the individuals she proposes to, and does, make subject to a TPIM notice. She must therefore only impose provisions in a TPIM notice which are proportionate to the terrorism-related risk posed by the individual in the particular circumstances of the case. Very careful consideration will be given to the impact of each of the measures in a TPIM notice, both individually and collectively, on the individual and their family before the Secretary of State imposes the TPIM notice and throughout the period it remains in force, and account will be taken of any representations made on behalf of the individual.
- (f) Before imposing a TPIM notice, the Secretary of State must consult with the police (who must consult with the relevant prosecuting authority) as to the prospects of prosecuting the individual for a terrorism-related offence. Prosecution through the criminal courts remains the Government's priority for persons believed to have engaged in terrorism and this is reflected in clause 10 of the Bill.
- (g) The High Court substantively reviews the Secretary of State's decisions in imposing the TPIM notice, including the necessity and proportionality of each of the measures in that notice (clause 9). This High Court review takes place automatically, without the individual having to initiate those proceedings. Under the control order regime, the courts have repeatedly made it clear that they will consider the proportionality of the obligations imposed under a control order – and the courts will do the same in relation to the proportionality of the measures imposed in a TPIM notice. For example, in the case of *BH v Secretary of State for the Home*

Department [2009] EWHC 3319 (Admin) Mitting J considered the factors which led the Secretary of State to conclude that the Secretary of State's relocation of BH under his control order to another part of the country was necessary and commented that he "would, but for the factors considered below, have unhesitatingly upheld it". However, he went on to confirm that, because the article 8 rights of the individual and his family were engaged, he "must consider the proportionality" of the measure. He considered the matter was finely balanced but he rehearsed BH's family circumstances and concluded that "applying *Wednesbury* principles, I would not hold [the relocation] to be flawed; but applying the more intensive review required by the proportionality test, I am satisfied that it would be disproportionate on the basis of current information to remove BH to Leicester."² The courts will therefore make their own decision on the proportionality of measures in a TPIM notice, following the law as set down by Lord Steyn in paragraph 27 of *R (Daly) v SSHD* [2001] 2 AC 532:

"First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decision. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex p. Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. ...

In other words the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

- (h) The range of measures which may be imposed on an individual under a TPIM notice are more limited than those available under a control order. For example, a requirement to remain in the residence is limited to an overnight period under a TPIM notice (as opposed to up to 16 hours under a control order³); a TPIM notice does not allow the Secretary of State to relocate the individual to another part of the country without their consent (whereas a control order does); and unlike a control order, a TPIM notice may not completely prohibit the individual's access to the internet or other communications devices and a TPIM notice may not confine an individual to a particular geographical boundary (other than

² It should be noted that a TPIM notice, unlike a control order, may not make provision for the relocation of an individual to another part of the country.

³ There is caselaw relating to control orders to the effect that a curfew of up to 16 hours may not constitute a deprivation of liberty – see paragraphs 21 to 23 below.

overnight) – it may only restrict the individual’s access to specified areas or places.

- (i) A TPIM notice may require the individual to live in accommodation provided by the Secretary of State (paragraph 1 of Schedule 1) but such accommodation must be either in a locality agreed by the individual or in an “appropriate locality” – that is a locality where the individual resides or has a connection, or if the individual has no such residence or connection, in a locality the Secretary of State considers appropriate. The restriction that the accommodation must be in an “appropriate locality” prevents the Secretary of State from forcibly relocating the individual away from their home area in the way that is allowed by a control order. The purpose of this provision is to allow the Secretary of State to house a homeless individual for the duration of the TPIM notice or to move an individual into accommodation which is suitable for the purposes of monitoring and enforcing the TPIMs – but not away from their home area or area they wish to live. Under the control order regime, relocation to accommodation provided by the Secretary of State in another part of the country has been upheld by the court on several occasions as proportionate to the risk posed by the individual (see for example *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin). The interference with article 8 rights by a requirement to move to other accommodation within the same area under the Bill is therefore proportionate (although, as with any other measure, whether it is proportionate in any particular case will of course depend on the circumstances).
- (j) A TPIM notice only lasts for 12 months. The Secretary of State may extend the notice - once only - for a further period of 12 months (clause 5). A further TPIM notice may only be made against an individual who has been subject to such a notice for a 2 year period if the Secretary of State reasonably believes that the individual has engaged in further terrorism-related activity since the imposition of the original TPIM notice. (This is in contrast to the control order regime, under which there is no statutory limitation on the number of times the Secretary of State may renew a control order.)
- (k) The Secretary of State may “revive” a TPIM notice that has been revoked but only for the unexpired portion of the 12 months for which it was originally to remain in force (clause 13) and the individual has the right of appeal against such a revival (clause 16).
- (l) The Secretary of State may also make a new TPIM notice following a quashing of, or court direction to revoke, a TPIM notice – but again, the new notice may only last for the period for which the overturned notice would otherwise have remained in force. This provision is to allow the Secretary of State to take appropriate action to protect the public should the original TPIM notice have been overturned on a technicality. The permission of the court will be required before any new measures may be so imposed.
- (m) The individual has the right to request a variation to the measures in the TPIM notice or to request that the notice is revoked at any time (clauses 12 and 13).
- (n) The Secretary of State may revoke the notice at any time (clause 13).

