

## **TPIM notices**

### **Latest Update**

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The Terrorism Prevention and Investigation Measures Act 2011 repealed the control orders issued under the Prevention of Terrorism Act 2005 and introduced a new order, the terrorism prevention and investigation measure (TPIM). The legal genealogy of TPIM's can be traced back to Part IV of the Anti-Terrorism, Crime and Security Act 2001 that allowed a Home Secretary to order the indefinite detention of foreign nationals suspected to be involved in acts of terrorism. Following the House of Lords decision in *A and others v SSHD* [2005] 2 AC 68 it was held this provision violated article 5 (right to liberty and security of the person), article 6 (right to fair trial) and article 14 (right to freedom from discrimination) of the European Convention on Human Rights as there was no judicial scrutiny of the detention, the decision was the Home Secretary's alone based on intelligence received from various sources regarding the person detained and it only applied to non-UK citizens. This was replaced by control orders issued under the Prevention of Terrorism Act 2005 that following judicial scrutiny, applied both UK and non-UK citizens and placed very restrictive conditions on that citizen's movements. Following criticism of control orders by Lord MacDonal in his 2011 review of counter-terrorism and security powers where he said that if such orders were replaced by those that were linked to criminal investigations, containing conditions close to those issued in traditional bail conditions in criminal investigations rather than hinder a route to prosecution thereby maintaining a contribution to public safety would be preferable (paragraph 15). Along with the Supreme Court's decision in *SSHD v AP* [2010] 3 WLR 51

that held control orders violated the ECHR (article 8 in relation to the distance AP had to live from his family), the UK Government replaced control orders with less restrictive TPIM's.

## **Overview of the Topic**

1. **Imposition of Tpim's.** Issued by the Secretary of State (Home Secretary) under section 2 TPIM a Tpim has to be granted if conditions A to E outlined in section 3 TPIM are met.
2. **The A – E conditions under which a Tpim can be authorised and prior permission of the court.** A – the Home Secretary reasonably believes the individual is or has been involved in terrorism related activity. B – that some or all of the relevant activity is new terrorism-related activity. C – the Secretary of State reasonably believes that it is necessary for purposes with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual. D – the Secretary of State reasonably considers that it is necessary, for the purposes connected with preventing or restricting the individual's involvement in terrorism-related activity for the specified terrorism prevention and investigation measures to be imposed on the individual. E – the Secretary of State requires the permission of the court before issuing a Tpim (s.3(5)(a)). Under s.6 TPIM the court's function in granting permission is to determine if the Secretary of State's decisions are 'obviously flawed' (s.6(3)(a)) and to determine whether to give permission to impose TPIM measures on the individual (s.6(3)(b)) as well as considering where the court determines that the Secretary of State's decision is flawed to give the Secretary of State directions in relation to the measures to be imposed on the individual (s.6(9)). Under condition E the Secretary of State can issue a TPIM without a court authority if they reasonably consider it is urgent that a

Tpim without a court authority if they reasonably consider it is urgent that a Tpim needs to be imposed on an individual without such permission for the court (s.3(5)(b)).

3. **Terrorism-related activity (TRA).** Under TPIM the term ‘terrorism’ has the same meaning as that under s.1 Terrorism Act 2000 (s.30(1) TPIM (and as per Lloyd Jones LJ paragraph 4 in *SSHD v CC and CF* [2012] EWHC 2837 (Admin)). However TRA under TPIM is wider than the Terrorism Act 2000 provision under s.40(1) (Collins J, paragraph 5 *SSHD v BM* [2012] EWHC 714).

Section 4 TPIM states that TAC occurs when a person is:

- (a) Involved in the commission, preparation or instigation of acts of terrorism;
- (b) Conduct facilitating the commission, preparation or instigation of acts of terrorism or is intended to so;
- (c) Conduct which gives encouragement to the commission, preparation or instigation of acts of terrorism or is intended to do so;
- (d) Conduct which gives support or assistance to individuals who are known or believed by the individual to be involved in the commission, preparation or instigation of acts of terrorism.

