FACULTY OF LAW
Lund University

Sofia Gehlin

Temporary Restrictions on Travel:
How the United Kingdom deals with foreign fighters and how it affects the individual's Human Rights

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Supervisor: Markus Gunneflo

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Contents

Summary

In February 2015 the British Parliament adopted the Counter-Terrorism and Security Act 2015 for the purpose of filling gaps in the previous counter-terrorism legislations. The temporary restriction on travel measures thus introduced, target the increasing problem with so-called foreign fighters and consist of two elements. The power to seize and retain passports and/or travel documents entrusts a port constable the discretion to decide whether there are reasonable grounds to suspect that an individual intends to leave the United Kingdom for engaging in terrorism-related activity while being abroad. In such event, the constable is permitted to seize the passport and/or travel documents, and on authorization from a senior police officer, retain them. The second element is triggered when a person is outside the UK and the Secretary of State considers there are reasonable grounds to suspect that the person is, or has been, involved in terrorism-related activity. The Secretary of State may then seek permission from a court to impose a Temporary Exclusion Order upon the individual. The court is obliged to give permission, unless the decisions taken by the Secretary of State are obviously flawed, which results in the person being prohibited from returning to the UK, regardless of whether the affected individual is a UK citizen or not.

In the event of other States following the UK in introducing new counter-terrorism measures to prevent people from travelling abroad to participate in terrorism, it is vital to assess the human rights implications these measures bring.

In this thesis, I argue that the temporary restriction on travel measures are criminal in nature although in the domestic legal order they are classified as administrative powers. The European Court of Human Rights established in its judgment in *Engel and Others v the Netherlands* three criteria for determining the *de facto* character of domestic provisions as they should be understood within the meaning of the European Convention on Human Rights: the label in national law, the nature of the offence and the severity of the penalty. In applying these criteria to the temporary restrictions on travel, my analysis shows that the use of these powers amounts to an imposition of a criminal sanction, in particular due to the severe intrusions with the affected individual's human rights and liberties they cause.

To consider a provision criminal in nature, as opposed to administrative, renders the need to include procedural safeguards appropriate for criminal law standards. The fundamental protection in this respect is the right to a fair trial codified in ECHR, article 6. For the use of the temporary restrictions on travel measures to be lawful, adequate judicial review is crucial in order to protect from an arbitrary application. As my analysis reveals, the Act lacks sufficient safeguards to the detriment of the targeted individual, which I contend is due to the choice to regard the provisions as containing administrative powers.

Sammanfattning

I februari 2015 antog det Brittiska parlamentet *the Counter-Terrorism and Security Act 2015*, i syfte att fylla ut luckor i den tidigare kontra-terror lagstiftningen. De temporära reseförbud som därmed infördes riktas mot det tilltagande problemet med så kallade foreign fighters och består av två delar. Befogenheten att beslagta och kvarhålla pass och andra resedokument ger en gränskontrollerande tjänsteman friheten att bestämma om det föreligger skälig grund att misstänka att personen ifråga har för avsikt att resa utanför Storbritannien för att delta i terrorismrelaterad verksamhet. I en sådan situation har tjänstemannen tillåtelse att beslagta passet och/eller resedokumenten och, efter tillstånd av en polistjänsteman av högre rang, kvarhålla dem. Den andra delen aktiveras när en person befinner sig utanför Storbritannien och Secretary of State (den minister som har det övergripande ansvaret för säkerhet och terrorism, lagstiftning och budgetfrågor) anser att det finns skälig anledning att misstänka att personen är, eller har varit, delaktig i terrorismrelaterad verksamhet. Secretary of State kan då söka tillstånd hos en domstol om att få ålägga individen en temporär exkluderingsorder. Domstolen är skyldig att ge tillstånd, såvida inte de beslut Secretary of State har fattat är uppenbart felaktiga. Till följd av detta förbjuds individen att återvända till Storbritannien, oavsett om det är en Brittisk medborgare eller inte.

För den händelse att andra länder följer Storbritannien och introducerar nya kontra-terror åtgärder för att förhindra människor från att resa utomlands för att delta i terrorism, är det nödvändigt att granska vilka konsekvenser för mänskliga rättigheter dessa åtgärder medför.

I den här uppsatsen argumenterar jag för att de temporära reseförbuden är straffrättsliga till sin natur, även om de i det inhemska rättssystemet klassificeras som administrativa åtgärder. Europadomstolen för mänskliga rättigheter fastställde i sitt avgörande i *Engel med flera mot Nederländerna* tre kriterier för att avgöra den *de facto* karaktären på nationella bestämmelser så som de ska tolkas inom ramen för Europakonventionen för mänskliga rättigheter: den nationella klassificeringen, brottets beskaffenhet och straffets allvarlighet. Genom tillämpning av dessa kriterier på de temporära reseförbuden, visar min analys att utövandet av befogenheterna innebär ett åläggande av en straffrättslig sanktion, särskilt med beaktande av de allvarliga intrång i individens mänskliga rättigheter som de orsakar.

Att betrakta lagrum som straffrättsliga, i motsats till administrativa, ställer krav på att inkludera processuella skyddsmekanismer som är lämpliga för den straffrättsliga standarden. Det grundläggande skyddet i detta hänseende är rätten till en rättvis rättegång i Europakonventionens artikel 6. För att användningen av de temporära reseförbuden ska vara laglig måste en godtycklig tillämpning undvikas, vilket kräver en adekvat rättslig granskning. Min analys visar att lagen saknar tillräckliga skyddsmekanismer vilket medför en nackdel för den berörda individen, något jag menar beror på valet att betrakta åtgärderna som administrativa.

Preface

I would like to state my gratitude to a number of persons who have assisted me in the writing process of this thesis.

First, thank you to Markus Gunneflo, my supervisor, who has guided me from the very beginning in the art of thesis writing and helped me to realize the discrepancies between what I actually say and what I intend to say.

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Sincerely yours,

Sofia.

Abbreviations

CoE	Council of Europe
CTS Act 2015	Counter-Terrorism and Security Act 2015
CTS Bill	Counter-Terrorism and Security Bill
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
JCHR	Joint Committee on Human Rights
JTAC	Joint Terrorism Analysis Centre
TEO	Temporary Exclusion Order
TPIM	Terrorism Prevention and Investigation Measures
UNSC	United Nations Security Council

1 Introduction

The history of terrorism and counter-terrorism legislation in the United Kingdom goes far back in time. The political struggle of IRA in Northern Ireland, alongside various isolated terrorist attacks, has provoked several legislative measures intended to be temporary but prolonged into a state of permanency.[1] The majority of the Acts composing the anti-terrorism laws were drafted and enacted as a reaction to a tragic event.[2] In contrast, the Terrorism Act 2000[3] was the result of a careful consideration based on a substantial review and thus "consolidated, normalized, and made permanent the previous patchwork of 'provisional' counter-terrorism laws".[4] Nevertheless, the Terrorism Act 2000 has been criticized particularly for its failure to avoid the need for new emergency measures – as evidenced by the adoption of the Terrorism, Crime and Security Act 2001.[5] This shortcoming is further revealed by the number of counter-terrorism acts issued post 2001: the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Counter-Terrorism Act 2008, the Terrorism Prevention and Investigation Measures Act 2011; and the last one, the Counter-Terrorism and Security Act 2015 (hereinafter, the CTS Act 2015 or the Act will serve as synonyms), which is under scrutiny in this thesis.[6] Indeed, the latest Act is the seventh concerned with counter-terrorism measures that has been introduced the past fourteen years.[7]

The triggering factor this time is a raised terrorist threat level from substantial to severe, meaning that a terrorist attack is "highly likely".[8] The Joint Terrorism Analysis Centre (JTAC) indicates that the threat primarily derives from international terrorism and UK nationals travelling overseas to serve as foreign fighters represent a part of the problem.[9] Accordingly, the Counter-Terrorism and Security Bill (CTS Bill) was drafted to *inter alia* "disrupt the ability of people to travel abroad to fight […] and to control their return".[10]

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[1] Walker, Clive, *Blackstone's guide to The Anti-Terrorism Legislation*, 1 ed., Oxford University Press, New York, 2002, p. 1.
[2] Walker, 2002, pp. 3-4.
[3] The Terrorism Act 2000: 2000 Chapter 11 [20th July 2000].
[4] Neal, Andrew A., "Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors" in *Terrorism and Political Violence*, Vol. 24, Issue 3, 2012, pp. 357-374, p. 360.
[5] *See* Walker, 2002, pp. 4-7 and Neal in *Terrorism and Political Violence*, p. 360.
[6] Counter-Terrorism and Security Act 2015: 2015 Chapter 6, [12th February 2015].
[7] Liberty (the National Council for Civil Liberties), *Liberty's second reading briefing on the Counter-Terrorism and Security Bill in the House of Commons*, December 2014, para. 1.
[8] CTS Bill, Explanatory Notes, HL Bill 75-EN, para. 3.
[9] https://www.mi5.gov.uk/home/about-us/what-we-do/the-threats/terrorism/threat-levels.html; https://www.mi5.gov.uk/home/about-us/what-we-do/the-threats/terrorism/international-terrorism/international-terrorism-and-the-uk/foreign-fighters.html, 30 March 2015.
[10] CTS Bill, Explanatory Notes, para. 4.

In this thesis, I will study the rationale and character of the recently added temporary restrictions on travel powers – to seize and retain passports and/or travel documents and to impose a temporary exclusion order (TEO) – along with the impacts on human rights and liberties these new powers bring. The temporary restrictions on travel powers allow a constable at a port to seize, and apply for retention of, the passport and/or travel document from an individual based on reasonable grounds to suspect that the person is intending to leave the country for engaging in terrorism-related activity abroad. This will prevent the person from travelling outside the UK for a period of 14-30 days. Likewise, the Secretary of State is entrusted with the discretion to decide whether there is reasonable ground to suspect that a person is or has been involved in terrorism-related activity while being abroad and it therefore is necessary to temporarily exclude the person from the UK. Let us say, for instance, that a person is abroad and there seem to be reasonable grounds for suspecting that he or she is involved in terrorism-related activity. A court gives the Secretary of State permission to impose a TEO, resulting in the person's inability to return home to the UK unless he or she accepts the conditions indicated by the Secretary of State in a permit to return.

1.1 Purpose and research question

My work in this thesis stems from a proposition, based on which I will conduct my research. I argue that, the temporary restrictions on travel constitute a way of imposing sanctions amounting to criminal penalties. This assumption stems from the jurisprudence of the European Court of Human Rights (ECtHR or the Court) where national provisions have been judged 'criminal' within the meaning of the European Convention on Human Rights[11] (ECHR or the Convention), although in the domestic legal system they have been designated as part of another regime of law. This means that human rights law requires criminal law standards, such as the right to a fair trial, to be met in order to minimize the risk of violations of an individual's human rights and liberties.

During the passage of the CTS Bill, the UK Government issued an ECHR Memorandum addressing potential impacts on the affected individual's human rights. This assessment, however, was conducted from a different point of view than mine, namely that the measures are purely administrative in nature. From this perspective, the Government concluded that the CTS Act 2015 is compatible with the Convention. On the contrary, from my standpoint, the temporary restrictions on travel should be determined as containing norms of penal character, otherwise it would inappropriately influence the respect for and protection of the individual's human rights. To be clear, I do not suggest that there should not be any preventative measures, on the contrary these are vital in the fight against terrorism.

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950.

However, taking into account that the preventative powers in 'ordinary' criminal law are limited by procedural safeguards intended to protect the individual's rights and liberties, I consider the need of rigid safeguards to be equally (and perhaps even more) important when it comes to combating terrorism as the powers to interfere are more far-reaching than in 'ordinary' criminal law.

Consequently, the aim of this thesis is to examine the ECtHR's case law to detect the criteria that the Court has used in determining certain provisions as being 'criminal' within the meaning of the Convention, notwithstanding another classification in domestic laws. I will then apply these criteria to the temporary restriction on travel measures provided for by the CTS Act 2015 in order to estimate the *de facto* character of the provisions. This in turn is intended to enable an assessment of the consequences of this presumed criminal character. Thus, for realizing this goal, I will answer the following questions:

(I) What powers do the temporary restrictions on travel give to the executive and what is the rationale behind their introduction?
(II) Which criteria has the European Court of Human Rights established when considering the *de facto* character of national provisions imposing sanctions to the detriment of an individual?
(III) When applying these criteria to the temporary restrictions on travel measures contained in the Counter-Terrorism and Security Act 2015, what is their *de facto* character?
(IV) Supposing that the *de facto* character is criminal, which procedural safeguards must be respected in order to protect the individual's human rights and liberties?

The first question will be answered in chapter 2; chapter 3 is dedicated to question two and three; and chapter 4 will be dealing with question four.

The reasons for targeting my focal point at the temporary restrictions on travel are three:

(I) They bring new powers to the personnel entrusted with the execution of the anti-terror laws[12];
(II) these new powers might interfere substantially with the affected individual's rights and liberties, substantially enough to be judged as entailing penal characteristics (as will be elaborated upon in this thesis); and

[12] The novelty of the powers is, however, a matter of interpretation. Powers similar to seizing passports exists under the Royal Prerogative to cancel and withdraw passports, *see* below chapter 2.4.1; and the practice of excluding individuals has previously existed in relation to terrorism in Northern Ireland; individuals were excluded from Great Britain to Northern Ireland based on the government's suspicion that they were involved in terrorism without judicial hearing. *See* Foley, Frank, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, Cambridge University Press, New York, 2013, p. 188.

(III) due to the current attention paid to people choosing to travel to a distant country with intention of engaging in what could be deemed as terrorism, my personal interest lies with the cross-border dilemma of the so called 'foreign fighters'.[13]

Because of the increasing disquiet about foreign fighters, states need to adopt or amend their legislation to face and challenge the problem with persons travelling to combat zones to engage in the conflict. To impose temporary restrictions on travel is one way of doing this and the United Kingdom is one of the first to introduce such measures. Already prior to the adoption of the CTS Act 2015, the British counter-terrorism legislation was one of the most far-reaching in Europe and the UK definition of terrorism is extraordinarily wide.[14] The introduction of the CTS Act 2015 extends this far-reaching legislation further. At the probabilities of other States introducing similar measures in addressing the problem with foreign fighters, it is crucial to scrutinize their human right's implications, and how their use conform to international human rights instruments. That is what this thesis will do.

1.2 Method and material

Counter-terrorism measures are often subject to judicial review on application of an individual whose rights and freedoms are allegedly violated due to the exercise of these powers. The "draconian and illiberal measures" are thus frequently found to be contrary to human rights.[15] A reasonable guess is, accordingly, that the powers contained in the CTS Act 2015 will be under scrutiny by national courts as well as the ECtHR in the future. The contribution of this thesis is thus to precede the judicial process.

My methodology is quite straightforward and encompasses three steps. First, I will introduce the CTS Act 2015. Second, I will examine the jurisprudence by the ECtHR to detect the criteria for establishing a 'criminal' character and subsequently apply these criteria to the temporary restriction on travel measures. Third, I will assess the consequences of the

[13] The current focus is reflected, for instance, by an article in *The Economist*: "It ain't half hot here, mum. Why and how Westerners go to fight in Syria and Iraq", Vol. 412, No. 8902, 30 August 2014, pp. 28-30; a reportage in Swedish television by *Uppdrag Granskning*, episode 6, 18 February 2015, available at: http://www.svtplay.se/video/2688371/uppdrag-granskning/uppdrag-granskning-avsnitt-6, 12 May 2015; and a series of reportages published by *Le Monde*, http://www.lemonde.fr/proche-orient/article/2015/04/13/pres-de-1-500-francais-combattraient-en-syrie-selon-l-ue_4614689_3218.html, 12 May 2015.

[14] Walker, 2002, p. 29. In his submission to the JCHR, Walker stated "UK has the most extensive terrorism laws in the whole of Europe, and the necessity for new additions should always be questioned, as should their impact on right and legitimacy", *Counter Terrorism and Security Bill 2014-15*, 5 December 2014, para. 2. On the extent of powers entrusted to the discretion of executive officers, *see* the ECtHR's assessment in *Gillan and Quinton v the United Kingdom*, Appl. No. 4158/05, 12 January 2010, paras. 79-85.

[15] Neal in *Terrorism and Political Violence*, p. 359.

findings in the second part, i.e. how the safeguards included in the Act coincide with what is required by the criminal law regime. In doing that, I will enable an assessment as to whether these powers are of *de facto* penal character and whether the requirements of the right to a fair trial in ECHR, article 6 should in fact be taken into account when the powers are used.

For realizing a thorough analysis of the temporary restriction on travel measures, I will conduct a traditional legal study of the Act, related bill documents and case law where relevant. One cornerstone in conducting a legal research is to attend to authoritative sources.[16] Belonging to the Common Law system, the British case law is of immense importance for the interpretation of legal provisions as the judges' decisions have the function of binding precedents as well as the function of developing the law.[17] Accordingly, while assessing the supposed criminal nature of the Act, I will resort to jurisprudence in relation to the definition of terrorist, which is relevant for determining whom the legislation targets. However, due to the recent adoption of the CTS Act 2015, it will not be possible to rely upon interpretations of its contents by the judges; except for when reference is made to former legislation, there simply is no case law yet. Consequently, the material that will serve as my primary sources in relation to the CTS Act 2015, are the explanatory notes, various Impact Assessments, the ECHR Memorandum and the research and briefing paper issued by the Government throughout the passage of the Bill. In addition, I will use documentation from the Legislative Scrutiny performed by the Joint Committee on Human Rights (the JCHR or the Committee), as well as evidence given to the JCHR and the Home Affair Committee. Furthermore, divers submissions and reports related to the Bill and counter-terrorism legislation in general will be studied.

All member states of the European Union have to cooperate sincerely and, *inter alia*, refrain from realizing measures "which could jeopardise the attainment of the Union's objectives".[18] Hence, a correct interpretation of the domestic legislation – when concerning an issue encompassed by the EU competence – should be carried out in consideration of the union's authoritative sources of interpretation, particularly case-law from the Court of Justice of the European Union (hereinafter the EU Court of Justice) and the general principles of the European Union.[19] As regards counter-terrorism regulations, there are two main instruments to take into account, namely the Council of Europe Framework Decision on combating terrorism and the Council of Europe Convention on the Prevention of Terrorism. These, along with the latest contribution on behalf of the United Nation (UNSC res. 2178, 2014), will be considered in determining how measures dealing with foreign

[16] Korling, Fredric & Zamboni, Mauro (eds.), *Juridisk metodlära*, 1 ed., Studentlitteratur, Lund, 2013, p. 29.
[17] Hanson, Sharon, *Legal method, skills and reasoning*, 3 ed., Routledge Cavendish Taylor & Francis Group, London and New York, 2010, p. 156.
[18] Treaty of Lisbon amending the treaty on the European Union and the treaty establishing the European Community, 2007/C 306/01, Article 3a.3
[19] Reichel, Jane, "EU-rättslig metod" in Korling & Zamboni, pp. 109-140, p. 125.

fighters have been approached in other jurisdictions. In this respect, case law from the EU Court of Justice, and reports on both the EU and the UN regulations will serve as a basis for my analysis, albeit no exhaustive account will be provided. Moreover, the ECHR is of particular interest since the UK legislation will be analysed from a human rights perspective and the Convention is thus the point of departure. For the interpretation of the ECHR and its provisions, cases from the ECtHR are inevitable to include in the research. Consideration will also be given to the International Covenant on Civil and Political Rights (ICCPR).

As to the material concerning the 'criminal' criteria established by the ECtHR, my primary sources are obviously cases from the Court. For reasons of time and space, it is not feasible to give an exhaustive account of the case law on the topic; rather, a limited selection of cases will serve as authorities in this respect. The chosen jurisprudence, however, are cases frequently referred to by the Court itself and by scholars commenting on related issues.[20] In addition, there are a tremendous amount of doctrine available; thus, how to approach administrative and civil sanctions in disperse circumstances have been elaborated upon, interpreted and analysed repeatedly since the Court's first ruling on the matter (in the case of *Engel and Others v the Netherlands*, judged in 1976).[21] On the contrary, the application of the *Engel*-criteria to administrative or civil provisions concerned with countering terrorism is not as easy to find; with respect to the CTS Act 2015 in particular, there is none for natural reasons. Consequently, this thesis will be one of the first in this specific field.

1.3 Delimitations

The CTS Act 2015 is a comprehensive supplement to the United Kingdom anti-terrorism legislation consisting of seven parts and eight schedules. Notwithstanding the relevance of examining the Act in its entirety and situate each part in their specific contexts, this thesis will primarily be dedicated to the travel restrictions contained in part 1. This is not to be taken for neglecting the significance of other measures in facing the threat posed by terrorists in general and foreign fighters in particular, but is simply motivated by time and space concerns. Due to the magnitude of anti-terror laws in the United Kingdom and the multiple provisions included in Acts mainly concerned with other issues (such as the Data Retention and

[20] *See for instance* Emmerson, Ben QC and Ashworth, Andrew QC, *Human Rights and Criminal Justice*, Sweet & Maxwell, London, 2001; and Nowak, Karol, *Oskyldighetspresumtionen*, Nordstedts Juridik, Stockholm, 2003.

[21] The significance of the distinction between criminal sanctions on the one hand and administrative or civil sanctions on the other is comprehensively discussed, albeit without reference to the *Engel*-case, in "Les Problèmes Juridiques et Pratiques Posés par la Différence entre le Droit Criminel et le Droit Administratif Pénal/The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law" in *Revue Internationale de Droit Pénal*, Vol. 59, Nos. 1-2, Association Internationale de Droit Pénal, 1988.

Investigatory Powers Act 2014[22] and the Immigration, Asylum and Nationality Act 2006[23], for instance) the scope of this thesis do not allow for a comprehensive analysis of the entire counter-terrorism framework in the UK. Nor will I study the internal relationship between the CTS Act 2015, on the one hand, and previous domestic legislation on the other. The Human Rights Act 1998 was enacted in order to give "further effect to the rights and freedoms guaranteed under the ECHR; …"[24], thus, the compatibility with the former generates in principle the compatibility with the latter.

During the passage of the CTS Bill, both the Government and the JCHR recognized a potential interference of ECHR, article 14[25]; in particular in the light of the discriminatory use of the stop and search powers in the Terrorism Act 2000, the extensive discretion entrusted with the executives is troublesome.[26] In relation to passport seizures, the Government asserted that the Code of Practice will indicate how to monitor the exercise of the powers in order to prevent their discriminatory application.[27] To scrutinize whether violations of article 14 are realized by the use of the temporary restriction on travel measures must inevitably include future studies of empirical material; at this point in time, there is no such material available and the inclusion of such would render the scope of this thesis far too extensive. Thus, it suffices to note that the introduction of the temporary restrictions on travel could potentially render breaches of the right to non-discrimination.

Furthermore, the UK employs a general strategy for countering terrorism called CONTEST, its third and latest version was published in July 2011. The strategy aims at reducing the threat from terrorism "so that people can go about their lives freely and with confidence"[28], and consists of four main parts: Pursue, Prevent, Protect and Prepare.[29] The purpose of the first element is to stop in-country terrorist attacks as well as those overseas threatening the UK interests; the second section addresses radicalisation; Protect aims at strengthening the protection against terrorist attacks and thus reduce the state's vulnerability; and the Prepare part is intended to ease the consequences of an attack should it not be possible to stop it.[30] Changing terrorist threat affects the strategy and leads to the integration of new Government policies.[31] As such, the CTS Act 2015 is one fraction of this strategy and predominately strengthens the Pursue, Prevent and Protect

[22] The Data Retention and Investigatory Powers Act 2014: 2014 Chapter 27 [17th July 2014].
[23] The Immigration, Asylum and Nationality Act 2006: 2006 Chapter 13 [30th March 2006].
[24] The Human Rights Act 1998: 1998 Chapter 42 [9th November 1998].
[25] JCHR, Legislative Scrutiny, para. 2.40.
[26] That the powers have been used in a discriminatory fashion was confirmed by the ECtHR having examined evidence presented in the case of *Gillan and Quinton v the United Kingdom*, para. 85.
[27] ECHR Memorandum, para. 8.
[28] CONTEST The United Kingdom's Strategy for Countering Terrorism, July 2011, para. 1.2
[29] CTS Bill, Explanatory Notes (n 6), para. 5.
[30] CONTEST, paras. 1.16, 1.27, 1.33 and 1.40.
[31] *Ibid.*, para. 1.1.

streams of work.[32] The strategy refers to the ambitions of a four years period meaning that this year the strategy is at sunset. At the assumption of a fourth CONTEST version being published in the near future, beside its amplitude, there is little reason to make the strategy a priority within the scope of this thesis. To analyse the appropriateness and execution of it would require studies of a considerable amount of empirical material as well as evaluations thereof, an exercise lacking feasibility within this work.