- (o) The individual has the right of appeal to the High Court against a decision by the Home Secretary (i) to extend or revive a TPIM notice (ii) to vary that notice without the individual's consent (iii) to refuse a request by the individual to vary the notice (iv) to refuse a request to revoke the notice (v) to refuse permission to do something which requires the Secretary of State's permission under the terms of the measures in the notice (clause 16).
- (p) Following the automatic court review of the TPIM notice or any appeal, the court has the power to quash the TPIM notice or any measure in that notice or to direct the Secretary of State to revoke or vary the notice.
- (q) The Secretary of State is required to keep the necessity of the TPIM notice and each of the measures in it under review while the notice remains in force (clause 11).
- (r) The Secretary of State and the individual will have the option of applying to the court for an anonymity order to protect the identity of the individual subject to the TPIM notice – in particular to protect the individual's article 8 (or article 2 or 3) rights.
- (s) The Secretary of State will report to Parliament every 3 months on the exercise of the powers in the TPIM legislation (clause 19).
- (t) An independent reviewer will review the operation of the TPIM legislation and report annually on the outcome of that review: the Secretary of State will publish this report (clause 20).

18. Accordingly, the Government considers that the provisions in the Bill allowing TPIMs (as defined in Schedule 1) to be imposed on an individual are compatible with Convention rights.

Article 5

Overnight residence requirement

19. Paragraph 1 of Schedule 1 to the Bill provides that a TPIM notice may include a requirement under which the individual may be required to remain in their residence for a specified number of hours overnight.

20. The limitation on this residence requirement (the period of confinement must be "overnight" only) is such that it is unlikely to engage article 5 of the ECHR in view of the case law in relation to control order curfews.

21. Section 1 of the PTA allows the Secretary of State to impose an obligation on an individual under a control order to remain in their residence, provided the obligations in that order are not incompatible with the individual's right to liberty under article 5⁴. In *Secretary of State for the Home Department v JJ & Others [2007] UKHL 45*, the House of Lords found that curfews of 18 hours (or more) amounted to a deprivation of liberty. And, as none of the exceptions to the right of

⁴ The references in this memorandum are to non-derogating control orders – that is control orders made by the Secretary of State and orders which may not impose obligations that are incompatible with article 5. The PTA also allows for the imposition of derogating control orders, by the court following application by the Secretary of State – which orders impose obligations which are incompatible with article 5 (see section 1(2) of the PTA).

liberty specified in article 5 (a) to (f) apply, such curfews constitute a breach of article 5. In *Secretary of State for the Home Department v E & Another* [2007] UKHL 47 and *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46, the House of Lords found that control order curfews of 12 and 14 hours do not deprive an individual of their liberty.

22. In assessing what constitutes a deprivation of liberty, what must be focused on is the extent to which the individual is “actually confined” – that is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, particularly those which contribute to the social isolation of the individual, are however to be taken into account. But such “other restrictions (important as they may be in some cases) are ancillary” and “[can] not of themselves effect a deprivation of liberty if the core element of confinement . . . is insufficiently stringent”⁵. This assessment of the position was reaffirmed in the Supreme Court judgment in *AP v Secretary of State for the Home Department*⁶ [2010] UKSC 24. Lord Bingham in that case also said that in his view “for a control order with a 16-hour curfew (a fortiori one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living”⁷.
23. Under a TPIM notice, an overnight residence requirement will fall well short of the “grey area”⁸ that has been identified in the control order context – a confinement of between 14 and 16 hours - where consideration of the other restrictions imposed on the individual are to be taken into account in (and indeed will be key to) assessing whether there is a deprivation of liberty. As noted above, the House of Lords has found that a 12 hour curfew does not constitute a deprivation of liberty. Further, the other restrictions that may be imposed under a TPIM notice are also less stringent than those available under the control order regime: A TPIM notice may not impose such severe restrictions on association or communications and may not impose a geographical boundary within which the individual must remain during non-confinement hours. And so again, even taking into account consideration of the other restrictions that may be imposed on the individual in addition to the “core element of confinement”, a TPIM notice would not constitute a deprivation of liberty.

Article 6

Degree of scrutiny by the court

24. Clauses 9 and 16 provide for the review by the High Court of the Secretary of State’s decisions in relation to imposing TPIMs and the various appeal rights of the individual. The review which is conducted in accordance with clause 9 takes place automatically (without the individual having to initiate the proceedings). The court is to review the decisions of the Secretary of State in deciding that the conditions were met to impose TPIMs and to maintain TPIMs against the individual at the date

⁵ paragraph 11 of the *MB and AF* judgment.

⁶ Paragraph 1.

⁷ Paragraph 4.

⁸ Paragraph 2 of *AP*.

of the hearing. Such TPIM proceedings will engage the civil limb of article 6.⁹ The protection afforded by article 6 in the context of control orders has been extensively considered by the courts.