Certainly by adding to s.4(1) TPIM the fact it is immaterial whether the acts of terrorism are specific acts or acts of terrorism in general along with (d) above, one can see why Collins J stated this activity is wider than s.40 in the 2000 Act. On assessing if an act is one that applies to s.4 TPIM TAC Collins J emphasised the point that for a Tpim it is not necessary to establish the actions to a specific TRA to any higher standard than that which can properly give rise to such a belief, saying:

‘No doubt some facts which go to forming belief will be clearly established, others may be based on an assessment of the various pieces of evidence available. But there is certainly no requirement that particular TRA needs to be established

to the standard of at least more probable than not'. (*SSHD v BM* (2012) at paragraph 34)

4. **Offences.** If, without reasonable excuse, an individual on whom a Tpm is granted and is in force contravenes any measure specified in the Tpm they commit an offence (s.23 (1) TPIM). Because those on whom a Tpm is granted have not been convicted of a terrorist related offence, their identity is protected. However since the inception of Tpm's there have been ten individuals subject to a Tpm and two of them have broken the conditions of the Tpm. As a result they have been named (BX – Ibrahim Mgag and CC – Mohammed Mohamed) and at the time of writing are they still at large.

5. **Schedule 1 Measures that can be imposed in a Tpm.** TPIM measures that can be imposed on an individual are:

*Overnight resident measure* (Schedule 1 paragraph 1) – This is a major change brought about following the Supreme Court's decision in *AP* and states this can be premises that are the individual's own residence or one provided by the Secretary of State that is situated in an appropriate locality or agreed locality (Schedule 1 paragraph 1(3)). An agreed locality is simply one agreed between the Secretary of State and the individual (Schedule 1, paragraph 1(5)) and an appropriate locality is one in which the individual has a residence or where they have no residence a UK locality in which the individual has a connection or neither of these apply one that appears to the Secretary of State to be appropriate (Schedule 1 Paragraph 1(4)).

*Travel measure* (Schedule 1 paragraph 2) – travel restrictions can be imposed by the Secretary of State on the individual leaving or travelling outside a specified area with the specified area being the UK or Great Britain or Northern Ireland.

*Exclusion measure* (Schedule 1 paragraph 3) – the Secretary of State can impose restriction on an individual entering a specified area or place.

*Movement direction measure* (Schedule 1 paragraph 4) – the Secretary of State can impose a requirement for an individual to comply with the direction given by a constable in respect of the individual’s movements.

*Financial services measure* (Schedule 1 paragraph 5 – the Secretary of State can impose restrictions on the individual’s use or access to financial services. These include only allowing the person to hold an account nominated by the Secretary of State, to close or cease to have an interest in certain accounts or to comply with specified conditions in relation to the holding of an account or a requirement not to possess or control cash over a total value specified by the Secretary of State (Schedule 1 paragraph 5(2)).

*Property measure* (Schedule 1 paragraph 6) – this includes restrictions on the transfer of property be it money or other property to a person or a place outside the UK

*Electronic communication device measure* (Schedule 1 paragraph 7) – the Secretary of State can impose restrictions on the possession or use of electronic communication devices owned by the individual or other person’s at the individual’s residence. This includes a telephone fixed to landline, a computer, a mobile phone (Schedule 1 paragraph 7(3)) or any device that is capable of storing, transmitting or receiving images, sounds or information by electronic means and includes any component part of any such device (Schedule 1 paragraph 7(5))

*Association measure* (Schedule 1 paragraph 8) – the Secretary of State can impose restrictions on an individual’s association or communication with any other person.

*Work or studies measure* (Schedule 1 paragraph 9) – an individual can only carry out work or studies as those specified by the Secretary of State.

*Reporting measure* (Schedule paragraph 10) – this measure includes a requirement by the Secretary of State to report to a police station at such times in such a manner so requested and to comply with a constable direction made in relation to such reporting.

*Photography measure* (Schedule 1 paragraph 11) – the Secretary of State can require the individual to allow photographs to be taken of them in locations and at times specified in the Tpm.

*Monitoring measure* (Schedule 1 paragraph 12) – the Secretary of State can impose a measure that the individual’s movements, communications or other activities are monitored by electronic means (this includes the wearing of an electronic tag on their person).

**6. Proportionality.** All of the measures that can be imposed on an individual in a Tpm must be applied under the legal principle of proportionality. In *CF v SSHD* [2013] EWHC 843 (Admin) Wilkie J provided the test that is to be applied by the court when examining the measures outlined by the Secretary of State’s in the Tpm, saying the test should be applied in the following terms:

‘1. The objective must be sufficiently important to justify limiting a fundamental right; 2. The measures must be designed to meet the objective and must be rationally connected to it; and, 3 the means used to impair the right or freedom must be no more than is necessary to accomplish the objective. Furthermore, the graver the impact of the measure the more compelling the justification will need to be and the greater the care with which it must be examined. ... the term ‘necessity’ is not to be equated with “useful”, “reasonable” or “desirable”. In addition the court must examine

each measure individually and should not too readily accept claims to be deferential...’ (Paragraphs 25 and 26).