It must be noted that the introduction of the CTS Act 2015 is at the margin of what is acceptable with regard to the United Kingdom's international legal obligations towards other States, of which the respect for Human Rights is just one part. During the passage of the CTS Bill, Guy S. Goodwin-Gill submitted an account on the implications in this respect[33]; however, the scrutiny of the responsibilities to other states and to the international community has to fall outside the scope of this thesis.

Furthermore, for reasons of time and space it is not possible to give an exhaustive account of the components of the right to a fair trial, nor of all issues related to each element of the right that I will discuss. Instead, I will deliberate upon the right to a fair trial and related matters in those parts that are affected by the use of the temporary restrictions on travel.

1.4 Definitions

To determine the legal definition of terrorism as dictated in the United Kingdom is important as it serves as the basis for identifying which actions constitute terrorist acts and therefore who is a terrorist. Moreover, the legal definition is also the foundation for prescribing or extending controversial, intrusive powers assigned to the discretion of the executive authorities. Accordingly, the definitions of relevance for this thesis will be briefly presented here; in chapter 3.2.1 I will elaborate further on the extreme width of the UK definitions.

First, section 14(2) and schedule 1, paragraph 1(11) of the CTS Act 2015 refers to the Terrorism Act 2000 as regards the meaning of the terms "terrorism" and "terrorist". Consequently, **terrorism** is the use or threat of (i) serious violence against a person; (ii) serious damage to property; (iii) an action that endangers another person's life; (iv) an action that creates a serious risk to the health or safety of the public or a section thereof; or (v) an action designed seriously to interfere with or seriously to disrupt an electronic system. The use or threat of such actions must be designed to influence the government of an international governmental organisation or

[32] CTS Bill, Explanatory Notes (n 6), para. 5.
[33] Goodwin-Gill, Guy S., *'Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations*, Bills (14-15) 065, 2 December 2014.

to intimidate the public or a section thereof; it must also be made for the purpose of advancing a political, religious, racial or ideological cause.[34]

Second, a **terrorist** is, according to the Terrorism Act 2000, section 40[35], a person who has committed an offence ranging from membership in a 'terrorist' organisation; via support and information; to financial aspects in connection with terrorist activities.[36] A terrorist may also be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism.

Third, the CTS Act 2015, section 14(4) and schedule 1, paragraph 1(10) defines 'involvement in **terrorism-related activity**' as one or more of the following:

> (a) the commission, preparation or instigation of acts of terrorism;
> (b) conduct that facilitates the commission, preparation or instigation of such acts, or is intended to do so;
> (c) conduct that gives encouragement to the commission, preparation or instigation of such acts, or is intended to do so;
> (d) conduct that gives support or assistance to individuals who are known or believed by the individual [person] concerned to be involved in conduct falling within paragraph (a).

Fourth, the preamble of the United Nation Security Council (UNSC) resolution 2178 defines the term '**foreign fighter**' as

> individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict […].[37]

In the UK the notion of 'foreign fighters' is not expressly defined, albeit the research paper to the CTS Bill refers to "British nationals going abroad to join terrorist groups".[38] Taking into account the definition of 'terrorism-related activity', it is presumed, for the purpose of this thesis, that the British understanding of 'foreign fighter' is consistent to the one adopted by the UN.

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[34] *See* the Terrorism Act 2000, sections 1(1) to 1(5) in Supplement B.
[35] *See* Supplement B.
[36] *See* the Terrorism Act 2000, sections 11, 12, 15 to 18, 54 and 56 to 63, available at: http://www.legislation.gov.uk/ukpga/2000/11/contents, 11 March 2015. In addition, subsequent counter-terrorism Acts proscribe further offences, for instance, the Terrorism Prevention and Investigation Measures Act 2011: 2011 Chapter 23 [14th December 2011], s. 23; Terrorism Act 2006: 2006 Chapter 11 [30th March 2006], part 1; and CTS Act 2015, s. 10.
[37] United Nations Security Council Resolution 2178, S/RES/2178 (2014), 24 September 2014, preamble, p. 2.
[38] CTS Bill, Bill No 127 of 2014-15, *Research Paper 14/63*, 27 November 2014, p. 2.

1.5 Outline

In order to enable the analysis of the temporary restrictions on travel introduced by the CTS Act 2015, it is fundamental to understand the main lines of the Act. *Chapter 2* will therefore provide an overview of the Act in pursuit of answering the first research question: what powers does the temporary restrictions on travel give to the executive and what is the rationale behind their introduction? First, the purpose of the Act will be approximated for facilitating the understanding of the necessity of and the rationale behind the Act. Second, the temporary restrictions on travel measures will be carefully examined as this will serve as the basis for comprehending their stringency, which is why I advocate that the measures are indeed of *de facto* penal character.

Next, in *chapter 3*, I will examine the autonomy of the term 'criminal charge' as interpreted by the ECtHR. For ensuring an equal application of the ECHR, the Court has established three criteria of relevance when determining whether a national provision is in fact of 'criminal' nature, regardless of how it is labelled in the domestic legal system. Accordingly, this chapter will be dedicated to the second and third research questions, namely:

- Which criteria has the European Court of Human Rights established when considering the *de facto* character of national provisions imposing sanctions to the detriment of an individual?
- When applying these criteria to the temporary restrictions on travel measures contained in the Counter-Terrorism and Security Act 2015, what is their *de facto* character?

I will thus introduce the three so-called *Engel* criteria and how they have been developed in the Court's jurisprudence. Following these criteria I will examine how the temporary restrictions on travel powers are labelled in UK law; I will assess the nature of the offence; I will ascertain the severity of the penalty.

Lastly, *chapter 4* will encompass the analysis intended to answer question four, i.e. supposing that the *de facto* character is criminal, which procedural safeguards must be respected in order to protect the individual's human rights and liberties? The analysis will therefore proceed to examine what has been stated about the involvement of judicial authorities during the passage of the Bill, and how the criminal nature of the two measures affects these considerations. More specifically, I will assess the implications on the individual's right to a fair trial as protected by *inter alia* ECHR, article 6.

2 The Counter-Terrorism and Security Act 2015

To facilitate the understanding of the temporary restriction on travel measures introduced by the enactment of the CTS Act 2015, the first stop is to approximate the purpose and rationale for advancing the Bill. Second, the substantial provisions of the Act will be scrutinized. Thus, this chapter will give account of the content of the Act[39] and, for sake of clarification, related concerns and critiques that have been discussed during the passage of the CTS Bill.

2.1 The purpose of the Act

The Bill proposal and the following adoption of the Act is a direct reaction to the severe threat level announced by the JTAC in August 2014, meaning that a terrorist attack is "highly likely".[40] Facing the troubling fact that individuals travel from the United Kingdom to conflict zones abroad, the Government ascertains the intention to "strengthen the legal powers and capabilities of law enforcement and intelligence agencies to disrupt terrorism and prevent individuals from being radicalised in the first instance".[41] The overarching goal is to protect the public and ensure public safety.[42] The Government considers that

> [t]he Act reduces the risk of terrorism to the UK by:
> - Preventing individuals from travelling abroad to commit terrorist related activity;
> - Disrupting the ability of terrorist, or those suspected of terrorist related activity, to return to the UK;
> - Enhancing our ability to monitor and control the actions of those in the UK that pose a threat; and
> - Combating the underlying ideology that feeds, supports and sanctions terrorism.[43]

The new powers are intended to exist alongside those previously in place,[44] constituting yet another extension of the already comprehensive application of anti-terrorism laws in the UK.

The necessity of introducing additional powers, in particular the temporary restrictions on travel, has been a topic of repeated concern during the passage of the Bill. In that respect, the motivation frequently resorted to is

[39] Relevant parts of the Act are attached in Supplement A.
[40] CTS Bill, Explanatory Notes, para. 3.
[41] *Ibid*.
[42] CTS Bill, Privacy Impact Assessment, November 2014, p. 2.
[43] *Overarching Impact Assessment for the Counter Terrorism and Security Act 2015- Royal Assent*, Home Office, IA No: HO0150, 11 February 2015, para. 4.
[44] *Ibid.*, para. 8.

the risk of foreign fighters gaining experience and knowledge abroad, thus posing a threat to the public in the United Kingdom upon their return.[45] However, even prior to the CTS Act 2015 measures similar to the temporary restrictions on travel were in place; under a Royal Prerogative power to cancel or refuse passports with regard to public interest, British citizens have been stopped from travelling when the purpose has been to engage in terrorist-related activity. Likewise, foreign nationals have been prevented from re-entering the British territory and those endowed with dual nationality have had their British citizenship revoked.[46] The objective of the CTS Act 2015 is thus to provide for measures absent in former legislation in order to strengthen the powers to prevent terror attacks from being realized.[47] As such, the Independent Reviewer of Terrorism Legislation, David Anderson, deemed them "reasonably useful extra powers".[48]

A second matter that has been disputed during the Bill's passage is the resort to 'fast-tracking'; such a method leaves the opportunity for proper scrutiny at peril. The JCHR expressed concerns about "the compressed timetable [that] has inevitably affected our ability to scrutinise the Bill fully".[49] As justification, however, the Government expressed that "given the pressing operational need for enhanced powers to respond to the current terrorism threat" there was no possibility to extend the timetable in order to permit further parliamentary scrutiny.[50] James Brokenshire MP, Minister for Security and Immigration, similarly explained that due to the "clear operational needs […] there is a degree of urgency" which is the reason for an accelerated process to get the powers available.[51] Furthermore, the Minister adduced that "the Bill represents a considered and targeted response to the very serious and rapidly changing threats we face" and ensured the Committee that the Government had consulted operational partners to ensure that the Bill became feasible, contributing with operational value, while simultaneously striking "the correct balance between our rights to privacy and security".[52] Accordingly, the raised threat level in combination with the urgent need of dealing with those choosing to travel abroad to engage in terrorist related activity, are the reasons necessitating a new Act as well as justifying the fast-tracked process.

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[45] *See* for instance the response to Q7 by the Deputy Assistant Commissioner for the Metropolitan Police, Helene Ball in House of Commons, Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, HC 838, 3 December 2014; and House of Lords, House of Commons, Joint Committee on Human Rights, *Examination of Witness*: James Brokenshire MP, Minister for Security and Immigration, Home Office, Q17.

[46] CTS Bill, Explanatory Notes, para. 47.

[47] For further explanation relating to parts 2-7 of the Act, *see* CTS Bill, Explanatory Notes, paras. 49-54.

[48] Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, Q122.

[49] House of Lords, House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill*, Fifth Report of Session 2014-15, HL Paper 86, HC 859, para. 1.10.

[50] CTS Bill, Explanatory Notes, para. 29.

[51] JCHR, *Examination of Witness*, Q2.

[52] James Brokenshire MP, Immigration and Security Minister, Home Office, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, Bills (14-15) 078, 20 January 2015, p. 1.

In this respect, one further remark is necessary. In accordance with the UK legislative practice, the CTS Bill was accompanied by several Impact Assessments, both overarching ones dealing with the general aspects of the entire Bill, as well as more specialized ones handling the specific measures one by one. The assessments provide for the background and rationale for intervention; the objectives and contents; the existing measures in the field; the groups affected by the legislation; the consultation process; and the options available to the Government.[53] As regards the options, the Government has consistently identified two options: Option 1 – do nothing, and Option 2 (the preferred option) – do what the Government proposes in the Bill.[54] That is to say, in contrast to considering additional options available to tackle the problem as identified in the background and rationale for the measures. One such plausible option is presented by the JCHR in respect of TEOs; since the primary purpose with imposing a TEO is to facilitate the control of the individual once he or she returns, a less restrictive alternative would be to authorize the imposition of a 'notification of return order' instead of exclusion order. In the Committee's view, such a notification would allow the UK authorities to exercise the same supervision as intended with a permit to return, while simultaneously avoid the stringent sanction of excluding a British citizen from the country.[55] Whether the choice to address only two options in the Impact Assessments is the common practice when passaging a bill in the UK; whether it is the result of the Government's decision to fast-track the Bill; or whether there is another reason, I will leave unspoken. It suffices to note that less intrusive alternatives, potentially equally effective, have been identified.

2.2 Temporary restrictions on travel

Part 1 of the CTS Act 2015 contains the controversial and more innovative provisions on 'temporary restrictions on travel'. The passage of the Bill has been described as adopting "some of the most problematic changes to counterterrorism policy in years"[56] and the powers in part 1, in particular, has been described as "pretty draconian"[57]; by others, they have been deemed "valuable" and "reasonably useful".[58]

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[53] *See* for instance the structure of the *Overarching Impact Assessment for the Counter Terrorism and Security Act 2015 – Royal Assent.*

[54] For instance, in the *Overarching Impact Assessment* the second option is to "introduce legislation to disrupt the ability of individuals to travel overseas fight, or commit terrorist related activity, as well as disrupt their ability to return here; enhance our ability to monitor and control the actions of those in the UK that pose a threat; introduce measures to allow IP resolution; and better support those individuals at serious risk of being radicalised", para. 20.

[55] JCHR, Legislative Scrutiny, paras. 3.11-3.12.

[56] Human Rights Watch, *UK: New Counterterrorism Bill Curbs Rights*, 1 December 2014.

[57] Expression by the Chair, Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, Q6.

[58] Expressed by Helen Ball and David Anderson, Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, Q8 and Q122.

The purpose of this section is to scrutinize the powers and the associated discussions in order to fully understand their character and content. This will constitute the core for the verification or rejection in chapter 3 of my assumption that the powers are of *de facto* penal character, and the ensuing analysis on the powers' implications on an individual's human rights and liberties, provided for in chapters 3 and 4.

2.2.1 Power to seize and retain passports and/or travel documents

The substance of the seizure and temporary retention of passports (or equated document[59]) and/or travel documents (i.e. a ticket or similar permitting a person to travel across the UK borders[60]) is provided for in Schedule 1 of the CTS Act 2015. According to section 1(1), the powers are triggered when a person "is suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity". The rather extensive schedule encompasses regulations as to who has the authority to exercise the powers against whom, the threshold for exercising the power and their contents, albeit the more specific instructions on functions are provided for in a Code of Practice[61] issued by the Secretary of State.[62] Moreover, the schedule indicates the procedural safeguards intended to obstruct an arbitrary interference with an individual's rights and liberties (their sufficiency will be discussed below).

(a) Rationale

The power to seize and retain passports and/or travel documents (hereinafter I will refer to 'passports' only, which will include travel documents as well) is, as noted above, intended to fill a gap in the existing legislation. Prior to the adoption of the CTS Act 2015, there was no possibility for the police or border officers to *immediately disrupt* a person from travelling; hence, the identified temporal gap. The use of the Royal Prerogative to cancel or refuse a British passport entails a process too complex and time consuming to hinder a person at a port from leaving. Nor are the existing port and border powers to examine an individual sufficient, as they do not enable a disruption of travel.[63]

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[59] *See* definition of 'passport', CTS Act 2015, schedule 1, para. 1(7).
[60] *See* definition of 'travel document', CTS Act 2015, schedule 1, para. 1(6).
[61] Home Office, *Code of Practice for Officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents*, February 2015.
[62] CTS Act 2015, schedule 1, para. 18. The legal status of the Code of Practice is expressed as: "Police Constables (of any rank) and Border Force Officers (whether designated or otherwise) must exercise any functions conferred upon them by Schedule 1 in accordance with this code of practice". It is also admissible as evidence in a civil or criminal court which may take it into account where relevant, para. 20.
[63] These powers are provided for in Terrorism Act 2000, schedule 7, *see* CTS Bill, Explanatory Notes, para. 48.

During the passage of the Bill, contradictory opinions have been presented regarding the necessity of introducing the provisions. On the one hand, Liberty has emphasised the already existing power for the police to arrest someone without warrant if the police reasonably believes that the person is a terrorist as defined above. Such an arrest enables a pre-charge detention during up to 14 days while investigations are carried out; should such a measure be combined with a possibility to release the suspect on bail, Liberty argues, a reasonable condition could be to surrender the passport. Hence, there is no need for introducing the power of passport seizure and retention since the same result, i.e. to prevent people from travelling outside the UK, would be obtained, but "in a way that is much more robust with regard to both due process safeguards and keeping the rest of the population safe".[64] On the other hand, the Independent Reviewer of Terrorism Legislation, David Anderson contended that the Bill proscribed useful extra powers and that the seizure of passport "can be a beneficial thing" since "30 days certainly ought to give enough time to enable the relevant decisions to be made about whether to apply for the royal prerogative from the Home Secretary or whether to prosecute".[65]

In considering both of these standpoints, the JCHR concluded that there was a gap in the existing legislation, albeit "not nearly as wide" as the Government claimed. Thus, the necessity of the Bill had been demonstrated since "preventive action of this sort […] could prove more effective than taking action at a later date".[66]

(b) Content

In order to seize and temporarily retain a passport from a person, whether national or non-national[67], at a port, the constable must have "reasonable grounds to suspect" that the person intends to leave the country for the purpose of being involved in terrorism-related activity.[68] In such a case, in accordance with schedule 1, paragraph 2(5-6), the constable may search for, inspect and retain any travel document, and require a person to hand them over. The search may be exercised on the person, his or her belongings and a vehicle in which the constable believes the person have been or will be travelling. Once a travel document has been seized, the constable must "as soon as possible" either seek authorization for retaining the document or return it. The application for retention should be considered "as soon as possible" and the authorization must not be in writing; for authorizing a retention a senior police officer must be satisfied that there are reasonable grounds for the suspicion.[69] Should the retention application be granted, schedule 1, paragraph 5 provides that the travel document may be retained

[64] Liberty, para. 12.
[65] Home Affairs Committee, *Oral Evidence: Counter-Terrorism and Security Bill*, Q151.
[66] JCHR, Legislative Scrutiny, paras. 2.12 and 2.15.
[67] CTS Act 2015, schedule 1, para. 1(7).
[68] CTS Act 2015, schedule 1, para. 2(1). According to schedule 1, para. 1(8), the term 'port' means an airport, a sea port, a hoverport, a heliport and a railway station with cross-border connections.
[69] *Ibid.*, para. 4.

for a period of 14 days, while consideration is given as to whether to cancel the passport, to charge the person with an offence or to make the person subject to any measure or order in connection with protecting the public from a risk of terrorism. After 72 hours, paragraph 6 requires another police officer than the one who approved the retention in first instance to execute a review aiming at determining whether the authorization was flawed. The threshold of "reasonable grounds to suspect" a person's intention of engaging in terrorism-related activity and the obligation to request authorization for retention of the travel documents, are both considered as part of the safeguards preventing an arbitrary use of the powers.[70]

Additionally, schedule 1, paragraph 8 provides for the possibility to prolong the retention period from 14 to 30 days. Such an extension is subject to judicial review, although the judicial authority is limited to try whether the "relevant persons have been acting diligently and expeditiously" in their efforts to investigate the matters of potentially cancelling the passport, charging the person or subjecting him or her to anti-terror measures. The Government has emphasized the involvement of judicial authorities as an important safeguard;[71] the JCHR, however, has criticized it for only allowing oversight of the diligent and expeditious exercise of the powers as opposed to determine whether there are reasonable grounds for suspicion.[72] These contradictory views will be approached further in chapter 4. Moreover, in protection of the affected individual's interests, the Act requires in schedule 1, paragraph 9 that the person is given the opportunity to make an oral or written representation before the judicial authority when it considers an application for retention, and determines that the person is entitled to legal representation. However, by virtue of schedule 1, paragraph 10, the court enjoys the discretion to exclude both the affected individual and his or her representative from the hearing; as well as decide that none of them will be allowed to take part of material adduced as evidence if such a disclosure would threat national security or have consequences for criminal investigation and prosecution.

The judicial authority's function is limited, as mentioned, to answering the question whether the relevant persons are acting diligently and expeditiously in performing their investigations. Should the court be satisfied to the affirmative, it is obliged, by virtue of schedule 1, paragraph 8(4), to grant an extension of the retention period; otherwise, the extension must be negated. In the latter event, the passport should be returned as soon as possible; the person may in such case request information about the reasons for seizure and retention, to which a response, as comprehensive as possible while protecting national security, must be provided within 42 days.[73] The same

[70] Counter-Terrorism and Security Bill, European Convention on Human Rights Memorandum by the Home Office, Bills (14-15) 059, (ECHR Memorandum), para. 5.
[71] ECHR Memorandum, para. 5.
[72] JCHR, Legislative Scrutiny, para. 2.29.
[73] CTS Act 2015, schedule 1, para. 5(3) and Code of Practice, para. 74. An exception to this is provided for in para. 7, which allows for further retention if the constable believes that the document might be needed as evidence in criminal proceedings or in connection to a

person might be subjected to a repeated use of the powers, regardless of the extent of the retention period the first time, albeit the repetition is circumscribed by an initial retention period of 5 days (as opposed to 14) and the judicial review will include consideration of exceptional circumstances that justifies the repeated use.[74]

(c) Offences

In schedule 1, paragraph 15, the CTS Act 2015 introduces two new terrorist offences. If a person fails to hand over his or her travel documents without a reasonable excuse, or if a person "intentionally obstructs, or seeks to frustrate, a search", he or she will be guilty of committing an offence. For that reason, he or she might be convicted and sentenced to imprisonment for a maximum of 6 months, or to a fine, or to both penalties.

(d) Human Rights implications identified during the passage of the Bill

In its Memorandum on the Bill's compatibility with the ECHR, the Government identified that the powers to seize and retain passports would "likely amount to an interference" with the right to private and family life contained in article 8 "in a wide range of factual circumstances".[75] In addition, the Government acknowledged a potential breach of article 3 as the "exercise of the power could effectively render the person destitute, constituting inhumane treatment".[76] Furthermore, the JCHR indicates that the provisions also relates to the right to freedom of movement as per article 12 of the International Covenant on Civil and Political Rights (ICCPR).[77] These assertions will be scrutinized further in chapter 4, along with potential intrusions of other rights and liberties; for now, it suffices to note that the power triggers the application of these provisions.

2.2.2 Temporary Exclusion Orders

The second chapter of part 1 of the CTS Act 2015 entails the provisions regulating the imposition of an order to temporary exclude an individual from the United Kingdom. An individual subject to a TEO is, according to section 2(1), prohibited from returning to the UK unless he or she does so in acceptance of a permit to return, or the return is the result of a deportation order from another state to the UK. In addition, schedule 2 is applicable

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possible deportation order. The return might be equally obstructed by any power or provision in other regulations than schedule 1 that allows for lawful retention of documents.

[74] CTS Act 2015, schedule 1, para. 13. Unfortunately , neither the Explanatory Notes or the Code of Practice offer any guidance on what would constitute exceptional circumstances; the Code of Practice states that it is not intended that the power should be used as a "long term disruption tool" and that the repeated use within a six month period would be "highly unusual", para. 68.

[75] ECHR Memorandum, para. 3.

[76] *Ibid.*

[77] JCHR, Legislative Scrutiny, para. 2.5.

when a TEO has been issued with urgency – i.e. when the Secretary of State considers the case so urgent that there is no time to request a court decision prior to the imposition of a TEO[78] – and schedule 3 regulates proceedings in court. Besides, schedule 4 states the conditions for appeal against a conviction on a TEO offence.