25. Section 3(10) of the PTA provides that the court is to consider whether any of the Secretary of State's decisions in relation to making the control order "was flawed". In *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, the Court of Appeal read down this provision in accordance with section 3 of the Human Rights Act 1998, with the effect that High Court reviews of control orders must consider whether the Secretary of State's decisions "are flawed"¹⁰. The Court of Appeal also confirmed very recently in *BM v SSHD* [2011] EWCA Civ 366 that the court must consider whether the statutory tests for making a control order are met at the time of the hearing as well as at the time the control order was made. This "read down" is reflected in clause 9(1) of the Bill, which provides that the court is to review the decisions of the Secretary of State that the relevant conditions for imposing TPIMs "were met and continue to be met" – and clause 16 makes corresponding provision about the function of the court in relation to appeal hearings. Clause 11 also provides that the Secretary of State must keep the necessity of both the notice and its constituent measures under review throughout the duration of the notice.
26. The Court of Appeal in *MB* also laid down the standard of review that the court is to apply in control order cases. Section 3(11) of the PTA (review of control order) provides that the court is to apply the principles applicable on judicial review. There is similar provision in clauses 9 (review) and 16 (appeals) of the Bill. The standard applicable on judicial review in the context of control orders – and the same will apply in the context of TPIMs – is that laid down in *MB*. In that case, the Court found that the first part of the test (whether there are reasonable grounds for suspicion – or belief in the case of TPIMs - in relation to the individual's involvement in terrorism-related activity) is an objective question of fact¹¹. The court must therefore itself decide whether the facts relied upon by the Secretary of State amount to reasonable grounds for believing that the individual is or has been involved in terrorism-related activity.
27. In relation to the court's review of the necessity of the control order and its constituent obligations, the Court of Appeal held as follows – and this will apply equally in High Court reviews of TPIMs:

"Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and

⁹ The House of Lords decided unanimously in the case of *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46 that proceedings in relation to a non-derogating control order are civil proceedings and do not constitute the determination of a criminal charge.

¹⁰ Paragraphs 40 to 46.

¹¹ Paragraph 60.

the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.

The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for *instance: Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *Ireland v United Kingdom* (1978) 2 EHRR 25.

Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so. The exercise has something in common with the familiar one of fixing conditions of bail. Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the same result.”¹²

28. Therefore, while paying a degree of deference to the Secretary of State on her decisions on the necessity for the TPIM notice and for its constituent measures, the High Court will subject each of these decisions to “intense scrutiny” and this will provide the degree of scrutiny commensurate with article 6.

Closed evidence

29. Paragraphs 1 to 5 of Schedule 4 to the Bill (given effect to by clause 18) makes provision for the making of Rules of Court which may provide for the withholding of evidence from the individual and their legal representative where disclosure of that evidence would be contrary to the public interest (including because it would be contrary to the interests of national security). The Rule-making authority is to have regard to the need to ensure that decisions are properly reviewed, but also that disclosures of information are not made where they would be contrary to the public interest. The Secretary of State is to be required to disclose all relevant material, but may apply to the court (on an *ex parte* basis) for permission not to do so – 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. If the Secretary of State elects not to disclose material he does not have permission to withhold or not to disclose a gist where required to do so, the court may give directions withdrawing from its consideration the matter to which the material was relevant, or otherwise secure that the Secretary of State does not rely on that material. Paragraph 10 of Schedule 4 makes provision for the appointment of a special advocate to act in the interests of the individual in relation to the closed proceedings.

30. Paragraph 5 of Schedule 4 provides that nothing in these paragraphs dealing with the Rule-making power nor in the Rules made under them is to be read as requiring the court to act in a manner inconsistent with article 6 of the Convention.

¹² Paragraphs 63 to 65.

31. This system of closed proceedings, with the use of special advocates (which is also available in relation to, inter alia, hearings before SIAC, the Proscribed Organisations Appeal Commission and in control order cases) has been considered on a number of occasions by the courts, both domestically and in Strasbourg.
32. Article 6(1) of the ECHR provides that “everyone is entitled to a fair and public hearing... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the...protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”
33. The press and public may be excluded from the “closed” part of TPIM proceedings – as indeed may the individual and their legal representative. This is done 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 – often because it would be contrary to the interests of national security to disclose it. The information withheld from disclosure may, for example, be the names of covert human intelligence sources (or “agents”) – whose lives could be put at risk if their identity is revealed. Or it could be covert intelligence-gathering techniques, the disclosure of which could compromise wider national security interests.
34. The majority of the Court of Appeal in *MB and AF* found that despite the review process for control orders involving the use of closed proceedings, “it should usually be possible to accord the controlled person ‘a substantial measure of procedural justice’”¹³. It found that what was fair was essentially a matter for the judge, taking account of all the circumstances of the case, including what steps had been taken to provide the details of the allegations to the individual or summaries of the closed material. The majority found that although these protections and the special advocate procedure 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 PTA and the Rules¹⁴ 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”¹⁵ were added.
35. This “read down” is reflected in paragraph 5 of Schedule 4 to the Bill. The result is that although TPIM proceedings may make use of closed evidence, where the court concludes that there is material 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, in short, (at the Secretary of State’s discretion) either be disclosed or withdrawn from the case.