**7. The controversy over TPIMs.** The main controversy over TPIMs and its predecessor, control orders is that they are quasi-criminal procedures (Gearty 2013 p.46) that Fenwick describes as new methods to protect national security whilst affording some measure of procedural fairness, but her criticism is these type of measures are aimed at suspected terrorists the UK government cannot deport and who they consider they cannot prosecute (2011 p.130). In effect their argument is where there is insufficient evidence to charge and bring before a criminal court for a successful prosecution, the UK has introduced measures widening the scope of criminalising individuals and labelling them as terrorists. Also questioned has been the usefulness of Tpm’s. In his speech to the Royal United Services Institute in 2014 the current director of MI5, Andrew Parker said that individuals being on the security service’s radar does not mean they are under their microscope as the security services only focus on their most intrusive attention on a small number of cases at any one time (paragraphs 37-38) . This is evidenced by the fact that Tpm’s have only been applied to ten individuals. From the four TPIM’s cases we can see how each individual has had or got some direct connection with acts of terrorism. In *CC and CF* both individuals had travelled to Somalia and had close connections with the terror group Al Shabab (paragraphs 31-36), where both their activities (CF who we now know to be Mohammed Mohamed who absconded form his TPIM in 2013) included training and fighting in terrorist conflicts that were so sever it led to Lloyd Jones LJ stating that they had a substantial role in terrorist activity and as a result he found the national security case against them as ‘overwhelming’ (paragraph 38). In *BF v SSHD* w it was documented that BF held extreme,

radical Islamic views to such an extent Silber J held it was likely he would engage in terrorism activity overseas if he ceased to be subject to a Tpm (paragraph 35).

The courts have restricted or removed the measures imposed by the Secretary of State on TPIM measures imposed on individuals (for example *BF v SSHD* paragraph 42) as the courts have examined each measure in detail. This returns to the principle of proportionality and necessity regarding whether a measure contained in a TPIM is appropriate and relevant. In relation to proportionality in *Guzzardi v Italy* (Application no. 7367/76) the European Court of Human Rights held the difference between deprivation of and restriction of liberty is one of degree or intensity and not of one of nature or substance (paragraph 93). In the challenges made in the four TPIM cases by the applicants to the measures contained in their Tpm, this issue has been at the heart of the courts' decision making as Wilkie J in *CF v SSHD* stated, an inconvenience is not of such severity to make a measure lack proportionality. While a Tpm may be a diluted version of the Prevention of Terrorism Act 2005's control order provided a lighter touch regarding the restrictive measure imposed on an individual (Cochrane 2013, p.43) the question is if there is a need for them and as the UK government's 2011 Counter-Terrorism Review reported, surveillance by the police and the security services on suspected individuals does not provide control (paragraph 13).

## **Key Acts**

Terrorism Prevention and Investigation Measures Act 2011

## **Key Subordinate Legislation**

European Convention on Human Rights



## **Key Quasi-legislation**

None

## **Key European Union Legislation**

None

## **Key Cases**

*SSHD v CC and CF* [2012] EWHC 2837 (Admin)

*SSHD v BM* [2012] EWHC 714 (Admin)

*BF v SSHD* [2013] EWHC 2329 (Admin)

*CF v SSHD* [2013] EWHC 843 (Admin)

*Guzzardi v Italy* (Application no. 7367/76) (European Court of Human Rights)

## **Key Texts**

David Anderson QC (2014) *Terrorism Prevention and Investigation Measures in 2013*  
London, Stationary Office

## **Further Reading**

Counter-Terrorism Review Cm 8004 26<sup>th</sup> January 2011

Feargal Cochrane (2013) 'Not so extraordinary: the democratisation of UK counterinsurgency strategy' *Critical Studies on Terrorism* 6(1) 29-49

Helen Fenwick (2011) 'Preventative anti-terrorist strategies in the UK and ECHR: Control orders, TPIMs and the role of technology' *International Review of Law, Computers & Technology* 25(3) 129-141

Conor Gearty (2013) *Liberty & Security* Cambridge Polity

Andrew Parker (2103) Speech to the Royal United Services Institute, 8<sup>th</sup> October 2013