(a) Rationale

Considering the fact that an increasing amount of British citizens go abroad to participate in combats as foreign fighters, the Government has identified a gap in the existing counter-terrorism legislation. Before the CTS Act 2015, there were powers in place allowing for a disruption of travel to the UK of non-British citizens, while the new TEO powers will enable the same measure to be imposed on UK nationals.[79] Hence, British citizens that have travelled to a country where terrorist organizations operate might not be allowed to return to their home country – unless, of course, they agree to obey by the conditions indicated by the Secretary of State in a permit to return. However, the Minister for Security and Immigration, James Brokenshire, asserted to the JCHR that the purpose of a TEO is to manage the return of an individual, not to exclude someone from the country, as there is a "need for control to be exerted in respect of their potential return".[80]

Considering the evidence given by the Minister, the JCHR challenged the necessity of imposing an order that effectively results in a temporary exclusion of a person. A less intrusive option, the Committee argued would be to require an advance notification of return; a failure to provide one would be subject to criminal penalty.[81] Shami Chakrabarti, director of Liberty, expressed a similar opinion stating that "TPIMs […] already exist, so there is no need, in my view, to have this threat of depriving a British national from coming back to the country that is responsible for them".[82] On the contrary, the Independent Reviewer of Terrorism Legislation, David Anderson, reasoned that the TEOs "might have some benefits" since it has the potential of catching young, vulnerable people going abroad and instead of directly subjecting them to criminal sanctions, the controlled return alternative might be useful for them.[83]

In response to the JCHR's suggestion to alter the Bill and replace the TEOs with a notification of return order, the Minister for Security and Immigration pointed to the presumed ineffectiveness of such a measure:

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[78] CTS Act 2015, schedule 2, para. 1.
[79] CTS Bill, Explanatory Notes, para. 48.
[80] JCHR, *Examination of Witness: James Brokenshire MP*, Q17. *See also* Brokenshire, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, p. 4.
[81] JCHR, Legislative Scrutiny, paras. 3.11-3.12.
[82] Home Affairs Committe, *Oral evidence: Counter-Terrorism and Security Bill*, Q86.
[83] *Ibid*., Q138. In his answer, David Anderson stressed the need of "[injecting] some judicial control into [the TEO procedure] because it is quite an onerous thing to do to somebody; the order can last for up to two years".

> By only requiring an individual to notify the Government of their return to the UK and not obliging them to travel on a route or date which has been agreed with the UK authorities [which is, *inter alia*, what the permit to return would do, author's note], we would seriously limit the operational effectiveness of the power and thus our ability to manage the threat these individuals pose to the British public.[84]

Conversely, the effectiveness of the TEOs as provided for has also been questioned, mainly on two grounds. First, from the Examination of Witness James Brokenshire in the JCHR it is apparent that the Committee members were concerned over the factual imposition of the TEOs, i.e. how the exercise of the power would be implemented in practice. The Minister asserted that the executive would "seek to serve the notice on the individual, preferably in person, but, clearly, service may be on their [sic!] last known address in the UK".[85] The scenario of a person, subjected to a TEO, showing up at an airport without knowing that he or she has been imposed a TEO, was presented to the Minister, who admitted that it would not be possible for British police to "fly out there" and arrest the person overseas. Thus, how to deal with the situation would have to be solved on a case-by-case basis.[86] In this connection, another option was presented to the Minister:

> You are putting in place a complex arrangement that would be legally challengeable and expensive, with police officers going to foreign countries to interrogate people. Why not allow them to travel to Britain and, at the point they get off the aeroplane or the boat, take them into custody, offer them the managed process – one of your options – or arrest them for a crime and put them on trial?

In his answer, the Minister referred to the potential risk of the individual:

> Even overseas, they may pose a direct threat to the UK by either seeking to radicalise or to control others within the UK, so we need to manage risk [sic!] in an appropriate way. […] We have that existing measure that we are strengthening further in this Bill to prevent people from getting on aircraft, and then separately, we have the powers under the temporary exclusion order to facilitate the return of an individual in a controlled way, and, frankly, to keep them out if they do not adhere to that.[87]

The practicalities when imposing a TEO on someone was obviously not settled during the passage of the Bill, which might be problematic for the future efficiency of their use, as well as for the avoidance of an arbitrary application.

The second concern in relation to the effectiveness of the measures, is that the TEOs excludes those who might be willing to adhere to a permit to

[84] Brokenshire, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, p. 4.
[85] JCHR, *Examination of Witness: James Brokenshire MP*, Q25.
[86] *Ibid.*, Q26.
[87] *Ibid.*, Q27.

return but are practically unable to apply for one (this issue will be addressed further in chapter 3.2.3), but, on the contrary, "for those who genuinely seek to do us harm, the system of TEOs, permits and section 8 reporting obligations will offer few obstacles".[88] Liberty argues that the imposition of a TEO will obstruct the ultimate goal to neutralize the threat posed by these individuals, as they will rather notify the person of the authorities' interest in him or her and push the activities "further underground". Moreover,

> [i]t is difficult to see how a proposal which temporarily traps an individual in a region where jihadi groups have a strong presence will further the core objective […] of breaking the link between UK extremists and terror groups in foreign countries.[89]

It is obvious that the justification for, the necessity and the efficiency of the TEOs are disputed; their existence is indeed the most controversial provisions in the Act. Inevitably, I will come back to the issue later on.

(b) Content

The Secretary of State is entrusted with the discretion to decide whether to impose a TEO, assuming that five conditions outlined in section 2(2-7) are met:

(A) the Secretary of State must "reasonably suspect[…] that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom;
(B) the Secretary of State must "reasonably consider" that the imposition of a TEO is necessary in order to protect the public in the UK from a risk of terrorism;
(C) the Secretary of State must "reasonably consider[…] that the individual is outside the United Kingdom";
(D) the individual must have a right of abode in the UK; and
(E) a court must give permission to the Secretary of State to impose a TEO or the Secretary of State must "reasonably consider" that the case is too urgent to await the court's permission.

A TEO is valid for two years, except if the Secretary of State revokes or otherwise ends it earlier, but the revocation or expiration (at the end of a two-year's period) does not prevent another TEO to be imposed on the same individual. An order (as well as the revocation of an order) becomes valid by the time of notification and during that period, the excluded individual's British passport is invalidated.[90] In less urgent circumstances, the Secretary of State is obliged by sections 3(1-2) and 3(6-7) to apply to the court for permission to impose a TEO; the function of the court is then to determine

[88] Liberty, para. 17.
[89] *Ibid.*, paras. 18-19.
[90] CTS Act 2015, s. 4. The Secretary of State is required to keep the necessity of the TEO for purposes of protecting the public against terrorism under review during the time it is in force, s. 2(8).

whether the Secretary of State's decision that conditions A-D are met is "obviously flawed". Should the court answer the inquiry in the negative, it is obliged to give permission, otherwise the court may not.

In case of urgency, on the other hand, the Secretary of State may impose a TEO without prior consideration by a court. The court will instead perform a review within 7 days and then determine whether the "urgent case decisions were obviously flawed".[91] The decisions the court will examine are both the ones in relation to condition A-D (the relevant decisions) as well as the one on the urgency of the case; should any of the relevant decisions be obviously flawed, the court is obliged to quash the TEO, otherwise it must confirm the order. Should it be the urgency decision that is obviously flawed, the court may choose between quashing and confirming the imposition of a TEO.[92]

Once a TEO is in force, the affected individual may apply to the Secretary of State for a permit to return, which the latter must issue "within a reasonable period after the application is made".[93] Still, the right to have a permit to return issued is restricted by a requirement to attend an interview at a time and place indicated the Secretary of State; should the individual fail to attend the interview, the Secretary of State may by virtue of section 6(2) refuse to issue a permit to return. Furthermore, mandatory conditions may be included in the permit to return, a failure to comply with them will effectively invalidate the permit; the terms of a permit are for the Secretary of State to decide.[94] Having returned to the UK, the Secretary of State may additionally impose certain 'permitted obligations' on the individual, as indicated by section 9(1-2), namely (a) a requirement to report to a police station and/or to attend appointments as provided for in Schedule 1 to the TPIMs Act 2011, and (b) an obligation to notify the police of the individual's place of residence and any changes in that respect. When a subjected individual has returned to the UK, he or she may request a court review of the Secretary of State's decision in relation to conditions A-D; to impose a TEO; about the continuance of condition B[95]; and a decision to impose a 'permitted obligation'. The powers of the court in such a matter are limited to either quash the TEO (or the permitted obligation) or give directions to the Secretary of State to revoke the TEO (or the permitted obligation); otherwise, the court is required to decide that the TEO (or the

[91] CTS Act 2015, schedule 2, para. 3.
[92] *Ibid.*, schedule 2, para. 4.
[93] *Ibid.*, s. 6(1). A permit to return might equally be issued in case of deportation to the UK, or if the Secretary of State considers that there is an urgency requiring a permit to be issued expeditiously even though no application has been made by the individual or a there is a duty to do so because of a deportation order, s.7.
[94] *Ibid.*, s. 5(2-3 and 8).
[95] Should the Secretary of State fail to review the necessity of a TEO and decide upon its continuity, the court will treat the situation as if a decision that it continues to be met had been made, s. 11(11).

permitted obligation) continues to be in force. An appeal against the court's ruling may only be made on questions of law.[96]

Schedules 3 and 4 contain provisions regulating the proceedings in court connected to TEOs; the former applies to proceedings when the Secretary of State seeks permission to impose a TEO or, reversed, where a TEO has been imposed urgently and is subsequently referred to the court. It also applies when an individual within the UK has requested a review of the decision to impose a TEO, and to an application requesting anonymity in court with respect to the individual concerned.[97] Paragraph 5 of the schedule ensures explicitly that, albeit special rules of court may be made in relation to TEO or appeal proceedings, this does not mean that the procedural safeguards in ECHR, article 6 may be circumvented. As it is possible to exclude the individual to whom the proceedings relate as well as his or her legal representative, a special advocate may according to schedule 3, paragraph 10, be appointed in order to represent the interest of the individual (this will be discussed further in chapter 4).

Next, schedule 4 regulates the appeal proceedings against convictions determining the breach of an offence (see below). In such a case, schedule 4, paragraph 1 gives that the convicted individual has the right of appeal if the TEO is quashed and he or she "could not have been convicted had the quashing occurred before the proceedings for the offence were brought"; the same requirements applies to an appeal in relation to a permitted obligation notice. According to paragraph 4(1), the court must allow the appeal and quash the conviction. In furtherance, schedule 4 contains provisions indicating the competent court and the formal conditions applicable to the appeal proceedings (such as the time to lodge an appeal depending on the competent court).

(c) Offences

Similar to the offences relating to the seizure and retention of passports, CTS Act 2015, sections 10(1) and 10(3) provides that if an individual returns to the UK, without reasonable excuse, in contravention of a TEO, he or she is guilty of an offence. That is also the case if an individual fails to comply with the conditions in a permit to return or a permitted obligation. The consequence of committing such an offence is, according to section 10(5), a penalty of maximum 5 years imprisonment upon conviction on indictment, or a maximum of 12 months or a fine, or both, upon a summary conviction.

[96] CTS Act 2015, s. 11. A permitted obligation might also be subjected to variation, s. 11(6).
[97] *See* the definition of 'TEO proceedings' in CTS Act 2015, schedule 3, para. 1.

(d) Human Rights implications identified during the passage of the Bill

As noted earlier, the regime of TEOs is highly controversial, in particular because of the potential violations of human rights that might arise by the use of the powers. The JCHR noted that the use of TEOs may be incompatible with the ECHR, as well as the right to be protected against an arbitrary deprivation of the right to enter one's country under article 12.4 ICCPR.[98] The Committee summarized its opinion as follows:

> The provisions in the Bill still have the effect of invalidating a UK national's passport while they are abroad, and of preventing their return unless they comply with conditions imposed by the Secretary of State, without any judicial process apart from ex post facto judicial review which, by definition, will have to be pursued from abroad. In our view, this gives rise to a very real risk that the human rights of UK nationals will be violated as a result of the imposition of Temporary Exclusion Orders. We are opposed in principle to any exclusion of UK nationals from the UK, even on a temporary basis.[99]

In contrast to this severe critique, the Government reasons that the ECHR is not even "directly engaged" since the person subjected to a TEO will be outside the UK when the notification is given. Hence, as concerns articles 2, 3, 5 and 6 of the Convention there is no authority for extra-territorial application and there is thus no risk of breaching UK's obligation under that instrument.[100] On the contrary, the Government acknowledges the risk of interferences with the right to private and family life in article 8, albeit the Government considers that such an intrusion is "capable of being necessary and proportionate" since the excluded person has the ability to stop the intrusion him or herself by complying with the specified conditions.[101]

In response to the JCHR's concern about a potential breach of the United Kingdom's obligation under ICCPR, article 12.4, James Brokenshire emphasises that the provision is concerned with 'arbitrary' deprivation of a person's right to enter his or her home country. A decision to impose a TEO is not arbitrarily made – because it is safeguarded by the requisition to meet conditions A-E, as described above – and, more importantly, TEOs do not result in the deprivation of the ability to return to the UK (but rather subject that ability to an obligation to comply with specific conditions, author's note).[102] All of these considerations and further remarks will be elaborated upon in more detail in chapters 3.2.3 and 4. First, however, the criteria for determining whether a provision is 'criminal' in nature will be detected.

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[98] JCHR, Legislative Scrutiny, para. 3.4.
[99] *Ibid.*, para. 3.9. Similar critiques have been presented by Goodwin-Gill, para. 30, and Shami Chakrabarti, Director of Liberty, when giving evidence before the Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*.
[100] ECHR Memorandum, paras. 10-11.
[101] *Ibid.*, para. 15.
[102] Brokenshire, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, p. 4.

3 Penal characteristics

In this chapter I will introduce the ECtHR's approach to the notion of 'criminal charge' within the meaning of ECHR. No exhaustive account of the Court's case law concerned with the issue will be provided, nor of the academic discussions on the topic. Rather, I will introduce the relevant cases as needed for enabling the assessment of character of the temporary restrictions on travel.

3.1 The meaning of 'criminal' in the European Convention on Human Rights

The discussion about whether a sanction connected to a specific conduct is of a 'criminal' character within the meaning of the European Convention of Human Rights is not at all a novel topic. On the contrary, the meaning of the word 'criminal' in the terminology of *inter alia* ECHR, article 6 has been interpreted and elaborated upon in the case law of the ECtHR for nearly half a decade; the classification of the offences and related sanctions in domestic laws has varied from being disciplinary, to administrative, to civil. Nonetheless, the notion of a 'criminal charge' must be interpreted autonomously within the scope of application of ECHR. Consequently, for the purpose of the Convention, the ECtHR has determined that the character of an offence and the attached sanction might be deemed as 'criminal', regardless of how the provisions are classified in domestic law.[103]

The criminal, or as it may be non-criminal, character of an offence and sanction, in turn, depends on three criteria established by the Court in the case of *Engel and Others v the Netherlands*, in which the Court found it critical to examine whether the domestic proceeding concerned 'any criminal charge' for the scope of article 6 "for although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law".[104] Thus, the Court reasoned that it is first necessary to ascertain to what field of law the offence belong in the national legal system, i.e. to criminal law, administrative law or whatever it may be; the relative value of which, however, is only formal and subject to comparison with the equivalent provision in the legal order of other Contracting States. Second, and more importantly, the nature of the offence is a relevant factor; and third, it is required to consider the degree of severity

[103] *See Engel and Others v the Netherlands*, Appl. Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976 , with further references, where the Court stated "[i]f the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 […] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention", para. 81.
[104] *Ibid.*, para. 79.

of the penalty at stake.[105] In the case, the decisive factor turning the national proceedings into a 'criminal charge', even though they belonged to the system of military disciplinary law in the Netherlands, was the serious punishment – deprivation of liberty – that could have been imposed; that the final outcome did not in fact result in the possible punishment was of minor significance.[106]

The three criteria have been reiterated and elaborated further by the ECtHR in succeeding cases. *Benham v the United Kingdom*[107] and *Janosevic v Sweden*[108] concerned the obligation to pay community charge and taxes respectively; both were of civil character in the domestic legal order. In the former the nature of the offence was of a general character, applicable to all citizens, albeit the Court noted that it contained "some punitive elements". In addition, the applicant, sentenced to thirty days imprisonment, was liable for a maximum penalty of three months' deprivation of liberty; the factors altogether made the Court conclude that the applicant had been 'charged with a criminal offence' within the meaning of ECHR, article 6.[109] In the latter case, the Court deliberated on the nature of the Swedish system of tax surcharges in contrast to the criminal offence of tax fraud. In realizing that the main purpose of tax surcharges is to "exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations", as opposed to be intended as a pecuniary compensation, the Court considered that tax surcharges are both deterrent and punitive.[110] Thus, the purpose of the penalty and the general character of tax surcharges sufficed to classify the sanction as 'criminal'; however, that character was "further evidenced by the severity of the potential and actual penalty".[111] Moreover, in *Steel and Others v the United Kingdom*[112] concerning the application of ECHR, article 5, the Court made reference to the *Benham*-case while taking into account the nature of the national proceedings and the potential penalty, and concluded that the offence – breach of the peace – was 'criminal' within the meaning of the Convention.[113]

It stems from the approach taken in *Janosevic v Sweden* that the criteria are alternative in nature, although a cumulative application might be adopted where the separate examination of each criterion is insufficient to determine the criminal character of a sanction.[114] This methodology was subsequently confirmed in the case of *Sergey Zolotukhin v Russia*[115] where the Court reasoned that the nature of the offence ("minor disorderly acts") under the

[105] *Engel and Others*, para. 82.
[106] *Ibid.*, para. 85.
[107] *Benham v the United Kingdom*, Appl. No. 19380/92, 10 June 1996.
[108] *Janosevic v Sweden*, Appl. No. 34619/97, 23 July 2002.
[109] *Benham*, para. 56
[110] *Janosevic*, para. 68.
[111] *Ibid.*, paras. 68-69.
[112] *Steel and Others v the United Kingdom*, Appl. No. 67/1997/851/1058, 23 September 1998.
[113] *Ibid.*, para. 49.
[114] *Janosevic*, para. 67.
[115] *Sergey Zolotukhin v Russia*, Appl. No. 14939/03, 10 February 2009.

national administrative law taken together with the severity of the penalty (maximum of fifteen days imprisonment) pushed the national proceedings into the 'criminal' sphere.[116]

The EU Court of Justice has equally addressed the issue in relation to the *ne bis in idem*-principle due to the use of double sanctions for the same 'offence'. In the Bonda-judgment[117], an administrative regulation in pursuance of a common agricultural policy within the European Union was tested against the three *Engel*-criteria. Primarily, the EU Court of Justice noted that the regulation under scrutiny was not criminal but administrative according to EU law (which it, in the circumstances of the case, equated with domestic law); secondly, in reflecting on whether the purpose of the administrative sanction was punitive, it found that the essential aim was not to punish but to secure the management of funds within the Union.[118] Lastly, the EU Court of Justice took into account that the result of the sanctions was to deprive the concerned farmer of the prospect of obtaining aid in the three years to come, which it deemed not to be equivalent to criminal penalties; hence, the administrative sanctions under scrutiny did not conflict with the criminal proceedings instituted against the applicant in a way that the *ne bis in idem*-principle would obstruct the latter.[119]

It follows from the variety of the substantive matter in these cases that regardless of the national classification of an offence and the attached sanction, a provision might nonetheless be judged as 'criminal' in a European context.[120] It is equally clear that the criteria used to examine whether the proceedings under consideration are in fact 'criminal' as established in the *Engel*-case, are applicable whenever the notion of 'criminal' is relevant, i.e. regardless of which article is allegedly breached. Furthermore, due to the EU Court of Justice's inclination to adhere to the jurisprudence by the ECtHR and the latter's interpretation and application of the ECHR, the criteria may be applied also when the inquiry concerns EU regulations.

Despite the frequent resort to the criteria by the courts, their application has not passed undisputed; the critiques concern mainly the multitude of criteria and sub-criteria as how they relate one to another is not clear.[121] Nevertheless, both the ECtHR and the EU Court of Justice have continuously adopted them, before and after the critique; thus, the criteria will be used in the following in determining the *de facto* character of the temporary restrictions on travel measures.

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[116] *Sergey Zolotukhin*, paras, 56-57. This case confirms the application of the three *Engel*-criteria, not only as far as ECHR, article 6 is concerned, but also in relation to the *ne bis in idem*-principle in article 4 Protocol No. 7.
[117] C-489/10 *Bonda*, Judgment of 5 June 2012.
[118] *Ibid.*, paras. 38-40.
[119] *Ibid.*, paras. 2, 43-45.
[120] For a more detailed account of the variety of offences examined by the ECtHR in relation to the notion of 'criminal', *see* Emmerson and Ashworth, pp. 152-171.
[121] Trechsel, Stefan, *Human Rights in Criminal Proceedings*, Oxford University Press, New York, 2005, p. 30.

3.2 A penal character of the temporary restrictions on travel?

Before examining the *de facto* character of the temporary restrictions on travel in the CTS Act 2015, the first issue that has to be considered is which the relevant action capable of amounting to a 'criminal charge' in the Convention's terminology is. In the *Engel*-case, the relevant 'charge' was a decision to impose disciplinary actions against the applicants taken by the commanding officer.[122] In *Zolotukhin* the relevant 'charge' was the proceedings in relation to 'minor disorderly acts'[123], and in *Janosevic* it was the procedure of imposing tax surcharges.[124]

In relation to passport seizure and retention, it is the decision taken by a constable, when there are reasonable grounds to suspect that an individual is at a port with the intention to leave the UK for the purpose of going abroad to be involved in terrorism-related activity, that triggers the imposition of the power.[125] However, for the initial seizure of the passport to turn into retention – which is what might last for fourteen to thirty days – a senior police officer must authorize it.[126] As to TEOs, it is the Secretary of State who decides to impose such an order when he or she reasonably suspects that the individual is or has been involved in terrorism-related activity abroad, provided that certain conditions are fulfilled.[127] Prior to imposing a TEO, a court must decide, in regular circumstances, whether the decision taken by the Secretary of State is obviously flawed.[128]

Thus, in applying the *Engel*-method, the decisions "that settle […] once and for all what [is] at stake"[129] are the senior police officer's authorization to retain a seized passport and the court's permission to the Secretary of State to impose a TEO (albeit in urgent cases the decision of the Secretary of State the relevant one). These are the decisions that I presume have a penal character, which is what will be tested henceforth.

3.2.1 Label in national law

In order to apply the *Engel*-criteria to the temporary restrictions on travel powers, it is first vital to determine what conduct is the relevant one. In this case, there are offences expressly proscribed in schedule 1, paragraph 15, and section 10 respectively, which creates a delusion for approximating the relevant 'offences'. The conduct and the label will nonetheless be elaborated upon here in connection to a brief touch upon a wider debate of a more

[122] *Engel and Others*, para. 83.
[123] *Sergey Zolotukhin*, para. 54.
[124] *Janosevic*, para. 65.
[125] CTS Act 2015, schedule 1, para. 2(1). See also above, chapter 2.4.1.
[126] *Ibid.*, schedule 1, paras. 4-5.
[127] *Ibid.*, s. 2. See also above, chapter 2.4.2.
[128] *Ibid.*, s. 3.
[129] *Engel and Others*, para. 83.

general kind, namely the matter of 'overcriminalization' and 'undercriminalization'.

Since the seizure of a passport is executed against a person being at a port presumably with the intention to leave for terrorist-purposes, the relevant conduct is to attempt to leave the UK for the specific purpose of participating in terrorism-related activity abroad. Similarly, a TEO might be imposed when a person, who is outside the country, presumably is (or has been) involved in terrorism-related activity; hence, the relevant conduct is to somehow be involved in something as remote as facilitating, encouraging or giving support to the commission, preparation or instigation of acts of terrorism, while being abroad. This is a vibrant example of the extreme width of the UK definition of terrorism, especially when applied in conjunction with the notion of terrorism-related activity, which triggers the powers to use temporary restrictions on travel (this will be elaborated upon further in next subchapter).