¹³ Paragraph 66.

¹⁴ Part 76 of the Civil Procedure Rules 1998.

¹⁵ Paragraph 72.

36. The House of Lords again considered the issue of the compatibility of control order proceedings with article 6 of the ECHR in the case of *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 (“*AF(no.3)*”). The House maintained the “read down” it made in *MB and AF* but also introduced a further important development, taking account of the judgment in the European Court of Human Rights in *A & Others v United Kingdom* [2009] ECHR 301. On that basis, the House 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. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”¹⁶

37. There is ongoing litigation about the reach of the judgment in *AF (no.3)*, including whether those disclosure requirements apply in “light touch” control order cases, where the orders impose only restrictions on travel and reporting obligations (in contrast to the stringent restrictions on liberty imposed by the control orders considered in the *AF (no.3)* case¹⁷).

38. In each TPIM 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 and, subject to the outcome of the litigation referred to above, this decision will be made in accordance with the test set down in *AF (no.3)*. The individual will therefore be given sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations. A TPIM notice will not be able to be sustained on the basis of a case which is solely or decisively “closed”.

39. Where in any case the Secretary of State is not able to make sufficient disclosure to comply with article 6, the appropriate remedy will be for the court to quash the TPIM notice. This was the Court of Appeal’s finding in relation to control orders in *AN v Secretary of State for the Home Department; Secretary of State for the Home Department v AE and another* [2010] EWCA Civ 869. The same will apply in relation to TPIMs. And the Court of Appeal in that case also found that:

“it is unlawful for the Secretary of State to begin to move towards the making of a control order if, in order to justify it, he would need to rely on material which he is not willing to disclose to the extent required by *AF(No.3)*¹⁸”.

40. The Secretary of State, in determining whether to impose TPIMs, must therefore make her decision “conscientiously, with her disclosure obligations in mind”¹⁹.

¹⁶ Paragraph 59.

¹⁷ The Secretary of State is appealing the High Court’s judgment in *BC v SSHD; BB v SSHD* [2009] All ER (D) 140 (Nov).

¹⁸ Paragraph 31.

¹⁹ Paragraph 55 of *BX v SSHD* [2010] EWCA Civ 481.

Article 6: summary

41. The courts have therefore considered the compatibility of the control order regime with article 6 in detail. They have “read down” the control order legislation to ensure that it is interpreted compatibility with individuals’ article 6 rights and have laid down rules in relation to the level of disclosure that is required to comply with article 6 - and the outcome (quashing) should that level of disclosure not be made. The TPIM Bill makes provision which takes account of these “read downs” and the Government expects the scheme to operate in practice in accordance with the control order caselaw on article 6.
42. Accordingly, 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.

Powers of Entry, Search, Seizure and Retention

43. Schedule 5 to the Bill (given effect to by section 22) confers powers of entry and search, together with associated powers of seizure and retention, in connection the enforcement of TPIM notices. These are powers to:
- (a) enter premises where the individual is believed to be and search those premises for the individual for the purpose of serving on that individual a TPIM notice (or an extension of that notice, a revival notice or a notice varying the TPIM notice without consent) (paragraph 5 of Schedule 5).
 - (b) Search the individual or enter and search premises on the service of a TPIM notice for the purpose of ascertaining whether there is anything present which contravenes the TPIM notice (paragraph 6).
 - (c) Enter and search premises if a constable reasonably suspects that an individual has absconded from a TPIM notice in order to determine whether that individual has absconded and if so for anything to assist in the pursuit and arrest of that person (paragraph 7).
 - (d) Apply for a warrant to search the individual or premises for the purpose of determining whether the individual is complying with the TPIM notice (paragraphs 8 & 9).
 - (e) Search the individual for the purpose of ascertaining whether the individual is in possession of anything that could be used to threaten or harm any person (paragraph 10).
 - (f) Associated powers of seizure and powers of retention (paragraphs 11 and 12). Paragraph 12 also allows for the seizure and retention of anything which the individual has surrendered pursuant to a monitoring requirement attached to an electronic communications device measure (see paragraph 7(4)(e) of Schedule 1) if it is suspected to constitute or contain evidence of an offence.

Article 8

44. Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) provides that there is to be no interference with that right other than is in accordance with the law and is necessary

in a democratic society in pursuit of one of the legitimate aims listed in article 8(2). Article 8(1) is prima facie engaged in cases of search and seizure. The Government considers however that any interference with that right will be justified under article 8(2).