To criminalize this kind of conduct appears as going too far, in the sense that the criminal law perhaps should not encompass such a conduct that anyone could unintentionally exercise. Duff calls this phenomena the "perversion" of criminal law; "the criminal law is perverted when it is used for purposes that are not proper to it".[130] Taking into account this argument, that legislators sometimes inappropriately criminalizes conduct that should not be addressed as a 'criminal offence' (the issue of 'overcriminalization'), points in the direction that the conduct that I have identified as the relevant action in relation to passport seizures and TEOs should not be approached as a 'criminal offence'. On the other hand, there is the reversed problem of 'undercriminalization', meaning that states avoid labelling offences as criminal in order to circumvent the attached obligation to guarantee procedural safeguards to such a process.[131] To avoid labelling the conduct a crime, does not take away the fact that the sanctions are of *de facto* penal character, i.e. punishments for acting in a certain manner. Thus, when the consequence of a specific action is a penalty, whether imposed through administrative or judicial procedures, the argument of evading 'overcriminalization' is rendered null.

Although it might reasonably be expected that a person refrains from doing something that might cause a 'reasonable suspicion' that there is a criminal intent underlying an action – such as travelling abroad with an intention to engage in terrorism activities – there is nothing suggesting that the 'reasonable suspicion' evidences that a crime indeed will take place.[132] Hence, the reasons for avoiding criminalizing actions that might as well be entirely legitimate – such as possessing articles or travelling outside the

[130] Duff, R A, "Perversions and Subversions of Criminal Law" in Duff et. al. (eds.), *The Boundaries of the Criminal Law*, Oxford University Press, New York, 2010, pp. 88-112, p. 92.
[131] *See* Ashworth and Zedner in Duff et al. (eds.), p. 82.
[132] For a parallel discussion concerning the offence of 'possession for terrorist purposes' in the Terrorism Act 2000, section 57(1), s*ee* Duff in Duff et al. (eds.), p. 93.

country for the purpose of vacation or businesses. Yet, the UK has criminalized several so-called 'low-level terrorist offences'[133], giving reasons for approaching travelling for terrorist purposes in the same manner. This in turn would allow for the procedural guarantees, as per ECHR, article 6, to apply for the protection of the affected individual. Another, perhaps more reasonable approach, would be to maintain the imposition of travel restrictions as a non-criminal counter-terrorism measure, but nonetheless circumscribe it with due-process safeguards similar to those applicable in criminal law-proceedings. Ashworth and Zedner have branded this approach as 'civil preventive hybrid orders' characterized by the fact that the orders "may be made without conviction, or at sentence after conviction. Breach of the order is a criminal offence with a maximum sentence of five years' imprisonment".[134] Considering the offences related to the passport seizure and the imposition of a TEO as presented previously, this 'hybrid' between civil and criminal law seem to be what we are dealing with. Accordingly, should the individual refuse to hand over his or her travel documents, disobey the restrictions on return or fail to comply with a permitted obligation, the potential consequence to be convicted for an offence might be sufficient to motivate the imposition of procedural safeguards similar to those applicable to criminal offences.[135]

Another aspect is that the construed 'offences' appear as minor in relation to other criminal offences; to travel abroad with a (suspected) intention to encourage or offer assistance to someone while in another country struggles to be compared to traditional criminal acts (murder, assault, fraud or arson for instance). Nonetheless, a 'minor' offence might be criminal just as much as other acts "as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the *Engel* criteria, necessarily requires a certain degree of seriousness."[136] This view was first expressed in *Öztürk v Germany*[137] in which the Court stated that albeit the conduct – causing a traffic accident – was "admittedly a minor offence" it "does not take it outside the ambit of Article 6".[138]

As concerns the seizure of passports or the imposition of a TEO, the procedure involved is purely administrative in the sense that they are "controlled and implemented by the government (executive)" as opposed to

[133] Foley, p. 201.
[134] Ashworth and Zedner in Duff et al. (eds.), p. 63.
[135] Such an approach has been adopted by British courts, for instance in *W v Acton Youth Court* [2005] EWHC 954 (Admin), when dealing with civil preventative orders. In the case, Pitchers J reasoned that imposing the civil orders relevant in the case was a "powerful weapon […] Thus, for someone who obeys the order, there may be a significant restriction on his liberty. For someone who breaches the order, the consequence can be severe: for an adult, imprisonment up to […] five years in the Crown Court. […] The actual and potential consequences for the subject of an ASBO [anti-social behaviour order, authors note] make it, in my judgment, particularly important that procedural fairness is scrupulously observed", paras. 29-30. *See also* Ashworth and Zedner in Duff et al. (eds.), p. 84.
[136] *Sergey Zolotukhin*, para. 55.
[137] *Öztürk v Germany*, Appl. No. 8544/79, 21 February 1984.
[138] *Ibid.*, para. 53.

a judicial authority.[139] It is the executive senior police officer and the Secretary of State respectively that take the relevant decisions. Even with the involvement of a court in relation to the imposition of a TEO, the procedure is rather administrative than judicial as the court does not try the circumstances as such but only determines whether the decisions (concerning conditions A-D as presented above in chapter 2.4.2) by the Secretary of State are obviously flawed[140]; hence, the limited supervisory function of the court.

Regardless of whether the procedures of seizing and retaining passports and imposing a TEO are classified as administrative or a 'civil preventative hybrid', it appears safe to conclude that the label in national law is not criminal. This renders it inevitable to continue applying the *Engel*-criteria for the purpose of determining the *de facto* character of the measures.

3.2.2 Nature of the offence

The purpose of the second *Engel*-criteria is to determine the nature of the offence, or "the conduct imputed to the applicant" as the Court phrased it in the *Janosevic*-case.[141] In that respect, the ECtHR noted in *Öztürk v Germany* that the rule, which the applicant had contravened, was directed "towards all citizens […]; it prescribe[d] conduct of certain kind and [made] the resultant requirement subject to a sanction that [was] punitive". In addition, the offence pertained to criminal law in the majority of the Contracting States.[142] All these consideration rendered the Court's conclusion that the offence, though regulatory in the domestic legal order, was 'criminal' within the meaning of ECHR, article 6.[143]

In accordance with the reasoning in *Öztürk* three main features to which the Court pays attention in assessing the nature of the offence, can be identified:

- How the conduct is classified in other Contracting States;
- Towards whom the rule is directed; and
- The purpose of the related sanction.[144]

Thus, the crucial points in determining the nature of the offences, to which the sanctions of passport retention and TEOs respectively are imposed, stem from these three features.

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[139] Cf. Foley, p. 176, note 1.
[140] CTS Act 2015, s. 3(2). That the powers have an administrative character is confirmed by the JCHR in its Legislative Scrutiny, para. 2.10.
[141] *Janosevic*, para. 68.
[142] *Öztürk*, para. 53.
[143] *Ibid.*, para. 54.
[144] The same subcriteria were considered in *inter alia Benham*, para 56; *Janosevic*, para. 68; and *Sergey Zolotukhin*, para. 55.

(a) Classification of the conduct in other Contracting States

To approximate how other European States parties to ECHR regulate the conduct, as identified above, is a somewhat troublesome exercise, mainly because UK has exceptionally extensive counter-terrorism legislation and to investigate the existence, reach and content of equivalent provision in other domestic legal orders would require far more than what would be feasible within the scope of this thesis. Nevertheless, some remarks will be made.

The recent adoption by the UNSC of resolution 2178 articulates the global need for addressing the issue of foreign fighters and combating the increased threat of terrorism that they portray. Among the measures called for by the UNSC are the inhibition of "foreign terrorism fighter travel" and the prevention of the movement of terrorists.[145] In addition, all Member States are required to establish serious criminal offences sufficient to prosecute and punish *inter alia* "their nationals who travel or attempt to travel to a State […] for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training".[146] Concerning the imposition of TEOs and the measure's compatibility with the UN resolution, Guy S. Goodwin-Gill has emphasized that the latter's focus is on travel *from* the country of nationality or residences; hence, "what this resolution definitely does not do is to authorise or to require that States deny their citizens their right to return".[147]

On the regional level, in turn, the Council of the European Union has, following the adoption of UNSC res. 2178, issued a discussion paper emphasising the need of amending the EU Framework Decision on combating terrorism in order to keep up with the international and national developments in the area. Without such an update, the Framework Decision would "no longer be the yardstick for minimum required criminalization of terrorism across the EU".[148] The discussion paper also acknowledges that a number of EU Member States already has updated their national legislation to address the challenge of foreign fighters.[149] As to the Convention on the Prevention of Terrorism, it obliges the Contracting States to establish certain actions as criminal offences in their domestic legislation, namely to provoke others to commit terrorist offences, to recruit others for terrorism and to train others for terrorism.[150] In addition, article 9 establishes the obligation

[145] *See* the preamble, p. 2 and para. 2.
[146] *Ibid.*, para. 6(a).
[147] Goodwin-Gill, para. 25.
[148] Council of the European Union, *Foreign fighters and returnees: discussion paper*, 15715/2/14 REV 2, 2 December 2014, p. 2.
[149] *Ibid.*, pp. 2-3.
[150] Council of Europe Convention on the Prevention of Terrorism, No. 196, 16 May 2005, art. 5 defines provocation as the "distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of terrorist offences"; art. 6 provides that recruitment "means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences"; and art. 7 indicates that

to ensure that the national criminal legislation proscribes certain ancillary offences; thus, to participate as an accomplice, to organize or direct others and to contribute to an offence as set forth in articles 5-7 should be criminalized, as should the attempt to recruit or train others. The Convention does not address the challenge posed by foreign fighters explicitly, which might partly be due to the convention's age – it was adopted in 2005, i.e. ten years ago, when the threat posed by those terrorists was perhaps not as imminent as it has become today. However, this does of course not mean that the provisions do not apply to the ones choosing to travel for the purpose of engaging in terrorist activities abroad.

Consequently, against these international and regional instruments, it seems fair to conclude that there is a duty to take particular action in respect of foreign fighters and that the main provisions should be encompassed by the criminal law regime in the States. Whether this obligation has been complied with in the Contracting States to the ECHR is another question to be dealt with in future (most interesting) studies. Notwithstanding the general obligation to establish criminal offences allowing the prosecution and punishment of people who choose to travel (as encouraged in the UN resolution), other, less restrictive measures might be an adequate resort prior to reaching the threshold for applying the criminal law. In fact, in the fight against terrorism such preventative measures are arguably the most vital resource in order to obstruct fatal terrorist attacks.

(b) Towards whom are the powers directed?

To begin with, the rule on seizing and retaining a passport as expressed in schedule 2, paragraph 2(1) of the CTS Act 2015 is directed towards "a person at a port in Great Britain". This could be anyone of 'all citizens' that the constable has reasonable ground for suspecting that he or she will leave the UK with intention to engage in terrorism-related activity while abroad. Hence, the rule is of general application to all citizens, as opposed to a specific group of persons with a special status.[151] On the contrary, the application of the rule governing the imposition of TEOs, has a slightly narrower target, namely individuals with the right of abode in the United Kingdom.[152] Nonetheless, in my opinion, the specific group with the special status of having 'a right of abode' in the UK is wide enough to deem the 'offence' to be criminal in nature; the 'right of abode'- status is not sufficiently specific as to allow the identification of the individuals belonging to the group. The requirement for a TEO to be imposed that the individual concerned has a 'right of abode' in the country, indicates moreover that there is no distinction between nationalities; hence, a TEO

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training means giving instructions in several techniques "for the purpose of carrying out or contributing to the commission of a terrorist offence".

[151] *See* the reasoning in *Öztürk*, para. 53; *Benham*, para 56; *Janosevic*, para. 68; and *Sergey Zolotukhin*, para. 55.

[152] Subject to condition D as expressed in CTS Act 2015, s. 2(6).

might be directed to a British or foreign citizen as long as he or she has the right to live in the UK.[153]

Both the former Independent Reviewer of Terrorism Legislation, Lord Carlile, and his successor David Anderson, have noted that the width of the definition of terrorism "grant unusually wide discretions" to the executive authorities, discretions that become "wider still" by the application of more recently introduced terms as 'terrorism-related activity'.[154] Thus, of relevance for determining to whom the temporary restriction on travel measures are intended to apply is to recognize the extent of the UK definition of terrorism.

Having examined the definition as per Terrorism Act 2000, as amended, Lord Carlile concluded that the definition of terrorism is of practical importance since it, in itself, triggers several powers and describes offences.[155] Nonetheless, the definition has met with several critiques, the central one being that it is too wide to meet the requirement of clarity in criminal law. Lord Carlile himself comes to the same conclusion as concerns the width of the definition: "many examples can and have been cited of individuals who might fall inappropriately within the current definition, if considered solely in strict legal terms"[156]; hence, the protection against inappropriate application relies on the authorities' discretion.[157]

Likewise, David Anderson has raised similar concerns, in particular, as section 1(4)(d) of the CTS Act 2015 clarifies the target as *inter alia* any government of whatever country in the world, the international reach of the definition is "remarkably broad".[158] The extent of the protection in the UK anti-terror legislation was also a key issue in the case of *R v F*.[159] The defendant – convicted in lower courts for possession of documents "likely to be useful to a person committing or preparing an act of terrorism"[160] – claimed that the possession did not fell afoul of the terrorism legislation as it targeted an oppressive government.[161] Accordingly, the issue was whether the 'government'-requisite was limited to apply to actions taken against "democratic or representative" governments.[162] Replying to the defendant's assertion, Sir Igor Judge P stated:

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[153] In the Explanatory Notes the Government explains that according to section 2(1) of the Immigration Act 1971, British citizens and certain Commonwealth citizens have a right of abode in the UK, para. 78.
[154] Anderson Q.C., David, *The Terrorism Acts in 2012*, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006, July 2013, paras. 4.3 (c-d).
[155] *The Definition of Terrorism*, A report by Lord Carlile of Berriew Q.C., Independent Reviewer of Terrorism Legislation, Cm 7052, March 2007, para. 12, p. 6.
[156] *Ibid.*, paras. 26 and 34.
[157] *Ibid.*, paras. 60 and 64. It must be noted that Lord Carlile approves of such a solution.
[158] Anderson, 2013, para. 4.3(b).
[159] *R v F* [2007] EWCA Crim 243.
[160] *Ibid.*, para. 4.
[161] *Ibid.*, para. 6.
[162] *Ibid.*, para. 19.

> No authority is needed for the proposition that democratic government based on the consent of the people, and subject to the rule of law, is the lodestar for modern civilised communities. […] That however is far from saying that the only governments which can be included in legislation which provides for protection against terrorism are to be found in countries which adhere to the [European Convention on Human Rights] or are governed in accordance with its principles.[163]

In conclusion, there was nothing in the legislation supporting a distinction between different governments. Accordingly, the judges expressed that the breadth of the definition of terrorism as a whole was "striking" and does not exempt terrorism in a 'just cause'; "terrorism is terrorism, whatever the motives of the perpetrators".[164] For the temporary restrictions on travel measures this means that the activity relating to terrorism which the 'perpetrator' commits, could take place anywhere in the world against any government.

On the other hand, in the case of *SSDH v DD*[165] where the primary concern was whether to except the applicant from refugee status due to his participation in the resistance against national and NATO forces in his home country, the British court adopted a narrower interpretation. Lord Justice Pill noted:

> Serious violence against members of the government forces would normally be designed to influence the government and be used for the purpose of advancing a political, religious or ideological cause, within the meaning of those words in section 1 of the 2000 Act. On the other hand, it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism within the 2000 Act. […] However, on the authority of *KJ* [*KJ (Sri Lanka) v Secretary of State for the Home Department*[166], author's note], military actions against the Afghan Government, even if conducted by proscribed organisations, are not necessarily terrorist in nature. If that is so, they are not, as terrorist acts, contrary to the purposes and principles of the UN Charter.[167]

Thus, the UK court appears to accept that the definition of terrorism does not encompass attacks on all governments in the world; although, which government should be singled out is not clear.

In the case of *R v Gul (Mohammed)*[168], the UK Supreme Court was concerned with the national definition of terrorism in comparison to the standards of international instruments; more precisely, "whether international law requiring domestic definition of terrorism to be read

[163] *R v F*, para. 23.
[164] *Ibid.*, paras. 26-27.
[165] *SSDH v DD* [2010] EWCA Civ 1407.
[166] *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292.
[167] *SSDH v DD*, paras. 55-56.
[168] *R v Gul (Mohammed)* [2013] UKSC 64, [2013] 3 WLR 1207.

down".[169] The defendant was convicted in lower courts for uploading onto internet videos showing attacks on coalition forces in Iraq and Afghanistan. In his appeal, the defendant claimed that the definition in the Terrorism Act 2000, as amended, should be understood as not criminalizing actions taken abroad, since it was not a criminal offence under international law.[170] The first issue before the Supreme Court was to determine whether the scope of the UK definition includes military attacks by a non-state armed group against the armed forces of a state or inter-governmental organization in the context of a non-international armed conflict.[171] The Supreme Court noted that

> 28. As a matter of ordinary language, the definition [of terrorism in the Terrorism Act 2000, as amended (author's note)] would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or IGO in order to advance a very wide range of causes. Thus, it would appear to extend to military or quasi-military activity aimed at bringing down foreign government, even where that activity is approved (officially or unofficially) by the UK Government. […] It is neither necessary nor appropriate to express any concluded view whether the definition of terrorism goes that far, although it is not entirely easy to see why, at least in the absence of international law considerations, it does not. For present purposes it is enough to proceed on the basis that, subject to these considerations, the definition of terrorism in section I in the 2000 Act is, at least if read in its natural sense, very far reaching indeed. […].[172]

The Supreme Court concluded that "unless the appellant's argument based on international law dictates a different conclusion, the definition of terrorism […] is indeed as wide as it appears to be".[173] Subsequently, the Supreme Court examined whether international law requires a narrower interpretation of the definition; in determining that there is no rule obliging a state not to go further in legislations than the international treaty, it found that there was no reason to read down the meaning of section 1 of the Terrorism Act 2000.[174]

The Supreme Court's finding in *R v Gul (Mohammed)* means that to engage in insurgencies where the people of a State demonstrates its dissatisfaction with the governing authorities – as it has been during the Arabic Spring revolutions, for instance – could be considered as involvement in terrorism-related activity. Consequently, citizens of a State in change who decides to return home to contribute to the revolution could be prevented from leaving the UK or from returning back home when time comes.

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[169] *R v Gul (Mohammed)* 1207.
[170] *Ibid.*
[171] *Ibid.*, 1210.
[172] *Ibid.*, 1220.
[173] *Ibid.*
[174] Of importance was also the fact that in the case the defendant was a UK national convicted for having committed an offence within the country. *Ibid.*, 1223-1224.

However, before ending its judgment, the Supreme Court expressed as *obiter dictum* its concern about the width of the definition of terrorism. As the current legislation allows for far reaching powers incumbent upon prosecutors as well as police and immigration officers in ports and at borders depending on the discretion on their part, the Supreme Court welcomed any "legislative narrowing" of the definition. The court stated further:

> While the need to bestow wide, even intrusive, powers on the police and other officers in connection with terrorism is understandable, the fact that the powers are so unrestricted and the definition of "terrorism" is so wide means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise.[175]

Another reason for the extraordinary width of the UK definition is the 'influence' threshold in section 1(1)(b), which sets a notably low bar in comparison with *inter alia* the 'unduly compel'-requirement in the European Council Framework Decision on combating terrorism.[176] The Independent Reviewer David Anderson notes that the low bar not only render the UK definition unusually wide, but that it also is "unduly restrictive of political expression".[177] Activities with a political agenda, such as demonstrations, marches and speeches, typically have the legitimate goal of influencing the politicians; hence, the danger of classifying such activities as acts of terrorism. Moreover, the imposition of the remarkably broad powers to stop an individual at the ports and boarders of the United Kingdom for investigating whether that person *appears to be* "*concerned in* the commission, preparation or instigation of acts of terrorism [author's emphasis]"[178] was questioned in the case of *David Miranda v SSHD and MPC*.[179] The case has been elaborated upon by the Independent Reviewer of Terrorism Legislation, David Anderson, who ascertains "what the *Miranda* judgment reveals is that the publication (or threatened publication) of words may equally constitute terrorist action [bold omitted]".[180] Anderson adds the "vast penumbra of ancillary offences" to the already wide definition of terrorism, and highlights the possibility of resulting in a 'chilling effect'. He notices that the "publication of facts and opinions may *itself* be an act of terrorism, on no other basis than that it is politically motivated and is considered to endanger life or create a serious risk to public health or safety".[181] The consequences of such an application could end up far beyond

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[175] *R v Gul (Mohammed)* 1225.
[176] EU Council Framework Decision on combating terrorism, 2002/475/JHA, 13 June 2002, art. 1(1); the criteria was reiterated in the preamble of the Council of Europe Convention on the Prevention of Terrorism, No. 196, 16 May 2005. *For additional comparisons, see also*: Anderson Q.C., David, *The Terrorism Acts in 2013*, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006, July 2014, para. 10.36.
[177] Anderson, 2014, para. 10.38.
[178] Cf. The wording of Terrorism Act 2000, s. 40(1)(b) above.
[179] *David Miranda v SSHD and MPC* [2014] EWHC 255 (Admin).
[180] Anderson, 2014, para. 4.16.
[181] *Ibid.*, para. 4.20 and footnote 88.

the protection of national security, although Anderson admitted that the risk of such an extreme application was hardly a real one.[182]

Against this background, it appears as the suspicion of someone having an intention to engage in 'terrorism-related activity' could potentially be based on a myriad number of circumstances. Taking all of this into account, there seem to be little, if any, distinction as to whom the temporary restriction on travel powers target; in theory, anyone of all citizens could be suspected for intending to be, or having been, involved in terrorism-related activity.

What is more, both the power to seize and retain passports as well as the authority to impose a TEO, may be exercised in relation to children; neither the Act itself nor the bill documents give account of any specific procedure or regulation in connection to the treatment of minors suspected for (leaving the country for) involvement in terrorism-related activity. Regarding passport seizure, the Code of Practice emphasizes the need to take special care when exercising the power "where it is evident that the person is a child"; a child is "anyone who appears to be under the age of 18 in the absence of clear evidence that he or she is older".[183] The duty to take special care means that the constable is entitled to seize and/or retain the passport from a child, regardless of whether he or she is travelling alone or in company with an adult, but that when doing so the constable is obliged to "have due regard to the vulnerability of the child".[184]

To summarize, the extraordinary width of the UK definition of terrorism in conjunction with the 'terrorism-related activity' requisite renders, in the words of David Anderson, the potential suspect "at many removes, here, from the man with the bomb".[185] By the very definition, it suffices that a person intend to give support to or encourage the preparation or instigation to an act defined as terrorism. The group towards whom the two powers are targeted is neither limited in respect of nationality, nor with regard to the age of the individual. Consequently, the rule is directed towards 'all citizens' – except for the insignificant limitation of requiring a right to abode for imposing TEOs – in similar manner as has been the case when the ECtHR has considered offences to be 'criminal' in nature.

(c) The purpose of the sanctions

In finding that the offences were criminal in nature the ECtHR has put emphasis on the punitive and deterrent character of the sanctions, as these

[182] Anderson, 2014, para. 4.22. For an example of the extreme version, *see* paras 4.19-4.21.
[183] *Code of Practice*, para. 27.
[184] *Ibid.*, para. 30. For natural reasons, no such instruction is given in relation to the imposition of TEOs as a TEO may be imposed by the Secretary of State when a permission of a court has been obtained, or in urgent cases without prior permission. It is also the Secretary of State who gives instructions on the exercise of passport seizures, by virtue of schedule 1, para. 18; hence, the redundancy of issuing a Code of Practice in relation to TEOs.
[185] Anderson, 2013, note 72.

are "recognized as characteristic features of criminal penalties".[186] To punish and to prevent have traditionally been considered as characteristics of criminal penalties; the aim of punishing is primarily to achieve retribution for the 'bad' that has been committed, while the preventative function is to encourage the perpetrator and the general public to refrain from committing crimes.[187] On the other hand, in the *Bonda* case before the EU Court of Justice, the purpose of the agricultural sanction was "essentially to protect the management of European Union funds", which led to the conclusion that the offence was not criminal within the meaning of the ECHR.[188] Thus, to apply the same line of reasoning to the temporary restrictions on travel, renders the imperative of determining whether the sanctions are deterrent or punitive in character.