45. The provisions will be ‘in accordance with the law’ because they will be contained in primary legislation and formulated with sufficient precision to enable a person to know in what circumstance the powers can be exercised.
46. The powers also 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 TPIM notices (the purpose of which are related to the prevention of terrorism) are properly enforced, including uncovering evidence of any breach of a TPIM notice would facilitate a criminal prosecution.
47. 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 5 may only be exercised in defined circumstances and are no more than necessary for achieving the legitimate aims mentioned above for the following reasons:
 - (a) The powers may only be exercised by a constable.
 - (b) The power in paragraph 5 may only be exercised where the constable reasonably believes the person is in the premises and only for the purpose of effecting service of a TPIM notice (or other specified notice) – which must be served on the individual in person to be effective (see clause 24(2) and (3)).
 - (c) The powers in paragraph 6 are only exercisable on the service of a TPIM notice and the purpose is limited to ascertaining whether there is anything on the individual or in premises that contravenes the TPIM notice. This power is to ensure that anything the individual is prohibited from possessing under the TPIM notice is not kept in contravention of that notice following service.
 - (d) Other than on service of the TPIM notice, any searches of the individual or premises conducted for compliance purposes must be conducted under a warrant applied for under paragraphs 8 & 9 of Schedule 5. A judicial authority (who is a public authority for the purposes of section 6 of the Human Rights Act and must therefore act compatibly with Convention rights) may only grant such a warrant if satisfied that the warrant is necessary for the purpose of determining whether an individual is complying with their TPIM notice.
 - (e) The statutory safeguards contained in sections 15 and 16 of PACE (and equivalent provisions under the PACE (NI) Order 1989 with respect to Northern Ireland) apply to any warrant issued under paragraph 8 to search premises and similar safeguards are provided in paragraph 9 of Schedule 5 in respect of any warrant so issued to search the individual. These include time limits within which the warrant must be executed, provision that the search must be carried out at a reasonable hour unless that would frustrate the purpose of the search, provision about information to be supplied to the individual prior to conducting the search and provision about endorsement of the warrant.

- (f) Under paragraph 7 of Schedule 5, premises may only be entered and searched if the constable has reasonable grounds to suspect that an individual has absconded from a TPIM notice. And the purpose of the search is limited to determining whether the individual has absconded and if so whether there is anything which may assist in the pursuit and arrest of that individual.
- (g) The power under paragraph 10 of Schedule 5 is limited to searching the individual for the purpose of ascertaining whether the individual is in possession of anything that could be used to threaten or harm any person.
- (h) A constable may only use reasonable force where it is necessary in the exercise of these powers (paragraph 4 of Schedule 5).
- (i) PACE Codes of Practice A and B (and equivalent Codes for Northern Ireland) will be amended to include reference to the new powers – so all the relevant protections in those Codes (for example in relation to record-keeping and proportionate exercise of the powers) will apply.

48. It is therefore the Government's view that Schedule 5 to the Bill is compatible with Article 8.

Article 1 of the First Protocol

49. Article 1, Protocol 1 will be engaged where these new powers are used to seize property.

50. Property seized under the new powers may be retained only for as long as is necessary (paragraph 11 of Schedule 5) and so the ECHR consideration relates to the control of use of property under Article 1, Protocol 1. The test for justification of a control of use of property has three limbs. The first is that the control must be in accordance with the law. The second is that the control must be for the general interest (or for the securing of the payment of taxes or other contributions or penalties). The third limb is that the measure must be proportionate to the aim pursued.

51. The powers of seizure in this paragraph will be in accordance with the law because they are to be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The seizures will be in the general interest because the powers are to seize anything which (a) contravenes a TPIM 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) (in England, Wales or Northern Ireland) which constitutes evidence of any offence²⁰. The powers are therefore (a) aimed at the prevention or detection of crime (in particular the breach of a TPIM 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.

52. The powers of seizure are proportionate because:

²⁰ The Government is in discussion with the Scottish Government in relation to making provision for Scotland on the seizure of evidence relating to offences.

- (a) The articles seized could otherwise be used for the purposes of terrorism-related activity (which the measures in the TPIM 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 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.

53. It is therefore the Government's view that Schedule 5 to the Bill is compatible with Article 1, Protocol 1.

Anonymity Orders

54. Paragraph 6 of Schedule 4 to the Bill makes provision that Rules of Court made under that Schedule may provide for the making of an anonymity order by the court in respect of an individual who is subject to a TPIM notice or against whom the Secretary of State proposes to impose a TPIM notice.

55. An anonymity order is an order under which the court imposes such prohibition or restriction as it thinks fit on the disclosure of the identity of the individual or of any information that would tend to identify the individual. Such an order does not prevent the reporting of open court judgments in relation to the individual but the judgment would refer to that individual by court-given initials rather than by name.

Articles 2 and 3

56. Article 2(1) provides that everyone's right to life shall be protected by law. Article 3 provides that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

57. The Supreme Court in *Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury* [2010] UKSC 1 recognised that States are obliged by articles 2 and 3 to have a structure of laws in place which help to protect people from assaults or attacks on their lives, not only from emanations of the State but by other individuals. "Therefore, the power of a court to make an anonymity order to protect a...party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield".²¹

²¹ See paragraph 27.