A passport may be retained on the authorization by a senior police officer, as noted above in chapter 2.4.1, and the retention may continue while consideration is given as to whether to (a) cancel the passport; (b) charge the person with an offence; (c) subject the person to any measure connected to the protection of the public from a risk of terrorism.[189] Subsection 1(d) also allows the retention to continue while steps to carry out any of these actions are taken. Accordingly, the purpose of seizing and retaining passports is to "facilitate further investigations in respect of [the] individual".[190] The main purpose of imposing a TEO, in turn, is to manage and control the return of an individual that might pose a threat against the public should he or she come back into the country, rather than excluding the person – albeit the latter is what first happens.[191] Moreover, it has implicitly been indicated that there is a preventive function in the TEOs as well, in the sense that the knowledge about a potential exclusion will perhaps deter an individual from going abroad to engage in activities that might be perceived as terrorism-related activities.[192]

Consequently, the investigative aim of passports seizures is apparently not intended to neither deter from nor punish the individual for being at a port with the intent of leaving the UK. Such a solution would not only turn out extremely irrational but also detrimental to the general interest of travelling, whether in business, on vacation or whatever legitimate reason. On the contrary, the purpose of imposing a TEO is arguably both deterrence from leaving the UK with the intent of engaging in terrorism-related activity, or

[186] *Sergey Zolotukhin*, para. 55. *See also Janosevic*, para. 68 and *Öztürk*, para. 53.
[187] Frände, Dan, *Allmän straffrätt*, 4 ed., Forum Iuris, Helsingfors, 2012, pp. 17-18. A somewhat simplified description of the characteristics of a criminal penalty provides that (a) the convicted individual appreciate the penalty as something unpleasant and unwelcome, (b) the punishment is intentionally enforced according to a plan, (c) those who execute the punishment has a legal right to do so, and (d) the punishment is a direct sanction for a breach of a legal norm, p. 1.
[188] *Bonda*, para. 40
[189] CTS Act 2015, schedule 1, para. 5(1).
[190] JCHR, *Examination of Witness: James Brokenshire MP*, Q3.
[191] *Ibid.*, Q17. *See also*, Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, Q138.
[192] JCHR, *Examination of Witness: James Brokenshire MP*, Q20.

for reasons that could be perceived as such an intent, and punishment for having chosen to leave the country for such a reason. On this ground, it might therefore be established that the imposition of TEOs is a 'criminal' procedure within the meaning of ECHR, although to exercise the power to seize and retain a passport is not.

In conclusion, the two temporary restriction on travel powers are directed towards 'all citizens'; the purpose of imposing a TEO is arguably both deterrent and punitive; and it could be advocated that international instruments by which the UK is bound, require states to criminalize acts such as travelling abroad with the intent of engaging in terrorism-related activity. In respect of passport seizures, I find it difficult against these findings to conclude that the measures amount to a 'criminal charge' within the meaning of the ECHR. However, as noted above, the three *Engel*-criteria are available for a cumulative application where an isolated approximation of each of them does not suffice to deduce a 'criminal' nature. Consequently, the next step is to examine the severity of the penalty in order to determine whether my assumption that the temporary restriction on travels measures are of a *de facto* criminal character is valid.

3.2.3 Severity of the penalty

The third criteria established by the Court in *Engel and Others v Germany* is recognized as the most important one;[193] albeit, its importance has been disputed and its revocation advocated, except in circumstances where it "becomes obvious that the disciplinary label is designed to mask a criminal sanction".[194] Nevertheless, it was the criteria the Court was predominantly occupied with in the *Engel*-case and that led the Court to divers ruling in relation to the separate complainants. For the first and second applicant the punishment was a "light arrest" that did not involve deprivation of liberty, and "was of too short a duration to belong to the 'criminal' law", respectively. For the other three applicants, however, the charges "did indeed come within the 'criminal' sphere since their aim was the imposition of serious punishments involving deprivation of liberty".[195] This view has been reiterated in the Court's jurisprudence repeatedly, for instance in *Zolothukin*:

> As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are "criminal".[196]

[193] *See* for instance, Ashworth and Zedner in Duff et al. (eds.), p. 75; and Emmerson and Ashworth, p. 151.
[194] Trechsel, p. 30.
[195] *Engel and Others*, para. 85.
[196] *Sergey Zolotukhin*, para. 56. *See also Benham*, para. 56 and *Steel and Others*, paras. 45 and 49.

However, the involvement of deprivation of liberty is not mandatory for considering an offence as 'criminal' within the meaning of the Convention. In the case of *Janosevic*, the penalty at stake was tax surcharges of a considerable amount. There was no possibility to convert the penalty into a prison sentence in the event of default payment, but the Court, nevertheless, judged the potential and actual penalty to be so severe that it further evidenced the criminal character of the national provision.[197]

Similarly, in *Welch v the United Kingdom*[198] the Court considered whether a confiscation order imposed as a result of a conviction on drug-trafficking, was 'criminal' for the purpose of applying article 7 of the Convention. Although there was no deprivation of liberty at stake, the applicant "faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted".[199] Thus, in finding that the combination of punitive elements made the confiscation order, in the circumstances of the case, amount to a penalty, the Court reasoned that despite the preventative purpose of the sanction

> it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.[200]

This case led Ashworth and Zedner to the conclusion that the purpose of the sanction is important, but "if the effects of an order are sufficiently burdensome or intrusive […] there comes a point at which they may fairly be held to be punitive, irrespective of purpose".[201] Furthermore, the EU Court of Justice has found ECHR, articles 6 and 13 to be applicable in a case concerning the inclusion of individuals in so-called 'blacklists', which resulted in them having their funds frozen.[202] This finding indicates the EU Court of Justice's position that the severity of the penalty triggers the application of the Convention's protection, notwithstanding the fact that the purpose of the sanction is to prevent acts causing serious harm from taking place.

Thus, in accordance with this outline, the severity of the temporary restrictions on travel as a form of sanction will be scrutinized. For sake of

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[197] *Janosevic*, para. 69.
[198] *Welch v the United Kingdom*, Appl. No. 17440/90, 9 February 1995.
[199] *Ibid.*, para. 34.
[200] *Ibid.*, paras. 30 and 35. It is worth noting that the Court emphasized that the conclusion was only in relation to the retrospective application of the relevant legislation (prohibited by ECHR, article 7) "and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking", para. 36.
[201] Ashworth and Zedner in Duff et al. (eds.), p. 77.
[202] C-402/05 and C-415/05, *Kadi and Al Bakaraat International Foundation v Council of the European Union*, Judgment of the Court (Grand Chamber) 3 September 2008, paras. 335-336.

clarity, the rights at stake will be examined one by one; first, however, some general remarks will be provided.

The exercise of the power to seize and retain a passport from an individual at a port potentially infringes with several rights and liberties enshrined in the ECHR as well as the ICCPR. The UK Government has acknowledged, in its ECHR Memorandum, some of the rights at stake, but has avoided mentioning others. One example is the right to freedom of movement including the right to leave any country as the JC rightly noticed in its legislative scrutiny.[203] The explanation for failing to mention this right in the ECHR Memorandum might be found in the fact that it is an *ECHR* Memorandum. The right to freedom of movement is expressed in the ECHR Protocol No. 4, article 2, the UK has, however, signed but not ratified the protocol.[204] On the other hand, the right is equally ensured by virtue of ICCPR, article 12, to which the UK is a State Party.[205]

As regards the use of TEOs, the measure is more restrictive and triggers the application of additional human rights provisions than a decision to seize and retain a passport. At the outset, the JCHR recognized the controversial character of the provision since "excluding UK nationals from their own country, even temporarily, may be incompatible with an individual's rights under the ECHR which a UK national does not forfeit by travelling abroad".[206] Albeit the failure to expressly indicate what ECHR rights the Committee has in mind, two obvious candidates are the right to private and family life in article 8 and the right not to be subjected to torture or inhuman or degrading treatment or punishment in article 3. Moreover, it appears as the Government expected a potential violation of articles 2, 5 and 6, although it disputed (as noted in chapter 2.2.2) the applicability of the entire Convention.[207] Thus, the Government reasoned that ECHR would not be applicable extra-territorially and there would consequently not be any infringement with the right to life, the protection against arbitrary deprivation of liberty or the right to a fair trial.

This way of approaching the issue has been rigorously disputed by Professor Guy S. Goodwin-Gill who stated in a submission to the JCHR that the Government's argument "is based on a fundamental misunderstanding of the role of nationality and its link to jurisdiction".[208] Equally critical, the JCHR concluded that the only possibility to return after a TEO has been imposed is to obey by the conditions decided by the Secretary of State, without any judicial involvement "apart from ex post facto judicial review which, by definition, will have to be pursued from abroad". Consequently,

[203] JCHR, Legislative Scrutiny, para. 2.4.
[204] *See* Council of Europe website: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=UK&MA=999&SI=3&CM=3&CL=ENG, 4 May 2015.
[205] *See* UN website: http://indicators.ohchr.org/, 4 May 2015.
[206] JCHR, Legislative Scrutiny, para. 3.4.
[207] ECHR Memorandum, para. 10.
[208] Goodwin-Gill, para. 6.

to impose a TEO leads, in the Committee's view, to a substantial risk of human rights violations to the detriment of UK nationals.[209]

(a) Freedom of movement

According to ICCPR, article 12.1 shall "everyone lawfully within the territory of a State […], within that territory, have the right to liberty of movement and freedom to choose his residence", and subparagraph 2 provides that "everyone shall be free to leave any country, including his own". However, this is not an absolute right, but a qualified one that might be subjected to restrictions if in accordance with subparagraph 3 stating:

> the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In turn, the imposition of a TEO has potential to engage the right not to be arbitrarily deprived of the right to enter one's own country as provided for by ICCPR, article 12.4. In contrast to the possible implications with article 12 stemming from the seizure and retention of a passport, it is not permitted to subject the right to enter one's country to any limitations. As evidenced by the wording of subparagraph 3 – "the above-mentioned rights…" – subparagraph 4 is not covered by the possibility to make an exception.[210] In response to the JCHR's disquiet about the matter, the Immigration and Security Minister, James Brokenshire, asserted, that the provision "is concerned with 'arbitrarily' depriving a person of the right to enter his own country. TEOs do not deprive the subjects of the ability to enter the UK, and nor do they affect this ability 'arbitrarily'".[211] The means to avoid arbitrariness is, according to the Minister, the requirement that the Secretary of State must be satisfied that the conditions as set out in section 2 of the CTS Act 2015 are met and, additionally, the recourse to judicial review of the decision.[212] The judicial review the Minister refers to appears to be the one provided for in section 11 of the Act; however, that option is only available to individuals *in* the United Kingdom, i.e. excluded individuals who have agreed to comply with the conditions in a permit to return. This issue will be addressed further in chapter 4.

In this respect, it deserves to be noted that the UN Human Rights Committee (HRC) has clarified that the term 'arbitrarily'

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[209] JCHR, Legislative Scrutiny, para. 3.9.
[210] This interpretation is confirmed by the UN Human Rights Committee in its General Comment No. 27 (67) on the article, CCPR/C/21/Rev.1/Add.9, 1 November 1999, para. 11. According to ICCPR, article 4, it is, however, feasible to lodge a derogation notification with respect to article 12 in its entirety.
[211] Brokenshire, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, p. 4.
[212] JCHR, *Examination of Witness: James Brokenshire MP*, Q21.

> is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[213]

The HRC "considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable".[214] Obviously, the situation in the world has changed since this comment was published in 1999, but the necessity of adhering to the aims and objectives of the ICCPR and the requirement of reasonableness are still well-founded.

In furtherance, the EU Freedom of Movement Directive[215] reinforces this right as article 4 entails a right to "all Union citizens with a valid identity card or passport […] to leave the territory of a Member State to travel to another Member State", and article 5 requires Member States to "grant Union citizens leave to enter their territory with a valid identity card or passport". Article 27, however, permits the Member States to restrict the freedom of movement on grounds of public policy, public security and public health; by virtue of subparagraph 2, such a restriction must be proportionate and based on the personal conduct of the concerned individual. The conduct, in turn, "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Justifications for restricting the freedom that rely on "considerations of general prevention shall not be accepted".[216]

Thus, should there be reasonable grounds to suspect an intention of engaging in terrorism-related activity justifying the seizure and retention of an individual's passport, the inevitable intrusion with the right to freedom of movement might be perfectly legitimate and in compliance with the UK's international duties. However, whether the conduct of the concerned individual constitutes a genuine, present and sufficiently serious threat is less obvious, but will have to be determined in consideration of the circumstances of each specific case. As repeatedly emphasized, albeit disputed, the overarching purpose for introducing the powers is to protect the public against terrorist acts, and the necessity stems from a gap in the existing legislation (as elaborated upon above in chapter 2.4.1). The necessity of the powers will not be studied in more detail here; in relation to the severity of the penalty criteria it suffices to note that there is a potential breach of the right to freedom of movement stemming from the imposition of the sanction, i.e. seizing and retaining a passport.[217] On the other hand,

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[213] UN HRC, GC 27 (67), para. 21.
[214] *Ibid.*
[215] Directive 2004/38/EC of the European Parliament and of the Council, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, 29 April 2004.
[216] *See*, Directive 2004/38/EC, article 27.2.
[217] As noted above, in *Janosevic*, para. 69, the ECtHR took into account the severity of both the *potential* and *actual* penalty imposed, which is in line with the Court's statement in

the imposition of a TEO might be legitimate under the Freedom of Movement Directive on the same grounds as a decision to seize and retain a passport, but such arrangement risks violating the UK's obligations under ICCPR, article 12.4.

(b) The right to private and family life

To exercise the temporary restriction on travel powers equally triggers the application of the right to private and family life contained in ECHR, article 8, as the UK Government appreciated in the ECHR Memorandum.[218] The extensive scope of the article is reflected by the amount of case law in which the ECtHR has decided in a matter connected to the right to lead a private and family life.[219] In one of the first judgments, the Court noted that the article contains both a negative obligation to refrain from interfering with the right therein, as well as a positive obligation to realize an effective enjoyment of the right, meaning that the state must to some extent stop others from interfering.[220] Consequently, it is unquestionable that seizing the passport from an individual will contravene the right to private life, as the measure authorizes *inter alia* the constable to search a person and his or her possessions, and the right to family life due to obstruction of travel plans whatever their motive. Still, the right to private and family life might also be subjected to limitations by virtue of the second subparagraph, which requires an intrusion to be in accordance with law, necessary in a democratic society and in the pursuit of a legitimate aim (such as the interest of public safety for instance). Due to the 'margin of appreciation' allowing states to regulate lawful interferences with ECHR, article 8, it is not possible to determine in a generalized, sweeping manner that every seizure and retention of a passport will be violating the individual's human rights as protected by the Convention.[221] Nevertheless, some general remarks will be made.

In the case of *Sabanchiyeva and Others v Russia*, among others, the ECtHR deliberated on the margin of appreciation and noted that the extent of the national authorities' discretion depends on various factors and thus differs from case to case. It also reiterated its awareness in preceding cases of the particular challenges the States face when confronting terrorism and terrorist violence.[222] The matter to deal with in the case was the application of domestic anti-terror provisions depriving the applicants of the right to

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Engel, para. 85, that "the final outcome of the appeal cannot diminish the importance of what was initially at stake".

[218] ECHR Memorandum, paras. 3 and 14.

[219] *See for instance Sabanchiyeva and Others v Russia*, Appl. No. 38450/05, 6 June 2013, para. 117, with further references.

[220] *Airey v Ireland*, Appl. No. 6289/73, 9 October 1979, para. 32. *See also* Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerpen – Oxford – New York, 2002, p. 60.

[221] The inquiry whether some human rights are fundamentally inherent by the mere fact of being 'human', i.e. regardless of the codification of the rights in some instrument, might come into play here, but that is for someone else to consider. For a comprehensive review of the margin of appreciation in relation to article 8, *see* Arai-Takahashi, chapter 4.

[222] *Sabanchiyeva and Others*, para. 134.

participate in the internment of their deceased relatives; the latter were terrorists as defined in national laws and had been killed during confrontation with state forces. The Court observed that the infringement with the applicants' right to private and family life was severe as they were completely precluded from any participating in the funerals and were not allowed to know about the location of the graves.[223] With regard to the Russian government's interest in preventing further disturbances associated with the terrorist activities the deceased had been engaged in, the Court stated that it could "in principle, accept that […] the authorities could be reasonably expected to intervene". Furthermore, it accepted that

> in organising the relevant intervention the authorities were entitled to act with a view to minimising the informational and psychological impact of the terrorist act on the population and protecting the feelings of relatives of the victims of the terrorist acts.[224]

On the other hand, these goals were not sufficient to justify the denial of participation in the funerals and the opportunity to pay their respect to the deceased relatives to the detriment of the applicants. Thus, the government's automatic application of the domestic laws, lacking of consideration of the individual circumstances of each applicant, the Court ruled that the State had failed to strike a fair balance between the conflicting interests and the margin of appreciation was overstepped.[225]

Equally appreciating the special difficulties for States facing the threat posed by terrorism, the Court admitted in the case of *Brogan and Others v the United Kingdom*[226] that even the fundamental protection against arbitrary deprivation of liberty enshrined in ECHR, article 5 could be subjected to special treatment. Thus, the period of detention before bringing the person before a judicial authority could be prolonged if the individual was suspected for serious terrorist offences.[227] However, the scope for flexibility in the interpretation of the term 'prompt' in article 5.3 is limited and, albeit inspired by the aim of protecting the public from terrorism, the 'promptness' was exceeded in the circumstances of the case.[228]

Taking into account the Court's respect for the particular challenges States face in the fight against terrorism, the margin of appreciation accorded to the States when interfering with the right to private and family life is arguably wider still than what could otherwise be accepted. Nevertheless, the requirements in subparagraph 2 persist, and, in relation to passport seizure and retention, the UK Government suggested that "where the exercise of the power is reasonably foreseeable and circumscribed by adequate safeguards so that it cannot be used arbitrarily or otherwise

[223] *Sabanchiyeva and Others*, para. 138.
[224] *Ibid.*, paras. 141-142.
[225] *Ibid.*, paras. 143-146.
[226] *Brogan and Others v the United Kingdom*, Appl. Nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988.
[227] *Ibid.*, para. 61.
[228] *Ibid.*, para. 62.

misused, there are strong arguments that the legislation itself is compliant with Article 8".[229] The adequacy of the safeguards will be addressed further in the subsequent chapter. Regarding the foreseeability of the provision, it is questionable since the intelligence giving reasonable grounds to suspect that the individual has an intention to engage in terrorism-related activity while outside the UK is most likely classified information. The individual might therefore be unaware of the suspicions making it impossible to foresee the exercise of the powers. Concerning article 8, the Government accepted that to temporary exclude someone from the UK would interfere with the right to enjoy private and family life within the country, although the individual him or herself is able to bring that interference to an end by agreeing to the conditions of a permit to return. Hence, the interference is "capable of being necessary and proportionate, subject to consideration of the facts of each case".[230]

(c) The right to not be subjected to torture or inhuman or degrading treatment or punishment

As the right to freedom of movement and the right to private and family life are qualified rights that might legitimately be limited for the purpose of protecting the public, it has to be ascertained in each individual case whether a potential breach of the provisions is at stake in the sense that the measure is to be understood as a severe sanction amounting to a 'criminal' punishment. Yet, the UK Government has identified another right at stake, namely "[i]f the power is exercised in respect of a person who is not a UK resident, such as a person who is a transit passenger, stopping off in the UK en route to another destination, then there is potentially an Article 3 interference too".[231] This acknowledgement is more troublesome since the prohibition of torture or inhuman or degrading treatment in article 3 is absolute and cannot be subjected to any limitations.[232] The potential interference would derive from the circumstance that the individual concerned might be rendered destitute if he or she has "nowhere to stay in the UK for the period during which his travel documents are retained, and has no source of funds in the UK to sustain him [or her] for that period".[233] Should this risk be realized, the measure would not only breach the UK's international obligations to abstain from subjecting the individual to inhuman treatment, but it would also mean that the severity of the penalty (the potential risk of being subjected to inhuman treatment) most likely situates the measure within the criminal law regime.

The risk of an article 3 violation taking place is even more imminent in the TEO circumstances; the individual, stranded in a country abroad – perhaps

[229] ECHR Memorandum, para. 4.
[230] *Ibid.*, para. 15.
[231] *Ibid.*, para. 3.
[232] In *Sabanchiyeva and Others* the Court confirmed the absolute character of article 3 in stating that that "even in the most difficult circumstances, such as the fight against terrorism or organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment", para. 104.
[233] ECHR Memorandum, para. 3.

where the practice of torture or inhuman or degrading treatment is more commonly resorted to – is likely to be singled out as a 'terrorist' and thus subjected to reprisals of varying kind.[234] In *Chahal v the United Kingdom*[235], the ECtHR deliberated upon a situation where the UK Government had decided to expel the applicant for reasons of national security – the applicant was suspected for having committed terrorist acts.[236] The Court confirmed the *non-refoulment* principle and the absolute character of article 3 in expressing that

> [t]he Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[237]

By analogy, if the absolute prohibition to subject a person to torture or inhuman or degrading treatment or punishment frustrates the expulsion by a non-national to his or her country of origin, the decision to negate the return of a citizen who is outside the state must be equally prohibited, notwithstanding any reasonable suspicion of involvement in terrorism-related activity abroad.[238] Following the same reasoning, it is equally plausible that imposing a TEO potentially triggers the application of the right to life in article 2; an individual rendered stranded and destitute in a state in turmoil is at danger to be killed in the disturbances. In such circumstances, the UK could be deemed liable for not taking action to protect the life of the individual in breach of its positive obligation under the article. Alternatively, or additionally, the negative obligation to refrain from acting in a way that could result in the loss of life is breached due to the concrete, factual decision to impose a TEO.

The possible implications on the right to freedom of movement, the right to private and family life, and the right not to be subjected to torture or inhuman or degrading treatment or punishment to the detriment of a person who is subjected to a temporary restriction on travel measure are, separately or at least cumulatively, severe enough to amount to a criminal penalty in the meaning of the ECHR. Despite that, one additional consequence has to be considered in relation to the imposition of a TEO.

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[234] The concern about article 3 implications was raised during the passage of the Bill, *see* CTS Bill 2014-15 Parliamentary stages, SN/HA 07073, 10 February 2015, p. 11; and has equally been uttered by Liberty, para. 21.
[235] *Chahal v the United Kingdom*, Appl. No. 22414/93, 15 November 1996.
[236] *Ibid.*, paras. 23-24 and 75.
[237] *Ibid.*, para. 79.
[238] For an ample account of the *non-refoulment* principle and its relation to the national security of states, *see* Bruin, Rene and Wouter, Kees, "Terrorism and the Non-derogability of Non-refoulement" in Samuel, Katja L.H. and White, Nigel D. (eds.), *Counter-Terrorism and International Law*, Ashgate, Farnham, 2012, pp. 377-401.