58. There may be cases where the individual subject to the TPIM notice has legitimate concerns about their safety should their identity as a person subject to such a notice become public. Indeed in the case of *Secretary of State for the Home Department v AP (no.2)* [2010] UKSC 26 the Supreme Court upheld the anonymity order in respect of a person formerly subject to a control order, having found that there was “at least a risk that AP’s convention rights would be infringed”²² if his identity was revealed. This was against the background of evidence to the effect there might be racist and other extremist abuse and physical violence against that individual.
59. The availability of an anonymity order is a way in which the article 2 or 3 rights of an individual subject to a TPIM notice may be protected in appropriate circumstances.

Article 8

60. It was also recognized by the Supreme Court in *Application by Guardian News* that giving the court the power to make anonymity orders is also one of the ways that the UK fulfils its positive obligation under article 8 of the ECHR to secure that individuals (including the press) respect an individual’s private and family life (see *Von Hannover v Germany Application No. 58320/00*). An individual subject to a TPIM notice may consider that publication of their identity as a person who is reasonably believed to be or have been involved in terrorism-related activity would be an undue intrusion on their right to respect for their private and family life. For example, they may consider that disclosure of their identity may cause serious damage to their reputation and may lead to a loss of contact for themselves and their immediate family with the local community who may fear to associate with them.
61. The availability of an anonymity order is a way in which the article 8 rights of an individual subject to a TPIM notice may be protected in appropriate circumstances.

Article 10

62. Article 10(1) provides that everyone has the right to freedom of expression. Article 10(2) provides that “the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such ...conditions, restrictions...as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others...”.
63. In *Application by Guardian News*, the Supreme Court noted that although article 10(1) does not mention the press, it is settled that the press and journalists enjoy the rights which it confers²³. In that case, members of the press were prevented from reporting the name of the individuals subject to the asset freezes they were challenging in legal proceedings and complained that this restriction interfered with their right to freedom of expression.

²² See paragraph 14.

²³ Paragraph 33.

64. It is clear that an anonymity order will interfere with the article 10(1) rights of the press to report proceedings in the manner that they might wish – namely to use the real name of the individual subject to a TPIM notice in the context of reporting on TPIM proceedings. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed (*Campbell v MGN Ltd* [2004] 2 AC 257 paragraph 59) and Lord Rodgers noted in paragraph 63 of the *Application by Guardian News* judgment that “stories about particular individuals are simply much more attractive than stories about unidentified persons”. The court also noted that the purpose of the freezing order – and the same holds true for the purpose of a TPIM notice – is public. It is to do with preventing terrorism. And so the press may be restricted from reporting a complete account of an important public matter.
65. The article 10 rights of the press can however, as noted above, be subject (under article 10(2)) to restrictions that are prescribed by law and necessary in a democratic society “for the protection of the reputation or rights of others”. The “rights of others” include their rights under article 8 – which (as mentioned above) are also engaged by the issue of publication of the identity of the individual. Making provision for an anonymity order to be made is therefore justified in accordance with article 10(2) because the article 8 (or indeed 2 or 3) rights of the individual may justify such an order being made, depending on the facts of the case.
66. As well as the article 8 rights of the individual, there may be other justifications for making an anonymity order. These were recognised in *Times Newspapers Ltd v Secretary of State for the Home Department* [2008] EWHC 2455 (Admin) in the context of control orders, and endorsed by Lord Rodgers in paragraph 11 of *AP*:
- “There may be a risk of disorder in any given local community. The knowledge that the individual is subject to a control order may conversely make him attractive to extremists in the area where he lives. It may make provision of a range of services, including housing, to the individual or his family rather more difficult. If the individual believes that he faces these sorts of problems, he has a greater incentive to disappear... All of this can make monitoring and enforcement of the obligations more difficult, and increase significantly the call on the finite resources which the police or security service have to devote to monitoring these obligations.”
67. The case law on anonymity in control order cases endorses the need for such an order to be made at the permission stage - that is before the restrictions are served on the individual – to enable the individual time to muster evidence to argue that their identity should continue to be protected. But the case law also says that the maintenance of an anonymity order must be reviewed at the first opportunity (see paragraph 7 of *Times Newspapers v Secretary of State for the Home Department and AY* [2008] EWHC 2455 (Admin) where Ouseley J outlined a number of compelling reasons why the Courts should grant anonymity at the ex parte permission stage; confirmed by Lord Rodger in *Secretary of State v AP (No. 2)* [2010] UKSC 26 at paragraph 8).
68. Whether or not an anonymity order will be maintained in any TPIM case will involve a consideration of the circumstances of the case by the court – in particular

whether articles 2 or 3 are engaged, but generally a balancing exercise between the competing rights of the individual and their family under article 8 (and a consideration of the other factors mentioned above) and the rights of the freedom of expression of the press under article 10. Although the Supreme Court in *Application by Guardian News* concluded on the facts of the case that the anonymity orders were not justified in light of the general public interest in identifying the individuals (as against the evidence in relation to the individuals' article 8 rights in that case), it made it clear 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 indeed, the Court noted that the protection of article 2, 3 and 8 rights positively demanded the availability of such an order.

69. The Government therefore considers that the provision for anonymity orders in paragraph 6 of Schedule 4 to the Bill is compatible with article 10 of the ECHR.