(d) Statelessness

During the passage of the Bill, it has been argued that TEOs will render the targeted individual stateless. This is not at all an uncontroversial suggestion; the positions on the matter differ greatly. The Government, through the Minister James Brokenshire, reassured the JCHR that the measure is not intended to nor has the effect of making someone stateless, because the affected persons may return.[239] On the opposite side stands Liberty, claiming that during the time passing from the moment a TEO is imposed – which automatically means that the individual's passport is invalidated – up until the date of conditional return, the individual is in practice stripped of citizenship.[240] The president of Liberty, Shami Chakrabarti, expressed her view to the Home Affairs Committee when giving oral evidence on the Bill:

> To tell British citizens that they may not return to their country unless they accept a form of punishment without trial, which is a TPIM or a control order or whatever you want to call it, is de facto statelessness. […] It is de facto statelessness to say to somebody that you can only come back if you agree effectively to punishment without trial, which is what TPIMs and control orders are.[241]

A perhaps more neutral opinion is delivered by Goodwin-Gill, who does not expressly state that the imposition of a TEO is in practice rendering the individual stateless; nonetheless, he refers to his earlier contributions to the debate on the topic and stresses "the citizen's right to return to his or her own country and the State's duty to admit its citizens".[242]

To approximate the inquiry, it is, at the outset, relevant to identify what is meant by the term 'stateless'. The UN Convention relating to the Status of Stateless Persons, adopted in 1954, defines a 'stateless person' as

> a person who is not considered as a national by any State under the operation of its law.[243]

The crux is thus to determine whether the individual subjected to a TEO could be deemed as not considered a UK national *under the operation of* the UK law. To begin with, the CTS Act 2015 states explicitly in section 4(9) that "at the time when a temporary exclusion order comes into force, any British passport held by the excluded individual is invalidated". From this perspective, when the individual is stuck abroad without a valid passport, it appears as if the individual will face problems in availing him or herself of the protection offered by UK laws. On the other hand, the Minister for Security and Immigration asserted to the JCHR

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[239] JCHR, *Examination of Witness: James Brokenshire MP*, Q19.
[240] Liberty, para. 26.
[241] Home Affairs Committee, *Oral Evidence: Counter-Terrorism and Security Bill*, Q82 and Q112.
[242] Goodwin-Gill, para. 2.
[243] United Nations Convention Relating to the Status of Stateless Persons, 28 September 1954, article 1.1.

> certainly British citizens are entitled to appropriate support from our consular network and, indeed, our embassies. Therefore [sic!] in terms of the principle of British citizenship […] obviously connection and contact with the British embassy would potentially be available.[244]

The notion of *de facto* statelessness, in turn, has been defined as "a person ...who ...is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality".[245] How an individual – stranded in a State in turmoil, perhaps where no British consulate or embassy is located – could, in practice, avail him- or herself of this support when such a support is reliant on the individual travelling to another state where there is a consulate or an embassy, is an unanswered question. Moreover, there might be practical obstacles to even apply for a permit to return, giving further reasons to fear that this person would be unable to enjoy the UK Government's protection. Thus, there seem to be grounds for Shami Chakrabarti's worries about imposing TEOs is, at least in some instances, equivalent to rendering the person in a state of *de facto* statelessness.

Whether the TEOs in fact constitute a mean to render someone stateless or not depends in the end on one's political stance. For the present purpose, however, it is enough to point out that the imposition of such an order has the potential to render someone stateless; hence, the severity of the penalty at stake. What is more, a TEO is according to section 4(3)(b) valid for two years ("unless revoked or otherwise brought to an end earlier"), making the harsh consequences endure for a considerable period in time.

From this rather extensive excursion on what is at stake when temporary restrictions on travel measures are imposed, it becomes clear that the sanctions have potential to amount to criminal penalties. Although there is no deprivation of liberty involved, the danger of subjecting the individual to a measure that triggers the application of either the prohibition of torture or inhuman or degrading treatment or punishment, or the right to life, is more than enough to deem the provisions 'criminal' within the meaning of the Convention. Even more, when the risk of rendering the person stateless and the inevitable intrusion of the individual's private and family life are added; the threshold of severity is, in my opinion, undoubtedly reached.

[244] JCHR, *Examination of Witness: James Brokenshire MP*, Q23.
[245] UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1, section III, para. 2.

3.3 The character of temporary restrictions on travel: conclusion

To really determine the compatibility of the temporary restriction on travel powers with the UK's international obligations, in particular to respect human rights, must be made on a case-by-case basis while taking into account the specific circumstances of each case. The lawfulness and proportionality of employing the powers of seizing and retaining passports and imposing TEOs depends, in the end, on the intelligence upon which the decisions are made. Such intelligence is more often than not confidential information due to security concerns, and might not even be displayed during judicial processes in relation to the individual. Nonetheless, it is possible to ascertain the character of the measures in general terms with the aim to establish whether they are *de facto* criminal sanctions that should be circumscribed by the procedural safeguards inherent in the criminal law regime.

Accordingly, the three criteria used to assess whether a national provision belongs to the 'criminal' law in the meaning of the ECHR, as established by the ECtHR in the case of *Engel and Others v the Netherlands*, are (I) the label in national laws; (II) the nature of the offence; and (III) the severity of the penalty

In the foregoing application of these criteria to the temporary restriction on travel measures, it has been established:

(I) In the UK legal order, the measures are purely administrative as it is the executive authority – a constable at a port or the Secretary of State – who decides whether to subject an individual to any of these powers. It has been suggested that measures of this kind should be approached as 'civil preventive hybrid orders' since the non-compliance with the sanctions becomes a criminal offence with quite severe punishments. In any event, the measures are not labelled criminal in the domestic legislation.

(II) Both the power to seize and retain a passport and/or travel documents and to impose a TEO are directed towards all citizens in the United Kingdom, apart from the insignificant limitation of requiring a right to abode for the use of a TEO. The width of the definition of terrorism further extends the targeted group. The purpose of the sanction is to facilitate investigations as concerns passport seizures, but arguably deterrent and punitive in respect of TEOs. Finally, the classification of similar measures in other ECHR States falls outside the scope of this thesis, but international instruments, particularly in UNSC res. 2178, requires criminalization of travels for terrorist purposes.

(III) The potential consequences of seizing and retaining a passport and/or travel documents and of imposing a TEO are serious infringements with several of the affected individual's human rights. Most disturbingly, both powers risks contravening unqualified rights, in addition to the qualified rights at stake.

In conclusion, the label in national law is clearly not decisive for deeming the temporary restrictions on travel measures as 'criminal'; hence the necessity to proceed to the other two criteria. Should the nature of the offence also be insufficient, the severity of the penalty is what makes it abundantly clear that the measures reach the threshold for being 'criminal' within the meaning of the Convention. In addition, a cumulative approach is accepted; in considering the nature of the offence *together with* the severity of the penalty, there seem to be little, if any, room for judging the measures as purely administrative. The fact that few, if any, cases concerned with national provisions imposing sanctions as a consequence of an administrative or civil offence results in the ruling that the considered provision is not criminal in nature[246], further supports this conclusion. It must be deemed viable that the Court would find the temporary restrictions on travel to be 'criminal' in nature for the purpose of applying the Convention.

[246] Trechsel, p. 30.

4 Implications for the inclusion of procedural safeguards

Initially, it must be reiterated that the following chapter will not give an exhaustive account of the components of the right to a fair trial, nor of all issues related to the elements mentioned. Rather, in this chapter I will deliberate upon the right to a fair trial and related matters in those parts that are affected by the use of the temporary restrictions on travel measures.

4.1 The notion of a fair trial

The main provision of the ECHR addressing the judicial procedures in the determination of a person's "civil rights and obligations or of any criminal charge" against him or her, is article 6, entailing "the right to a fair trial". When a Contracting State decides to bring a charge against someone because of the commission of a criminal offence, that person is, according to subsection 1, entitled to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Furthermore, subsection 3 of the article establishes the minimum standards that have to be met, and includes *inter alia* a right to be informed promptly in a language the person understands, to be able to prepare the defence, to have legal assistance and to examine witnesses. In the context of a criminal charge the presumption of innocence, provided for by subsection 2, is likewise triggered.

The purpose for adopting an autonomous understanding of the term 'criminal' was plainly expressed by the ECtHR in the case of *Engel and Others v the Netherlands:*

> If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.[247]

Similarly, in relation to what could be regarded as 'minor' offences, in *Öztürk v Germany*, the Court stated:

> Furthermore, it would be contrary to the object and purpose of Article 6 (art. 6), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole

[247] *Engel and Others*, para. 81.

> category of offences merely on the ground of regarding them as petty.[248]

The procedural protection offered by the Convention aims at impeding an arbitrary exercise of national powers, whether classified in the domestic legal order as administrative, disciplinary, civil or criminal. Any measure interfering with an individual's rights and liberties is thus supposed to be "predictable, ordered, and fair".[249] In addition, the concept of autonomy is vital to ensure uniformity of the application of the Convention in relation to every individual, notwithstanding the scope of the terminology in the national legal systems.[250]

Likewise, the ECtHR has established that with respect to the term 'charge' an autonomous approach should be adopted; hence, the right to a fair trial in its entirety, is applicable already prior to the actual proceedings before a judicial authority if the "situation of the [suspect] has been substantially affected".[251]

As to the presumption of innocence expressed in article 6.2, it is a fundamental principle in the criminal law regime, the respect of which generates at least an impression of a fair justice system free from authoritarian suppression by the judicial entities. The significance of the presumption has two facets. It requires the responsible authorities to realize a thorough investigation into the suspicion of an individual having committed a criminal offence, which is capable of constituting the foundation to a subsequent trial and, as it may be, conviction.[252] Moreover, the presumption encompasses the requisites for considering the trial 'fair' and is closely related to the principle of 'equality of arms'; the recognition of the former assists the accused in facing the advantage of the investigating authorities in terms of resources and intelligence.[253] Consequently, it is not plausible to draw a firm line between the different components of the concept of a fair trial, conversely, to be presumed innocent until proven guilty necessitates the tribunal to be independent and impartial and the process to respect the equality of arms.[254]

The presumption also includes a duty to refrain from anticipating the outcome of the judicial proceedings. It is primarily the personnel involved in the criminal proceedings that must respect the presumption (such obligation is to some extent incumbent on the media as well), meaning that they should not make statements or otherwise act as if they consider the person guilty prior to the final ruling of a court.[255] To determine whether the presumption has been breached, the relevant considerations concern (i)

[248] *Öztürk*, para. 53.
[249] Ashworth and Zedner in Duff et al., p. 82.
[250] Emmerson and Ashworth, p. 75.
[251] *Deweer v Belgium*, Appl. No. 6903/75, 27 February 1980, para. 46.
[252] Nowak, pp. 49-50
[253] *Ibid.*, p. 50.
[254] *See ibid.*, p. 107.
[255] *See ibid.*, p. 285.

whether the statements on the individual's guilt anticipate the outcome of the court; (ii) whether the statements menace the impartiality of the court; and (iii) whether the public regards the individual as guilty because of the statements.[256] As regards the temporary restriction on travel measures, the third criterion is of interest.

At the outset, the instigation of the criminal charge must be established since the presumption of innocence applies to "everyone charged with a criminal offence". It is evident from the ECtHR's jurisprudence that the presumption is applicable even to those judicial proceedings that are classified as administrative in the national laws as long as the individual's situation is substantially affected, since the notion of 'criminal charge' should be interpreted autonomously for the purpose of the Convention. For instance, in *Janosevic v Sweden* the Court considered an alleged violation of article 6.2 in relation to (i) the burden of proof inflicted upon the applicant, and (ii) the premature enforcement of the sanction, notwithstanding the non-criminal nature of the tax surcharges in domestic law.[257] Accordingly, when a passport is retained or a TEO has been imposed, the individual's situation is substantially affected due to the severe consequences the measures bring (as discussed in chapter 3.2.3), and the use of the powers implies inevitably the suspicion that the person is a terrorist. The pejorative and stigmatized nature of the word 'terrorist' risks condemning the individual in the eyes of the public already prior to the commencement of investigations into the individual's involvement in terrorism-related activity, and certainly in anticipation of a court's sentence. Hence, the use of the temporary restriction on travel measures puts the presumption of innocence at peril and, depending on the circumstances in each case of course, potentially violates the Convention.[258]

As concerns the legitimacy of interfering with ECHR, article 8, the ECtHR deliberated upon the matter in the case of *Gillan and Quinton v the United Kingdom*. At the outset, the Court noted that the requisite in article 8.2, that an interference with the private and family life of a person must be 'in accordance with law', entails a requirement of accessibility and foreseeability of the law. This means that the law must be "formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct".[259] This, in turn, renders the State's duty to "afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention".[260] Consequently, the Court judged the safeguards circumscribing the stop and

[256] Nowak, p. 302. Having examined various cases from the ECtHR, Nowak detect these three criteria as being the relevant ones and notes that they can coincide; it is not necessary that all of them are met for determining a breach of the Convention.
[257] *Janosevic*, para. 99.
[258] The application of the presumption of innocence is far from as straightforward as it might seem from this brief excursion. Nowak has identified several unresolved questions stemming from the case-law of the ECtHR, *see for instance* p. 135 and p. 302. Regrettably, the extent of this thesis do not allow for a deeper examination of the issue.
[259] *Gillan and Quinton*, para. 76.
[260] *Ibid.*, para. 77.

search powers provided for by the Terrorism Act 2000 as not constituting "a real curb" on the executive's wide powers.[261] Albeit the safeguards connected to the temporary restriction on travel powers are more rigorous than the ones scrutinized in the *Gillan and Quinton*-case – there must be a reasonable suspicion and, as concerns TEOs, the Secretary of State must reasonably consider it necessary to impose an order[262] – the foreseeability of the law is nevertheless questionable. Due to the wide application against practically all citizens of whom there might be a reasonable suspicion in combination with the need to keep undisclosed the intelligence instituting that suspicion, there is a small chance that the concerned individual can foresee the application of the law in a way that he or she can regulate his or her conduct. Hence, the need for adequate safeguards protecting against arbitrary use of the powers.

Besides the vital role of the right to a fair trial within the scope of the ECHR, it is equally a fundamental principle of the European Community "which must be guaranteed even in the absence of any rules governing the procedures in question" in "all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person".[263] Likewise, the EU Court of Justice stated in *Kadi and Al Bakaraat International Foundation v Council of Europe*

> [a]ccording to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States which has been enshrined in Articles 6 and 13 of the ECHR.[264]

It is therefore understandable that the lack of sufficient involvement of judicial authorities has been an issue of constant concern during the passage of the CTS Bill. The main obstacle for enjoying the protection of judicial review differs between the two elements of the powers to impose temporary restrictions on travel; hence, their separate assessment.

4.2 Passport seizure and retention

With regard to the seizure and retention of passports, the Government acknowledged the necessity of observing ECHR, article 6 within the context of judicial scrutiny, including the requirement of informing the individual of the grounds for interference with his or her rights.[265] Hence, the CTS Act 2015 provides in schedule 1, paragraph 8, for the involvement of a judicial authority when there is a need to prolong the initial retention period of 14 days. In addition, the Government ascertains that "the exercise of the power

[261] *Gillan and Quinton.*, para. 79.
[262] Cf. *ibid.*, paras. 80 and 83.
[263] T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, 12 December 2006, para. 91.
[264] *Kadi and Al Bakaraat International Foundation*, para. 335.
[265] ECHR Memorandum, para. 7.

would be susceptible to judicial review and emergency injunctive challenge where appropriate".[266] However, the JCHR notes that "the availability of judicial review alone […] is not sufficient to satisfy the requirements of the right to a fair hearing". The supervisory function of the court at this point – the mandate is, as noted previously in chapter 2.2.1, to judge the diligent and expeditious work by the police and other relevant persons – does not allow the individual to challenge in substance the reasonable grounds for suspecting that he or she intends to travel for engaging in terrorism-related activity.[267]

A key issue in relation to the supervisory function of the judicial authority is the notion of 'judicial review', i.e. what is to be understood by the terminology. By definition, a judicial review of an administrative decision is focused upon its legality, not with the merits of the decision; thus, "the task of the judges is to ensure that the exercise of any power which has been delegated to ministers and administrative and adjudicatory bodies is lawful according to the power given to that body by Act of Parliament".[268] By virtue of sections 6(1) and 7 of the Human Rights Act 1998, the lawfulness of British laws has to be judged in consideration of the ECHR. Consequently, the review performed by the judicial authority with regard to a potential prolongation of a passport retention should include considerations of whether the affected individual's rights under the Convention has been infringed and, in that case, whether the infringement was justified. Such a control does not appear to be what the legislature intended since the function of the court is limited to supervise the diligence and expeditiousness of the relevant persons.

Besides, according to schedule 1, paragraph 8(4) the judicial authority is under a *duty* to extend the retention period if it considers that the relevant persons have been acting diligently and expeditiously. Indeed, the Code of Practice indicates the court's function:

> [a]t the hearing, the court will neither examine the merits of the exercise of the power nor review the officer's decision to exercise it. The court will instead consider whether persons responsible for considering the possibility of taking additional disruptive action (and taking steps in relation to that) have been acting diligently and expeditiously in the investigation. If the court concludes that they have been, then it must grant an extension.[269]

Such a limitation is obviously troubling in the assessment of the adequacy of judicial involvement.

[266] ECHR Memorandum, para. 7.
[267] JCHR, Legislative Scrutiny, para. 2.20. *See also* Walker, 2014, para. 5.
[268] Barnett, Hilaire and Jago, Robert, *Constitutional and Administrative Law*, 8 ed., Routledge Taylor & Francis Group, London and New York, 2011, p. 722.
[269] *Code of Practice*, para. 62.

4.2.1 Access to court within a reasonable time

In the context of passport seizure and retention, the moment when the situation substantially affects the individual is when the senior police officer decides to approve retention for an initial period of 14 days. This decision is, accordingly, what triggers the application of the safeguards in ECHR, article 6 and, in particular, the right to trial "within a reasonable time" in subparagraph 1. The late entrance of judicial scrutiny, i.e. first after 14 days when there is an obligation to demand judicial authority to prolong the retention, has been questioned during the passage of the Bill as it is a "considerably longer period" than in relation to other counter-terrorism measures.[270] In the ample scope of article 6, 14 days before judicial involvement is in no way extreme or even worth reacting to. Nonetheless, the reasonableness is relative depending on the circumstances in each case; the complexity of the case is one factor to take into account.[271] Given the fact that, as far as cash are concerned, the executive authorities must obtain permission from a court for retention within 48 hours, there seem to be little reason for needing 14 days before such an application can be made in relation to passport retention; in my opinion, the complexity at this point does not justify that need.

On the contrary, the Minister of Security and Immigration, James Brokenshire, argued that should the judicial review take place earlier, it would undermine the efficiency of the safeguard since the evidence provided at the hearing would be unlikely to differ from case to case; instead, the prolonged 30 days period is intended to ensure a proportionate use of the power.[272] Nonetheless, the possibility to retain a passport for 14 days without any involvement of a judicial authority provokes an extensive period of restrictions on the individual's right to freedom of movement and the right to leave a country protected by ICCPR, article 12, as well as the right to private and family life as per ECHR, article 8. Even more troubling is the extensive period of intrusion with article 3, should the affected individual be rendered destitute. In relation to article 8, the UK Government emphasized the need to circumscribe the use of the powers with adequate safeguards in order to avoid an arbitrary application.[273] These safeguards referred to could reasonably be the involvement of a judicial authority, giving reasons for advocating an earlier entrance of such.

[270] The example given is the power to seize cash under the Anti-Terrorism, Crime and Security Act 2001 subjected to judicial review after 48 hours. *See* JCHR, Legislative Scrutiny, paras. 2.25-2.26; Walker, 2014, p. 3; Independent Reviewer of Terrorism Legislation, David Anderson in Home Affairs Committee, *Oral Evidence: Counter-Terrorism and Security Bill*, Q151.
[271] Arai-Takahashi, p. 51.
[272] Brokenshire, *Counter-Terrorism and Security Bill: Legislative Scrutiny*, p. 2.
[273] ECHR Memorandum, para. 4. *See* above in chapter 3.2.3.

4.2.2 Right to information

The requirement to give information is equally judged an insufficient safeguard, as the duty is limited to inform about the statutory basis upon which the decision is taken, i.e. the suspicion of the person's intent to leave the country for terrorist-purposes, rather than the factual reasons underlying that suspicion.[274] The JCHR touched upon the matter in the examination of James Brokenshire, who ensured the committee that "it is intended that there will be some means of informing the individual as to why the power had been used".[275] That intention has subsequently been codified in the Code of Practice, which requires the police to issue a notification containing *inter alia* information, "as fully as possible", on the reasons why the travel documents were seized and retained. The information is intended to enable the understanding of why a person is subject to investigation and from that consider whether the investigation is carried out diligently and expeditiously, but limited due to national security concerns.[276]

In the light of jurisprudence by both the ECtHR and the EU Court of Justice, the contrasting positions advanced by the Government on the one side and JCHR, among others, on the other, are typical in the balancing between protecting the public against terrorism and the respect for an individual's human rights and liberties. One example is the case of *Organisation des Modjahedines du people d'Iran v Council of the European Union* where the applicants asserted that their right to a fair hearing had been disregarded when the Organisation was included in a 'blacklist' resulting in a freezing of their assets. The EU Court of Justice did not make explicit reference to the *Engel*-criteria in scrutinizing the challenged provisions, but considered nonetheless that the applicants were entitled to the protection of the right to a fair hearing. This right encompasses, according to the court, two main features, namely (i) "the party concerned must be informed of the evidence adduced against it to justify the sanction" and (ii) the party must be "afforded the opportunity to effectively make known his view on that evidence".[277] However, the right to a fair hearing and its equivalent in the ECHR terminology, the right to a fair trial, might be subjected to restrictions, in particular in the context of combating terrorism as

> overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure.[278]

[274] JCHR, Legislative Scrutiny, para. 2. 31.
[275] JCHR, *Examination of Witness: James Brokenshire, MP*, Q4.
[276] *Code of Practice*, para. 75.
[277] *Organisation des Modjahedines du peuple d'Iran*, para. 93.
[278] *Ibid*., para. 133. *See also* ECtHR's judgment in *Chahal v the United Kingdom*, para. 131 where the Court acknowledged that confidential use of evidence may be necessary in cases dealing with national security issues, but proceeded to determine that to assert such an issue does not mean that the national authorities are relieved of any judicial control.

Accordingly, in circumstances where giving information to an individual could jeopardize the effect of subjecting an individual to a measure in connection to protecting the public from acts of terrorism, this element of the right to a fair trial could be limited. It must, however, be noted that this approach has been adopted in circumstances where giving *prior* information to the subjected individual would jeopardize the effectiveness of the counter-terrorism measure as the element of surprise is fundamental.[279] Nevertheless, in *Kadi and Al Bakaraat International Foundation* the EU Court of Justice judged that the circumstances surrounding the inclusion of the appellant's name in a so-called 'blacklist' did not respect the right to defence, particularly the right to be heard, and the right to effective judicial review.[280]

Thus, to withhold information from the individual to whom that information relates could be justified for public security reasons, particularly where the disclosure of such would jeopardize the measures efficiency or the security of other persons and/or investigations. However, for the concerned individual to be able to defend him or herself against suspicions of involvement in terrorism-related activities it is crucial that at least some information about the material grounds for that suspicion is provided.

4.3 Temporary Exclusion Orders

Turning to the imposition of a TEO, there is, in less urgent circumstances, a requirement of court involvement already prior to the relevant decision (as noted above in chapter 2.2.2). It is evident that the aim is to make sure that the Secretary of State does not decide to impose a TEO arbitrarily, without sufficient grounds for such a decision. The court should thus determine whether the Secretary of State has obviously erred in deciding (A) that there are reasonable grounds to suspect that the individual is, or has been, involved in terrorism-related activity; (B) it is necessary, for purposes connected with protecting the public in the UK from a risk of terrorism, for a TEO to be imposed; (C) it could reasonably be considered that the individual is outside the UK; and (D) that the individual has a right of abode in the UK.[281] In order to fulfil this function, the court must reasonably consider the merits of the decisions, at least to some extent. However, it has not been indicated during the passage of the CTS Bill, what errors make the Secretary of State's decisions 'obviously flawed'. Consequently, the threshold will have to be established by the UK courts whilst considering giving permission for a TEO. Such solution renders the legislation less foreseeable and accord great powers to the courts' discretion, threatening the individual's protection.