Fingerprints and Samples

70. Schedule 6 to the Bill (given effect to by clause 23) makes provision in relation to the taking of biometric material from individuals subject to a TPIM notice.

71. Paragraphs 1 and 4 confer on a constable the power to take fingerprints and non-intimate samples from individuals in England, Wales and Northern Ireland²⁴ and “relevant physical data” and samples from individuals in Scotland²⁵.

72. Such material may be taken with or without consent and the individual may be required to attend a police station for the purpose. Prints, samples or information derived from samples may be checked against specified databases and information (paragraph 5). The purpose of this search is 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 identify and to determine whether the person has previously had their biometrics taken and whether those biometrics have been found at a previous crime scene.

73. Schedule 6 also makes provision in relation to the retention and destruction of such material (paragraphs 6 to 12) and about the uses to which retained material may be put (paragraph 13).

²⁴ “Fingerprints” and “non-intimate samples” have the meaning given to them in section 65 of PACE. That is, “fingerprints” include palm prints and “non-intimate samples” means a sample of hair other than pubic hair; a sample taken from a nail or from under the nail; a swab taken from any part of a person's body including the mouth but not any other body orifice; saliva and a footprint or a similar impression of any part of a person's body other than a part of his hand.

²⁵ “Relevant physical data” has the meaning given by section 18(7A) of the Criminal Procedure (Sc) Act 1995, that is, any fingerprint, palm print, print or impression of an external part of the body or certain records of a person's skin on an external part of the body. A constable may, with the authority of an officer of a rank no lower than inspector, take from the person a sample of hair other than public hair; a sample of nail or from under the nail; from an external part of the body, a sample of blood or other body fluid, of body tissue or of other material. A constable, or at a constable's direction a police custody and security officer, may take from the inside of the person's mouth, a sample of saliva or other material.

Article 8

74. The European Court of Human Rights found in *S and Marper v United Kingdom* (2008) 48 EHRR 1169 that the storage and retention of fingerprints and DNA samples and profiles constitutes an interference with an individual's right to a private life under article 8. The applicants in that case complained that their fingerprints, cellular samples and DNA profiles were retained after criminal proceedings against them had been discontinued or had ended in an acquittal. The ECtHR held that retention of such material pursued the legitimate aim of the detection and prevention of crime, but found that the "blanket and indiscriminate nature" of the retention powers in relation to suspected but not convicted persons constituted a disproportionate interference with their article 8 rights.
75. Persons subject to a TPIM notice are believed to be or have been involved in terrorism-related activity – but (like the applicants in *Marper*) have not (necessarily) been convicted of a criminal offence. Article 8 is clearly engaged by the provisions in Schedule 6. The taking and retention of the prints and DNA of individuals subject to a TPIM notice constitutes an interference with their right to private life which will only be lawful if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions are in accordance with the law because they are set out in detail in primary legislation; and that the purposes of the prevention and detection of crime²⁶ 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 for the following reasons:
- (a) The power can only be exercised in relation to a person who is subject to a TPIM notice – who is a person reasonably believed to be or have been involved in terrorism-related activity.
 - (b) The power to take prints or non-intimate samples is only exercisable by a constable (or in Scotland, in the case of a swab from a person's mouth, at a constable's direction by a police custody and security officer and in the case of other samples, a constable on the authority of an inspector).
 - (c) Before a constable in England, Wales or Northern Ireland takes the material, the individual must be informed of the reasons for the taking of the prints and non-intimate samples and the uses to which they may be put; and these matters must be recorded (paragraph 1(4) and (5) of Schedule 6). Where a person consents to the taking of the fingerprints and samples, that consent must be given in writing.
 - (d) The powers are limited to prints and non-intimate samples – they do not allow for the taking of intimate samples.
 - (e) It may be necessary to take the material from individuals subject to a TPIM notice so that the police can verify their identity, can conduct a search in relation to their material and can retain their data for cross-checking throughout the duration of the TPIM notice and for a circumscribed period afterwards.
 - (f) The Government considers that the degree of interference with a person's privacy caused by a requirement to attend a police station and to provide

²⁶ *Marper* is authority for this.

prints and non-intimate samples is modest. By contrast, the potential benefits for the prevention and detection of crime and the protection of others and national security from verifying the identity of the individual and checking to see whether their biometric data can be matched against data taken from e.g. a crime scene are considerable.

- (g) Samples taken from individuals subject to a TPIM notice must be destroyed as soon as the DNA profile has been derived from it or, if sooner, within 6 months of the sample being taken (paragraph 12 of Schedule 6). The ECtHR in *Marper* held that the greatest interference with private life was caused by the retention of DNA samples - that is the actual biological material taken from individuals (albeit that DNA profiles also contain “substantial” amounts of unique personal data). The Government considers that paragraph 12 represents a significant protection against some of the concerns expressed in the *Marper* judgment about excessive retention of material (particularly at paragraphs 70 to 73 in relation to fears about the “conceivable use of cellular material in the future”).
- (h) Prints, samples and DNA profiles may only be retained and used for limited purposes. In England, Wales and Northern Ireland, material may not be used other than in the interests of national security, for the purposes of a terrorist investigation, for purposes related to the prevention, detection, investigation or prosecution of crime or for identification of a deceased person or the individual subject to the TPIM notice. In Scotland, prints, samples and DNA profiles which are taken by a constable under the powers in Schedule 6 may only be used in the interests of national security or for the purposes of a terrorist investigation.
- (i) The material must be destroyed if it appears to the chief officer of police that it was taken unlawfully (paragraph 6 of Schedule 6).
- (j) The material may only be retained for a period of 6 months from the date the TPIM notice ceases to be in force (or if a further TPIM notice is imposed during that period, for 6 months from the date that further notice ceases to be in force). If the TPIM notice is quashed, subject to a new notice being made, the material may only be retained until there is no further possibility of an appeal against the quashing (paragraph 8 of Schedule 6). The Government considers this limited retention period strikes an appropriate balance between respecting the right to privacy of the individual and preventing and detecting crime and protecting national security (including counter-terrorism). The retention period also compares favourably with the retention period under the “Scottish model” for retention which was commented on with approval in paragraphs 109 and 110 of *Marper* and by the Parliamentary Joint Committee on Human Rights in its 12th report of the 2009-10 session²⁷ and which is largely being adopted by the Government in this session’s Protection of Freedoms Bill²⁸.

²⁷ Paragraph 1.73.

²⁸ Chapter 1 of Part 1. This provides (in brief) for the retention of material taken from persons charged with a qualifying offence (which includes terrorism offences) for 3 years and for the possibility of extending that period for a further 2 years on application to the court.

- (k) Paragraph 9 of Schedule 6 provides that if, when the TPIM notice is imposed or before the expiry of the retention period, the person is convicted of a recordable offence (other than one exempt conviction) or, in Scotland an imprisonable offence, the material may be retained indefinitely. This replicates the policy under the Protection of Freedoms Bill²⁹ for the retention of material taken from convicted adults and is considered justified. The *Marper* judgment concerned the issue of retaining data from people who had not been convicted. The Government accepts that the retention of convicted people’s data still needs to be justified as necessary in a democratic society, but it considers that this is supported by the substantial contribution which DNA records have made to law enforcement. In particular, it notes the decision of the ECtHR in *W v the Netherlands* [2009] ECHR 277, where a distinction was drawn between convicted and non-convicted people and where the ECtHR agreed with its previous decision in *Van der Velden v the Netherlands* (no.29514/05) that the interference caused by DNA retention was “relatively slight”. Further, a central aspect of the ECtHR’s reasoning in *Marper* does not apply to the case of convicted people: the fact of the conviction means that there is no risk of “stigmatisation”³⁰, which the ECtHR considered would arise if unconvicted people (who are entitled to the presumption of innocence) are treated in the same way as convicted people.
- (l) Paragraph 11 of Schedule 6 provides that, notwithstanding the retention periods set out above, material taken from a person subject to a TPIM notice may be retained for as long as a national security determination is made in relation to it by a chief officer of police. This is a determination, which may last for a renewable period of 2 years, that retention of the material is necessary for the purposes of national security. The Government considers it is essential that there should be a mechanism for retaining material beyond 6 months after the TPIM notice ceases to have effect, where this is necessary in the interests of national security. Where national security interests are engaged, it is impossible to prescribe in advance for how long it may be justifiable to retain DNA profiles and prints. National security and terrorism investigations are often prolonged, with the effect that a fixed retention period could have damaging consequences on the ability to investigate such threats. The *Marper* judgment does not specifically address the retention of material for national security purposes, although it does criticize the blanket and indefinite retention of biometric material for the purposes of preventing or detecting crime. It should be noted that paragraph 11 of Schedule 6 does not permit blanket retention in cases where data has been taken from an individual subject to a TPIM notice. Rather it requires the chief officer of police to positively consider and review the national security justification for the retention of each individual’s material at regular intervals.
- (m) Further, every time a national security determination is made (or renewed) in relation to an individual subject to a TPIM notice, that

²⁹ Clauses 5 and 6.

³⁰ Paragraph 122.

determination (or renewal) will be reviewed by an Independent Commissioner (the Commissioner for the Retention and Use of Biometric Material). Importantly, the Commissioner will have the power to quash a national security determination if he considers that it should not have been made. The Commissioner is to be established under the Protection of Freedoms Bill to review the retention of material for national security purposes of material taken from persons other than those subject to a TPIM notice – and an amendment will be made to that Bill to extend the Commissioner’s role to national security determinations made under this Bill.

- (n) Under the Protection of Freedoms Bill, the Secretary of State will be required to give guidance relating to the making or renewing of a national security determination. Such guidance will ensure that decisions are taken on a consistent basis. Before the guidance is brought into force the Secretary of State will consult with the Commissioner, and the guidance will then be required to be approved by both Houses. The Commissioner will be required to report annually to the Secretary of State regarding their functions, and the Secretary of State must then publish that report.³¹

76. The Government therefore considers that Schedule 6 to the Bill is compatible with article 8 of the ECHR.

³¹ See clauses 20 and 21 of the Protection of Freedoms Bill.