[279] *See also*, *Kadi and Al Barakaat International Foundation*, paras. 339-340.
[280] *Ibid.*, para. 334.
[281] *See* CTS Act 2015, s. 3 and above in chapter 2.2.2.

In addition, the individual's possibility to give his or her view on the matter and the material presented as a justification for the relevant decisions is limited by section 3(3-4) of the CTS Act 2015, which provides:

> The court may consider the application (a) in the absence of the individual, (b) without the individual having been notified of the application, and (c) without the individual having been given an opportunity (if the individual was aware of the application) of making any representations to the court.

Thus, on the authority of *inter alia* the case of *Organisation des Modjahedines du peuple d'Iran*, it is plausible that such a review do not satisfy the standards of giving the individual the "opportunity to effectively make known his view on that evidence". As noted above, in chapter 2.4.2, the Minister for Security and Immigration, James Brokenshire, admitted the risk that it might not always be viable to notify the subjected individual directly about the imposition of a TEO, which is reasonably one of the explanations for allowing the court to consider an application in the absence of the person. In this respect, the CTS Act 2015 states in section 4 that the Secretary of State must give notice of the TEO to the individual, but section 13(2) indicates that notice might "be deemed to have been given". This means that, if a notification is deemed to have been given because it has been sent to the latest known address in the UK, the excluded individual abroad might not be aware of the imposition of the TEO. Consequently, the person has no opportunity to give his or her view on the case or to defend him or herself against the exclusion, nor is the person informed of the accusation against him.[282] In other words, the procedural safeguards in article 6.3 that should apply within the ambit of a court review of a criminal charge are neglected.

The necessity of deciding whether conditions A-D are fulfilled prior to the imposition of a TEO is intended to protect from an arbitrary use of the power; indeed, their existence demand certain considerations and as such impedes a negligent use of TEOs. Furthermore, the CTS Act 2015, section 2(8) obliges the Secretary of State to keep under review whether to temporary exclude a person is necessary for protecting the public from terrorism (condition B). Despite this, the requirement of keeping condition B under review is not an adequate safeguard since there is no concrete instruction on the frequency of this review; in other words, the Secretary of State must review the decision but is entrusted with the discretion to decide how soon and how often. The same critique applies to the failure to designate the limits of the 'reasonable period' within which the Secretary of State must issue a permit to return upon application from the excluded individual (see above, chapter 2.2.2). This shortcoming leaves the individual in a state of uncertainty and anxiety as he or she has no possibility to know when the person will be allowed to return home. Additionally, it creates difficulties to challenge the permit to return-procedure since there are no

[282] The meaning of the term 'accusation' triggering the protection of article 6.3(a) is not entirely clear, for a discussion on the topic, *see* Trechsel, p. 196.

concrete instructions against which the exercise of the powers can be contrasted and the individual will be stuck abroad during the process.

Another protection against arbitrary use of TEOs, envisaged by the Minister for Security and Immigration, is the possibility to challenge the TEO through a judicial review.[283] This option is available to an excluded individual who has accepted the conditions in a permit to return in order to return to the UK, i.e. when the individual is within the UK.[284] Obviously, the fact that the resort to judicial review is only available to an individual in the UK is troubling from a human rights perspective. The rights and liberties of the affected person have already been restricted by the imposition of the TEO and the subsequent conditions in the permit to return; hence, the protection afforded by the judicial review of the decision comes into play too late.

4.3.1 Access to court

A significant obstacle for an individual subjected to a TEO is the *de facto* possibility to challenge the decision while stranded abroad. The Independent Reviewer on Counter-Terrorism Legislation David Anderson asserted, "if you are [abroad] with one of these orders served on you, I would suggest that the practicalities of bringing a case for judicial review in London are pretty difficult".[285] On the contrary, the Minister for Security and Immigration, James Brokenshire, contended that it would not be a bar or even an inhibition to someone outside the country to challenge the decision to impose a TEO, as individuals overseas have successfully exercised such rights in the past.[286] In addition, the Minister ensured the JCHR while giving evidence that the individual will have consular assistance and "connection and contact with the British embassy would potentially be available".[287] Nonetheless, when a person is subjected to a TEO because of reasonable suspicion that he or she is, or has been, involved in terrorism-related activity, it must reasonably be rather difficult to insist on court review from where he or she is stranded. Even if the possibility exists in theory, the feasibility in practice seems remote, especially when taking into account the pejorative nature of the word 'terrorist' and the stigmatization such a label brings. To be excluded from the home country and thus singled out as a terrorist fosters undoubtedly practical obstacles for availing oneself of the rightful protection of the Convention.

[283] JCHR, *Examination of Witness: James Brokenshire MP*, Q21.
[284] *See* CTS Act 2015, s. 11 and above, chapter 2.2.2.
[285] Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, Q141.
[286] JCHR, *Examination of Witness: James Brokenshire MP*, Q22.
[287] *Ibid.*, Q22 and Q23.

4.3.2 Legal representation

Schedule 3, paragraph 10, of the CTS Act 2015 allows for the appointment of a special advocate, whose function is to represent the interests of the individual when he or she and the legal representative have been excluded from the proceedings. Whether this applies also in a situation when it has not been possible to notify the person about a TEO, or only when the court decides to exclude the person from the proceedings, is not entirely clear from the provision itself. On the one hand, paragraph 10(1) refers to "any TEO proceedings", which according to paragraph 1(a) includes the situation when the court considers an application for permission to impose a TEO. On the other hand, paragraph 10(1) also refers to proceedings "from which the party (and any legal representative of the party) is excluded", which is not necessarily the reason for the absence of an individual during a 'prior permission of the court'-procedure. Consequently, it appears to be for the "appropriate law officers" to guarantee the appointment of a special advocate in the interest of the subjected individual, when such an arrangement is necessary. To leave such an important safeguard to the discretion of the appropriate law officer is unfortunate from a human rights perspective and could potentially violate the right to legal assistance in article 6.3(c).

4.3.3 Right to appeal

In addition, the right of appeal against a court decision on the matter is awarded only to the Secretary of State and limited to questions of law; hence, an individual against whom a TEO is imposed may not appeal against the court's ruling.[288] As the relevant decision that substantially affects the individual's situation is the permission to impose a TEO, the autonomous approach to the term 'charge' renders the application of the right to appeal in article 2 of Protocol No. 7 to the ECHR.[289] Yet, the article guarantees to everyone *convicted* of a criminal offence the right to appeal; hence, the decision to impose a TEO must be equated to a 'conviction'. Due to the severe implications for the individual – i.e. the severity of the penalty at stake, in the terminology of the *Engel*-criteria – the issuance of a TEO amounts to imposing a criminal penalty (as concluded in chapter 3), which renders the decision equal to a conviction. Accordingly, to protect the individual, the right to appeal applies and should be respected by means of allowing the subjected individual to challenge the court's decision to give permission to the Secretary of State to impose a TEO.

Consequently, as the imposition of a TEO creates practical difficulties for the affected individual to challenge the decision before a judicial authority, the need for legal representation during the 'prior permission by a court'-proceedings is vital. Equally important is the possibility for the individual to

[288] CTS Act 2015, s. 3(9).
[289] That the term 'criminal offence' in article 2 of Protocol No. 7 has the same meaning as in article 6 is "perhaps […] legitimate to expect", Trechsel, p. 363.

appeal against the imposition of such an order, something that is not provided for by the CTS Act 2015. The resort to judicial review when the individual has returned to the UK, i.e. has accepted the conditions of a permit to return, does not compensate for the lacking possibility of appeal. Such a late entrance of the court means that the individual's human rights have already been violated during the time passed since the imposition of the TEO.

4.4 Interference with the right not to be subjected to torture or inhuman or degrading treatment or punishment

The role of the judicial authority is apparently to safeguard against arbitrary interferences with the individual's human rights and liberties. With respect to article 3, however, its absolute nature does not permit any interference at all. In judging the delicate situation of the applicant in *Chahal v the United Kingdom* the Court stated "it should not be inferred […] that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether the State's responsibility under Article 3 (art.3) is engaged".[290] By the same token, it must be understood that any exclusion of an individual leaving him or her stranded abroad in a situation at risk of being subjected to ill-treatment engages the UK's responsibility. In the event of passport retention rendering the individual destitute in a situation amounting to inhuman or degrading treatment in the UK, this is certainly the case. Thus, the involvement of a court is even more crucial in its function to guard against an unlawful treatment in breach of article 3. At minimum, in compliance with ECHR, article 13 taken in conjunction with article 3, the UK is obliged to offer an effective remedy to review a complaint concerning the risk of being subjected to such a treatment. The comprehensive examination of the merits of the case the Court performed in the *Chahal*-case further evidences the importance of a rigorous judicial review. The Court stated:

> Indeed, in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3) and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[291]

Respecting the principle of subsidiarity[292], the national review system must equally perform a rigorous examination of the existence of a risk of ill-

[290] *Chahal*, para. 81.
[291] *Ibid.*, para. 96.
[292] The concept of subsidiarity was explained by the Court in connection to the exhaustion of domestic remedies in *Demopoulos and Others v Turkey*, Appl. Nos. 46113/99; 3843/02; 13751/02; 13466/03; 10200/04; 14163/04; 19993/04; 21819/04, Decision on admissibility, 1 March 2010, para 69.

treatment, which postulates the involvement of an external, objective authority, preferably a judicial one.

In relation to the right to an effective remedy provided for by article 13 of the Convention, the ECtHR has expressed its position that it suffices that the remedy is "as effective as it can be" in circumstances where disclosure of information is obstructed by national security considerations. Yet, this assertion was stated in relation to potential interferences with ECHR, articles 8 and 10; on the contrary, when a breach of article 3 was at stake, the Court reasoned that such an approach is not appropriate since "the issues concerning national security are immaterial".[293] Accordingly, by analogy, if a decision to withhold information for the purpose of protecting national security is contrary to the requirements of an effective remedy in expulsion cases, it would equally be contrary to the requirements of an effective remedy intended to consider an order that has the effect of not allowing an individual to re-enter the country. It follows from this approach that, for the TEO procedure to comply with the requirements of the Convention as interpreted by the Court, the intelligence relied on for imposing a TEO must be displayed to such an extent that an independent scrutiny of an alleged breach of article 3 is viable.

4.5 Temporary restrictions on travel in relation to the right to freedom of movement

The EU Freedom of Movement Directive also requires attention to procedural safeguards when the right to freedom of movement is restricted. In the case of *Sison v Council of the European Union*[294], the applicant had turned to the EU Court of Justice to challenge a decision to freeze his funds, which resulted from his inclusion on the EU 'blacklist' designating him as a suspected terrorist. In one of several pleas, the applicant alleged that the decision interfered with his right to a fair trial, the rights of defence and the presumption of innocence.[295] The EU Court of Justice noticed

> according to settled case-law, individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order, the right to such protection forming part of the general legal principles deriving from the constitutional traditions common to the Member States and being enshrined in Articles 6 and 13 of the ECHR.[296]

Admittedly, the EU Court of Justice proceeded to state that "[t]hat applies in particular to measures to freeze funds of persons or organisations suspected of terrorist activities". However, as the freedom of movement is considered

[293] *See Chahal*, para. 150 with further references.
[294] T-47/03, *Sison v Council of the European Union*, 11 July 2007.
[295] *See* the fifth plea, *ibid.*, para. 86.
[296] *Ibid.*, para. 157.

as "one of the fundamental freedoms of the internal market"[297] there is no reason to assume that this approach would not be applicable also to this right. The Directive requires, in article 30, notification in writing of any decision restricting the freedom of movement[298], and article 31 contains the procedural safeguards attached to such a decision. The person concerned enjoys the right to "have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review". The reference to 'host Member State', indicates that the Directive addresses a situation where an EU citizen is within the territory of another EU Member State than his or her State of nationality. It is thus applicable in circumstances where the UK authorities exercise the temporary restriction on travel measures against a non-British citizen.

Considering what has been asserted previously in connection with the alleged statelessness – in particular Goodwin-Gill's contribution in the matter[299] – it can reasonably be expected that the same responsibility apply in relation to the citizens of the UK as to citizens of other EU Member States at current within the UK. Consequently, in accordance with article 31 of the Freedom of Movement Directive an individual subjected to any temporary restriction on travel measure should have access to judicial review of the decision. Such redress shall, according to article 31.3 "allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based"; it must also consider the proportionality of the decision. The involvement of a judicial authority on the application for prolonging the period of retention of a passport, when the court considers whether the relevant personnel has acted diligently and expeditiously, does therefore not satisfy the requirements of the Directive. Neither does the judicial role of giving permission to imposing a TEO, or the possibility to appeal against such permission, as none gives the concerned individual the chance to have the facts and circumstances on which the decision is taken examined. Hence, the safeguards in the CTS Act 2015 do not satisfy the standard required by the Freedom of Movement directive either.

[297] *See* the second section of the preamble.

[298] The notification must provide the concerned person with precise and full information about the grounds on which the decision has been taken, unless it is contrary to the interest of public security, *see* article 30.2.

[299] *See* Goodwin-Gill, p. 3. Further supporting the application of the Directive is the EU Court of Justice's finding that in deliberating on the right to effective judicial protection "inspiration may be drawn from the provisions of Directive 2004/38", *Sison*, para. 204.

5 Conclusion

Rosalyn Higgins asked, "Is our study about terrorism the study of a substantive topic, or rather the study of the application of international law to a contemporary problem?"[300] My approach is the latter; I apply existing rules and principles of criminal law to the provisions confronting the contemporary problem posed by foreign fighters.

The rationale behind the introduction of the CTS Act 2015 was to address the challenges posed by people who chose to travel outside the UK for engaging in terrorism, who upon return pose a serious threat against the public in the UK. The legislation was thus intended to fill gaps in the previous counter-terrorism legislation, making it feasible to put a spoke in the wheel for their plans. The method chosen by the UK Government was to (i) prevent persons from travelling abroad in the first place by means of seizing and retaining their passports; and (ii) obstruct and subsequently control their return once they have travelled outside the country. At the outset, it must be kept in mind that these temporary restrictions on travel are just one part of a much more comprehensive framework addressing the disquiet about terrorism and terrorists; hence, the efficiency of the British counter-terrorism strategy should be evaluated in full with regard not only to one isolated element but to all components taken together. Nevertheless, it stems from the analysis performed in this thesis that the appropriateness of the temporary restriction on travel powers is questionable.

I began this thesis by stating my proposition that the imposition of the temporary restriction on travel measures is equivalent to subjecting the individual to a criminal punishment. This proposition was founded on the mere impression that the consequences following the use of the powers are, from a human rights perspective, extremely stringent. Having examined the three *Engel*-criteria established by the ECtHR for the purpose of assessing the *de facto* character of national provisions as they should be regarded for the protection of the ECHR, I came to the following conclusion.

In national law, the temporary restrictions on travel are labelled as administrative powers meaning that the discretion to decide when to impose such a measure is entrusted to the executives. The decision to seize a passport and/or travel document is for a port constable to take, and the authority to decide whether to retain the passport and/or travel document is accorded to a senior police officer. Likewise, the Secretary of State enjoys the power to decide the relevant decisions needed for the issuance of a TEO albeit a court takes the final decision whether to give permission to such an order. The relevant decisions that substantially affects the individual's situation are, accordingly, the ones taken by the senior police officer and the court respectively.

[300] Higgins, Rosalyn, "The general international law of terrorism" in Higgins, Rosalyn and Flory, Maurice (eds.), *Terrorism and International Law*, Routledge, London and New York, 1997, pp. 13-29, p. 13.

Next, international and regional instruments concerned with terrorism and foreign fighters, in particular, indicate an obligation to take action to challenge this threat and that the main provisions should be encompassed by the criminal law regime. This serves as a background to how the conduct might be classified in other jurisdictions. The temporary restrictions on travel provisions are directed against all citizens without distinction with regard to nationality or age – albeit in relation to TEOs, the individual must have a right of abode in the UK. The extraordinarily width of the UK definition of terrorism, which is extended further by the notion of terrorism-related activity, promotes the inclusion of everyone as potential suspects. Moreover, the deterrent and punitive purpose with imposing a TEO suggests that at least this element of the temporary restrictions on travel is criminal in nature. As regards the seizure and retention of a passport and/or travel document, the main purpose is to facilitate investigations in relation to the concerned individual, rendering difficulties to conclude that this measure is criminal in nature on this ground.

Lastly, the temporary restrictions on travel cause severe intrusions with the affected individual's human rights and liberties. Both measures put the right to private and family life, as protected by ECHR, article 8, and the right to freedom of movement, as per ICCPR, article 12, at stake; the EU Freedom of Movement Directive equally protects the latter. In addition, and more troubling, are the potential interferences with the absolute right not to be subjected to torture or inhuman or degrading treatment or punishment, codified in ECHR, article 3. Furthermore, whether the imposition of a TEO situates the person in a state of *de facto* statelessness or not is a disputed matter, but due to the invalidation of the individual's passport while a TEO is in force, there is at least a risk that the person is deprived of the rights a citizen is entitled to.

In my opinion, the use of the temporary restriction on travel powers cause intrusions severe enough to conclude that the measures are indeed criminal in nature. As the Court has accepted a cumulative approach to the three criteria, this is further evidenced by the nature of the offences. Because of the UK's classification of the measures as administrative, the CTS Act 2015 lacks safeguards proper to their criminal character. This is mainly because of the late entrance of judicial supervision in relation to passport seizure and retention, and because of the judicial authority's limited function. In relation to TEOs, the main obstacle for judicial control is the fact that the concerned individual is outside the UK, perhaps in a country where practicalities hampers the ability to get to a British consular or embassy to avail him or herself of the right to judicial review. To be able to return, the individual must obey to the conditions in a permit to return, the issuance of which is at the discretion of the Secretary of State and without the involvement of a judicial authority, notwithstanding the restrictive conditions that may be imposed.

Admittedly, to seize and retain a passport appears advantageous in comparison to a deprivation of liberty alternative, should it be urgent to prevent the person from leaving the UK for purposes connected to protecting the public. Liberty argues that to detain and release the person on bail is a better option as this would require criminal law safeguards to apply. With this, I agree, although to deprive someone of liberty because of reasonable grounds to suspect that he or she will be involved in terrorism-related activity seem to fall foul of the proportionality and least restrictive means-principles. One solution to this problem is to acknowledge the 'civil preventive hybrid order' as Ashworth and Zedner advocates, which could make it possible to act preventively – i.e. before the criminal law threshold for suspecting someone is reached – but nonetheless require rigid safeguards to apply. The fact that a failure to hand over the documents or to respect a TEO or a permit to return constitutes criminal offences making the individual liable for penalties of up to five years imprisonment, supports this approach. That a potential penalty is deprivation of liberty for five years is, in the light of the ECtHR's jurisprudence, more than sufficient for regarding the offence as criminal. In my view, the offences embrace the whole process and the criminal character thus extends to the use of the powers in the first instance, i.e. when the individual's situation is substantially affected. It goes without saying that proper judicial scrutiny is vital irrespective of the option chosen.

As to the imposition of TEOs, I strongly oppose to using powers that effectively excludes an individual from his or her home country. The efficiency of this measure has been oppugned, and I agree with that criticism. I struggle to see how to exclude someone will prevent this person from being involved in terrorism-related activity. On the contrary, finding yourself destitute in a State in turmoil, perhaps where a terrorist organization indeed operates, will not provide incentives for you to obey by the rules and conditions instituted by the one who excludes you, but rather nurture your resistance against the governing authorities. This risk is particularly imminent if the concerned person already is in a vulnerable position thinking about joining extremists. I do agree with the Independent Reviewer of Terrorism Legislation, David Anderson, in his assertion that to control the return of young and vulnerable persons has potential to provide better results in preventing them from adhering to terrorism or criminality. However, the TEOs as they stand, do not serve that purpose. A favourable option is the notification of return order advocated by the JCHR, which could catch young, vulnerable people upon their return to the UK without leaving them stranded abroad where they become easy targets for terrorist recruitment. This would also remedy the potential breach of ECHR, article 3, as their treatment would be for the UK authorities to cater for. As I see it, the instructions on when and how to return to the UK could equally be attached to a notification of return order, making the Minister for Security and Immigration, James Brokenshire's counter-argument about their inefficiency unfounded. Obviously, to impose a notification of return order necessitates the involvement of judicial authorities as well, even if the human rights implications are less alarming.

It is evident from the studied cases that there is a tendency to reduce the protection against intrusions with an individual's human rights, for the benefit of public security in the fight against terrorism. This is revealed from both the innovative ways in which States try to circumvent their obligations under human rights instruments and from the ECtHR's indulgence to States in these matters. Hence, the right to information, for instance, is limited when national security concerns require so, or the proportionality assessment in relation to the right to private and family life may approve for more restrictive interferences than what would otherwise be accepted. The circumstances and context of each individual case is thus what determines in the end whether the use of a counter-terrorism measure complies with human rights standards; although, such concerns are immaterial in connection to the absolute prohibition of torture or inhuman or degrading treatment.

It must be emphasized, that I reckon the potential of the temporary restrictions on travel measures to serve their purpose when it actually is a terrorist captured in the net. To stop someone from travelling could prevent that person from gaining experience in terrorism-related activity, which might chill the conviction about the good purpose and benefits of such activities. Equally, to prevent someone from returning after having gained experience could potentially avoid an act of terrorism from taking place in the UK. However, the question is to what cost these potentially desirable effects are obtained. The disadvantages of the measures are too palpable to justify their use. The risk of targeting an innocent is obvious, but even if the affected individual is not entirely innocent, that person still enjoys the right to be protected against an arbitrary interference with his or her human rights and liberties; such protection cannot be sacrificed just because the person is a suspected terrorist. Taking into account the Court's condemnation in the *Gillan and Quinton*-case of the lack of safeguards attached to the stop and search powers, it is satisfying to see that the UK Government has included the requisite of reasonable suspicion as a requisite for using the powers, albeit this does not compensate for the absence of judicial scrutiny.

Throughout the work with this thesis, several areas for future studies have been revealed. One apparent candidate is to perform a comparative study of counter-terrorism measures addressing the threat posed by foreign fighters in various countries. Such studies would enable an analysis of the efficiency, proportionality and adequacy of different methods to approach the issue and thus an approximation to the most advantageous one. Additionally, empirical studies of the factual use of the temporary restrictions on travel would allow an assessment of their efficiency alongside an examination of whether the prohibition of discrimination in ECHR, article 14 is at peril. Besides, my decision to study the temporary restrictions on travel provisions should not be understood as diminishing the significance of the other parts of the CTS Act 2015. On the contrary, the scrutiny of the remaining measures, as well as prior counter-terrorism legislation, is of highest relevance in order to comprehensively analyse the British approach to the balancing between the protection against terrorism

on the one hand and the individual's human rights and liberties on the other. Furthermore, as I noted in chapter 3.2.2, the temporary restriction on travel powers may be used against all citizens, i.e. without regard to the age of the targeted individual. Thus, how the measures are used against children and whether due regard to the age of the individual is taken is particularly relevant to examine alongside the powers' capability to comply with the UK's international obligations to act in accordance with the best interests of the child-principle.

To conclude, this thesis is a contribution to the debate about the far-reaching and restrictive counter-terrorism powers available to the executives in the United Kingdom today; as such, it is just one piece in the bigger picture. Nevertheless, my analysis reveals with all desirable clarity the tremendous need to maintain the respect for human rights by guaranteeing proper safeguards; after all, an arbitrary exercise of the governing authorities' powers is what the international human rights instruments were agreed upon to fetter.

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Counter-Terrorism and Security Act 2015

2015 CHAPTER 6

PART 1

TEMPORARY RESTRICTIONS ON TRAVEL

CHAPTER 1

POWERS TO SEIZE TRAVEL DOCUMENTS

1 Seizure of passports etc from persons suspected of involvement in terrorism

(1) Schedule 1 makes provision for the seizure and temporary retention of travel documents where a person is suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity.

(2) In Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (civil legal services)—

(a) in Part 1 (services), after paragraph 45 insert—

"Extension of time for retention of travel documents

45A (1) Civil legal services provided in relation to proceedings under paragraph 8 of Schedule 1 to the Counter-Terrorism and Security Act 2015.

Exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.";

(b) in Part 3 (advocacy: exclusion and exceptions), after paragraph 22 insert—

"22A Advocacy in proceedings before a District Judge (Magistrates' Courts) under paragraph 8 of Schedule 1 to the Counter-Terrorism and Security Act 2015."

(3) In Schedule 2 to the Access to Justice (Northern Ireland) Order 2003 (S.I. 2003/435 (N.I. 10)) (civil legal services: excluded services), in paragraph 2(d) (proceedings in court of summary jurisdiction in relation to which funding for representation may be provided), after paragraph (xx) insert—

"(xxi) under paragraph 8 of Schedule 1 to the Counter-Terrorism and Security Act 2015;".

CHAPTER 2

TEMPORARY EXCLUSION FROM THE UNITED KINGDOM

Imposition of temporary exclusion orders

2 Temporary exclusion orders

(1) A "temporary exclusion order" is an order which requires an individual not to return to the United Kingdom unless—

(a) the return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or

(b) the return is the result of the individual's deportation to the United Kingdom.

(2) The Secretary of State may impose a temporary exclusion order on an individual if conditions A to E are met.

(3) Condition A is that the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom.

(4) Condition B is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.

(5) Condition C is that the Secretary of State reasonably considers that the individual is outside the United Kingdom.

(6) Condition D is that the individual has the right of abode in the United Kingdom.

(7) Condition E is that—

(a) the court gives the Secretary of State permission under section 3, or

(b) the Secretary of State reasonably considers that the urgency of the case requires a temporary exclusion order to be imposed without obtaining such permission.

(8) During the period that a temporary exclusion order is in force, the Secretary of State must keep under review whether condition B is met.

3 Temporary exclusion orders: prior permission of the court

(1) This section applies if the Secretary of State—

(a) makes the relevant decisions in relation to an individual, and

(b) makes an application to the court for permission to impose a temporary exclusion order on the individual.

(2) The function of the court on the application is to determine whether the relevant decisions of the Secretary of State are obviously flawed.

(3) The court may consider the application—

(a) in the absence of the individual,

(b) without the individual having been notified of the application, and

(c) without the individual having been given an opportunity (if the individual was aware of the application) of making any representations to the court.

(4) But that does not limit the matters about which rules of court may be made.

(5) In determining the application, the court must apply the principles applicable on an application for judicial review.

(6) In a case where the court determines that any of the relevant decisions of the Secretary of State is obviously flawed, the court may not give permission under this section.

(7) In any other case, the court must give permission under this section.

(8) Schedule 2 makes provision for references to the court etc where temporary exclusion orders are imposed in cases of urgency.

(9) Only the Secretary of State may appeal against a determination of the court under—

(a) this section, or

(b) Schedule 2;

and such an appeal may only be made on a question of law.

(10) In this section "the relevant decisions" means the decisions that the following conditions are met—

(a) condition A;

(b) condition B;

(c) condition C;

(d) condition D.

4 Temporary exclusion orders: supplementary provision

(1) The Secretary of State must give notice of the imposition of a temporary exclusion order to the individual on whom it is imposed (the "excluded individual").

(2) Notice of the imposition of a temporary exclusion order must include an explanation of the procedure for making an application under section 6 for a permit to return.

(3) A temporary exclusion order—

(a) comes into force when notice of its imposition is given; and

(b) is in force for the period of two years (unless revoked or otherwise brought to an end earlier).

(4) The Secretary of State may revoke a temporary exclusion order at any time.

(5) The Secretary of State must give notice of the revocation of a temporary exclusion order to the excluded individual.

(6) If a temporary exclusion order is revoked, it ceases to be in force when notice of its revocation is given.

(7) The validity of a temporary exclusion order is not affected by the excluded individual —

(a) returning to the United Kingdom, or

(b) departing from the United Kingdom.

(8) The imposition of a temporary exclusion order does not prevent a further temporary exclusion order from being imposed on the excluded individual (including in a case where an order ceases to be in force at the expiry of its two year duration).

(9) At the time when a temporary exclusion order comes into force, any British passport held by the excluded individual is invalidated.

(10) During the period when a temporary exclusion order is in force, the issue of a British passport to the excluded individual while he or she is outside the United Kingdom is not valid.

(11) In this section "British passport" means a passport, or other document which enables or facilitates travel from one state to another (except a permit to return), that has been—

(a) issued by or for Her Majesty's Government in the United Kingdom, and

(b) issued in respect of a person's status as a British citizen.

Permit to return

5 Permit to return

(1) A "permit to return" is a document giving an individual (who is subject to a temporary exclusion order) permission to return to the United Kingdom.

(2) The permission may be made subject to a requirement that the individual comply with conditions specified in the permit to return.

(3) The individual's failure to comply with a specified condition has the effect of invalidating the permit to return.

(4) A permit to return must state—

(a) the time at which, or period of time during which, the individual is permitted to arrive on return to the United Kingdom;

(b) the manner in which the individual is permitted to return to the United Kingdom; and

(c) the place where the individual is permitted to arrive on return to the United Kingdom.

(5) Provision made under subsection (4)(a) or (c) may, in particular, be framed by reference to the arrival in the United Kingdom of a specific flight, sailing or other transport service.

(6) Provision made under subsection (4)(b) may, in particular, state—

(a) a route,

(b) a method of transport,

(c) an airline, shipping line or other passenger carrier, or

(d) a flight, sailing or other transport service,

which the individual is permitted to use to return to the United Kingdom.

(7) The Secretary of State may not issue a permit to return except in accordance with section 6 or 7.

(8) It is for the Secretary of State to decide the terms of a permit to return (but this is subject to section 6(3)).

6 Issue of permit to return: application by individual

(1) If an individual applies to the Secretary of State for a permit to return, the Secretary of State must issue a permit within a reasonable period after the application is made.

(2) But the Secretary of State may refuse to issue the permit if—

(a) the Secretary of State requires the individual to attend an interview with a constable or immigration officer at a time and a place specified by the Secretary of State, and

(b) the individual fails to attend the interview.

(3) Where a permit to return is issued under this section, the relevant return time must fall within a reasonable period after the application is made.

(4) An application is not valid unless it is made in accordance with the procedure for applications specified by the Secretary of State.

(5) In this section—

"application" means an application made by an individual to the Secretary of State for a permit to return to be issued;

"relevant return time" means—

(a) the time at which the individual is permitted to arrive on return to the United Kingdom (in a case where the permit to return states such a time), or

(b) the start of the period of time during which the individual is permitted to arrive on return to the United Kingdom (in a case where the permit to return states such a period).

7 Issue of permit to return: deportation or urgent situation

(1) The Secretary of State must issue a permit to return to an individual if the Secretary of State considers that the individual is to be deported to the United Kingdom.

(2) The Secretary of State may issue a permit to return to an individual if—

(a) the Secretary of State considers that, because of the urgency of the situation, it is expedient to issue a permit to return even though no application has been made under section 6, and

(b) there is no duty to issue a permit to return under subsection (1).

(3) Subsection (1) or (2) applies whether or not any request has been made to issue the permit to return under that provision.

8 Permit to return: supplementary provision

(1) The Secretary of State may vary a permit to return.

(2) The Secretary of State may revoke a permit to return issued to an individual only if—

(a) the permit to return has been issued under section 6 and the individual asks the Secretary of State to revoke it;

(b) the permit to return has been issued under section 7(1) and the Secretary of State no longer considers that the individual is to be deported to the United Kingdom;

(c) the permit to return has been issued under section 7(2) and the Secretary of State no longer considers that, because of the urgency of the situation, the issue of the permit to return is expedient;

(d) the Secretary of State issues a subsequent permit to return to the individual; or

(e) the Secretary of State considers that the permit to return has been obtained by misrepresentation.

(3) The making of an application for a permit to return to be issued under section 6 (whether or not resulting in a permit to return being issued) does not prevent a subsequent application from being made.

(4) The issuing of a permit to return (whether or not resulting in the individual's return to the United Kingdom) does not prevent a subsequent permit to return from being issued (whether or not the earlier permit is still in force).

Obligations after return to the United Kingdom

9 Obligations after return to the United Kingdom

(1) The Secretary of State may, by notice, impose any or all of the permitted obligations on an individual who—

(a) is subject to a temporary exclusion order, and

(b) has returned to the United Kingdom.

(2) The "permitted obligations" are—

(a) any obligation of a kind that may be imposed (on an individual subject to a TPIM notice) under these provisions of Schedule 1 to the Terrorism Prevention and Investigation Measures Act 2011—

(i) paragraph 10 (reporting to police station);

(ii) paragraph 10A (attendance at appointments etc);

(b) an obligation to notify the police, in such manner as a notice under this section may require, of—

(i) the individual's place (or places) of residence, and

(ii) any change in the individual's place (or places) of residence.

(3) A notice under this section—

(a) comes into force when given to the individual; and

(b) is in force until the temporary exclusion order ends (unless the notice is revoked or otherwise brought to an end earlier).

(4) The Secretary of State may, by notice, vary or revoke any notice given under this section.

(5) The variation or revocation of a notice under this section takes effect when the notice of variation or revocation is given to the individual.

(6) The validity of a notice under this section is not affected by the individual—

(a) departing from the United Kingdom, or

(b) returning to the United Kingdom.

(7) The giving of any notice to an individual under this section does not prevent any further notice under this section from being given to that individual.

Offences and proceedings etc

10 Offences

(1) An individual subject to a temporary exclusion order is guilty of an offence if, without reasonable excuse, the individual returns to the United Kingdom in contravention of the restriction on return specified in the order.

(2) It is irrelevant for the purposes of subsection (1) whether or not the individual has a passport or other similar identity document.

(3) An individual subject to an obligation imposed under section 9 is guilty of an offence if, without reasonable excuse, the individual does not comply with the obligation.

(4) In a case where a relevant notice has not actually been given to an individual, the fact that the relevant notice is deemed to have been given to the individual under regulations under section 13 does not (of itself) prevent the individual from showing that lack of knowledge of the temporary exclusion order, or of the obligation imposed under section 9, was a reasonable excuse for the purposes of this section.

(5) An individual guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both;

(b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine, or to both;

(c) on summary conviction in Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;

(d) on summary conviction in Scotland, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both.

(6) Where an individual is convicted by or before a court of an offence under this section, it is not open to that court to make in respect of the offence—

(a) an order under section 12(1)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (conditional discharge);

(b) an order under section 227A of the Criminal Procedure (Scotland) Act 1995 (community pay-back orders); or

(c) an order under Article 4(1)(b) of the Criminal Justice (Northern Ireland) Order 1996 (S.I. 1996/3160 (N.I. 24)) (conditional discharge in Northern Ireland).

(7) In this section—

"relevant notice" means—

(a) notice of the imposition of a temporary exclusion order, or

(b) notice under section 9 imposing an obligation;

"restriction on return" means the requirement specified in a temporary exclusion order in accordance with section 2(1).

(8) In section 2 of the UK Borders Act 2007 (detention at ports), in subsection (1A), for "the individual is subject to a warrant for arrest" substitute "the individual—

(a) may be liable to be detained by a constable under section 14 of the Criminal Procedure (Scotland) Act 1995 in respect of an offence under section 10(1) of the Counter-Terrorism and Security Act 2015, or

(b) is subject to a warrant for arrest."

11 Review of decisions relating to temporary exclusion orders

(1) This section applies where an individual who is subject to a temporary exclusion order is in the United Kingdom.

(2) The individual may apply to the court to review any of the following decisions of the Secretary of State—

(a) a decision that any of the following conditions was met in relation to the imposition of the temporary exclusion order—

(i) condition A;

(ii) condition B;

(iii) condition C;

(iv) condition D;

(b) a decision to impose the temporary exclusion order;

(c) a decision that condition B continues to be met;

(d) a decision to impose any of the permitted obligations on the individual by a notice under section 9.

(3) On a review under this section, the court must apply the principles applicable on an application for judicial review.

(4) On a review of a decision within subsection (2)(a) to (c), the court has the following powers (and only those powers)—

(a) power to quash the temporary exclusion order;

(b) power to give directions to the Secretary of State for, or in relation to, the revocation of the temporary exclusion order.

(5) If the court does not exercise either of its powers under subsection (4), the court must decide that the temporary exclusion order is to continue in force.

(6) On a review of a decision within subsection (2)(d), the court has the following powers (and only those powers)—

(a) power to quash the permitted obligation in question;

(b) if that is the only permitted obligation imposed by the notice under section 9, power to quash the notice;

(c) power to give directions to the Secretary of State for, or in relation to—

(i) the variation of the notice so far as it relates to that permitted obligation, or

(ii) if that is the only permitted obligation imposed by the notice, the revocation of the notice.

(7) If the court does not exercise any of its powers under subsection (6), the court must decide that the notice under section 9 is to continue in force.

(8) If the court exercises a power under subsection (6)(a) or (c)(i), the court must decide that the notice under section 9 is to continue in force subject to that exercise of that power.

(9) The power under this section to quash a temporary exclusion order, permitted obligation or notice under section 9 includes—

(a) in England and Wales or Northern Ireland, power to stay the quashing for a specified time, or pending an appeal or further appeal against the decision to quash; or

(b) in Scotland, power to determine that the quashing is of no effect for a specified time or pending such an appeal or further appeal.

(10) An appeal against a determination of the court on a review under this section may only be made on a question of law.

(11) For the purposes of this section, a failure by the Secretary of State to make a decision whether condition B continues to be met is to be treated as a decision that it continues to be met.

12 Temporary exclusion orders: proceedings and appeals against convictions

(1) Schedule 3 makes provision about proceedings relating to temporary exclusion orders.

(2) Schedule 4 makes provision about appeals against convictions in cases where a temporary exclusion order, a notice under section 9 or a permitted obligation is quashed.

Supplementary

13 Regulations: giving of notices, legislation relating to passports

(1) The Secretary of State may by regulations make provision about the giving of—

(a) notice under section 4, and

(b) notice under section 9.

(2) The regulations may, in particular, make provision about cases in which notice is to be deemed to have been given.

(3) The Secretary of State may make regulations providing for legislation relating to passports or other identity documents (whenever passed or made) to apply (with or without modifications) to permits to return.

(4) The power to make regulations under this section—

(a) is exercisable by statutory instrument;

(b) includes power to make transitional, transitory or saving provision.

(5) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

14 Chapter 2: interpretation

(1) This section applies for the purposes of this Chapter.

(2) These expressions have the meanings given—

"act" and "conduct" include omissions and statements;

"act of terrorism" includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see section 1(5) of that Act);

"condition A", "condition B", "condition C", "condition D" or "condition E" means that condition as set out in section 2;

"court" means—

(a) in the case of proceedings relating to an individual whose principal place of residence is in Scotland, the Outer House of the Court of Session;

(b) in the case of proceedings relating to an individual whose principal place of residence is in Northern Ireland, the High Court in Northern Ireland;

(c) in any other case, the High Court in England and Wales;

"permit to return" has the meaning given in section 5;

"temporary exclusion order" has the meaning given in section 2;

"terrorism" has the same meaning as in the Terrorism Act 2000 (see section 1(1) to (4) of that Act).

(3) An individual is—

(a) subject to a temporary exclusion order if a temporary exclusion order is in force in relation to the individual; and

(b) subject to an obligation imposed under section 9 if an obligation is imposed on the individual by a notice in force under that section.

(4) Involvement in terrorism-related activity is any one or more of the following—

(a) the commission, preparation or instigation of acts of terrorism;

(b) conduct that facilitates the commission, preparation or instigation of such acts, or is intended to do so;

(c) conduct that gives encouragement to the commission, preparation or instigation of such acts, or is intended to do so;

(d) conduct that gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraph (a).

It is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general.

(5) It is immaterial whether an individual's involvement in terrorism-related activity occurs before or after the coming into force of section 2.

(6) References to an individual's return to the United Kingdom include, in the case of an individual who has never been in the United Kingdom, a reference to the individual's coming to the United Kingdom for the first time.

(7) References to deportation include references to any other kind of expulsion.

15 Chapter 2: consequential amendments

(1) In paragraph 2 of Schedule 1 to the Senior Courts Act 1981 (business allocated to the Queen's Bench Division), after paragraph (bd) insert—

"(be) all TEO proceedings (within the meaning given by paragraph 1 of Schedule 3 to the Counter-Terrorism and Security Act 2015 (proceedings relating to temporary exclusion orders));".

(2) In section 133(5) of the Criminal Justice Act 1988 (compensation for miscarriages of justice)—

(a) omit "or" at the end of paragraph (e);

(b) after paragraph (f) insert "or

(g) on an appeal under Schedule 4 to the Counter-Terrorism and Security Act 2015."

(3) In section 18 of the Regulation of Investigatory Powers Act 2000 (exclusion of matter from legal proceedings: exceptions)—

(a) in subsection (1), after paragraph (dd) insert—

"(de) any TEO proceedings (within the meaning given by paragraph 1 of Schedule 3 to the Counter-Terrorism and Security Act 2015 (temporary exclusion orders: proceedings)) or any proceedings arising out of such proceedings;";

(b) in subsection (2), after paragraph (zc) insert—

"(zd) in the case of proceedings falling within paragraph (de), to—

(i) a person, other than the Secretary of State, who is or was a party to the proceedings, or

(ii) any person who for the purposes of the proceedings (but otherwise than by virtue of appointment as a special advocate under Schedule 3 to the Counter-Terrorism and Security Act 2015) represents a person falling within sub-paragraph (i);".

SCHEDULES

SCHEDULE 1

Section 1

SEIZURE OF PASSPORTS ETC FROM PERSONS SUSPECTED OF INVOLVEMENT IN TERRORISM

Interpretation

1 (1) The following definitions have effect for the purposes of this Schedule.

(2) "Immigration officer" means a person who is appointed as an immigration officer under paragraph 1 of Schedule 2 to the Immigration Act 1971.

(3) "Customs official" means a person who is designated as a general customs official under section 3(1) of the Borders, Citizenship and Immigration Act 2009 or as a customs revenue official under section 11(1) of that Act.

(4) "Qualified officer" means an immigration officer or customs official who is designated by the Secretary of State for the purposes of this Schedule.

(5) "Senior police officer" means a police officer of at least the rank of superintendent.

(6) "Travel document" means anything that is or appears to be—

(a) a passport, or

(b) a ticket or other document that permits a person to make a journey by any means from a place within Great Britain to a place outside Great Britain, or from a place within Northern Ireland to a place outside the United Kingdom.

(7) "Passport" means—

(a) a United Kingdom passport (within the meaning of the Immigration Act 1971),

(b) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom, or by or on behalf of an international organisation, or

(c) a document that can be used (in some or all circumstances) instead of a passport.

(8) "Port" means—

(a) an airport,

(b) a sea port,

(c) a hoverport,

(d) a heliport,

(e) a railway station where passenger trains depart for, or arrive from, places outside the United Kingdom, or

(f) any other place at which a person is able, or attempting, to get on or off any craft, vessel or vehicle in connection with entering or leaving Great Britain or Northern Ireland.

(9) A place is "in the border area" if it is in Northern Ireland and is no more than one mile from the border between Northern Ireland and the Republic of Ireland.

(10) "Involvement in terrorism-related activity" is any one or more of the following—

(a) the commission, preparation or instigation of acts of terrorism;

(b) conduct that facilitates the commission, preparation or instigation of such acts, or is intended to do so;

(c) conduct that gives encouragement to the commission, preparation or instigation of such acts, or is intended to do so;

(d) conduct that gives support or assistance to individuals who are known or believed by the person concerned to be involved in conduct falling within paragraph (a).

It is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general.

(11) "Terrorism" and "terrorist" have the same meaning as in the Terrorism Act 2000 (see sections 1(1) to (4) and 40 of that Act).

(12) "Judicial authority" means—

(a) in England and Wales, a District Judge (Magistrates' Courts) who is—

(i) designated under paragraph 29(4)(a) of Schedule 8 to the Terrorism Act 2000, or

(ii) designated for the purposes of this Schedule by the Lord Chief Justice of England and Wales;

(b) in Scotland, the sheriff;

(c) in Northern Ireland, a county court judge, or a district judge (magistrates' courts) who is—

(i) designated under paragraph 29(4)(c) of Schedule 8 to the Terrorism Act 2000, or

(ii) designated for the purposes of this Schedule by the Lord Chief Justice of Northern Ireland.

(13) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his or her functions under sub-paragraph (12)(a)(ii).

(14) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his or her functions under sub-paragraph (12)(c)(ii)—

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).

(15) "The 14-day period" and "the 30-day period" have the meanings given by paragraphs 5(2) and 8(7) respectively.

Powers of search and seizure etc

2 (1) This paragraph applies in the case of a person at a port in Great Britain if a constable has reasonable grounds to suspect that the person—

(a) is there with the intention of leaving Great Britain for the purpose of involvement in terrorism-related activity outside the United Kingdom, or

(b) has arrived in Great Britain with the intention of leaving it soon for that purpose.

(2) This paragraph applies in the case of a person at a port in Northern Ireland, or in the border area, if a constable has reasonable grounds to suspect that the person—

(a) is there with the intention of leaving the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom, or

(b) has arrived in Northern Ireland with the intention of leaving the United Kingdom soon for that purpose.

(3) The constable may—

(a) exercise any of the powers in sub-paragraph (5) in the case of the person, or

(b) direct a qualified officer to do so.

(4) A qualified officer must (if able to do so) comply with any direction given by a constable under sub-paragraph (3)(b).

(5) The powers are—

(a) to require the person to hand over all travel documents in his or her possession to the constable or (as the case may be) the qualified officer;

(b) to search for travel documents relating to the person and to take possession of any that the constable or officer finds;

(c) to inspect any travel document relating to the person;

(d) to retain any travel document relating to the person that is lawfully in the possession of the constable or officer.

(6) The power in sub-paragraph (5)(b) is a power to search—

(a) the person;

(b) anything that the person has with him or her;

(c) any vehicle in which the officer believes the person to have been travelling or to be about to travel.

(7) A constable or qualified officer—

(a) may stop a person or vehicle for the purpose of exercising a power in sub-paragraph (5)(a) or (b);

(b) may if necessary use reasonable force for the purpose of exercising a power in sub-paragraph (5)(a) or (b);

(c) may authorise a person to carry out on the constable's or officer's behalf a search under sub-paragraph (5)(b).

(8) A constable or qualified officer exercising a power in sub-paragraph (5)(a) or (b) must tell the person that—

(a) the person is suspected of intending to leave Great Britain or (as the case may be) the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom, and

(b) the constable or officer is therefore entitled under this Schedule to exercise the power.

(9) Where a travel document relating to the person is in the possession of an immigration officer or customs official (whether a qualified officer or not), the constable may direct the officer or official—

(a) to pass the document to a constable as soon as practicable, and

(b) in the meantime to retain it.

The officer or official must comply with any such direction.

Travel documents in possession of immigration officers or customs officials

3 (1) Where—

(a) a travel document lawfully comes into the possession of an immigration officer or customs official (whether a qualified officer or not) without a power under paragraph 2 being exercised, and

(b) as soon as possible after taking possession of the document, the officer or official asks a constable whether the constable wishes to give a direction under paragraph 2(9) in relation to the document,

the officer or official may retain the document until the constable tells him or her whether or not the constable wishes to give such a direction.

(2) A request under sub-paragraph (1) must be considered as soon as possible.

Authorisation by senior police officer for retention of travel document

4 (1) Where a travel document is in the possession of a constable or qualified officer as a result of the exercise of a power under paragraph 2, the relevant constable must as soon as possible either—

(a) seek authorisation from a senior police officer for the document to be retained, or

(b) ensure that the document is returned to the person to whom it relates.

"The relevant constable" means the constable by whom, or on whose direction, the power was exercised.

(2) The document may be retained while an application for authorisation is considered.

(3) A constable or qualified officer retaining a travel document under sub-paragraph (2) must tell the person to whom the document relates that—

(a) the person is suspected of intending to leave Great Britain or (as the case may be) the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom, and

(b) the constable or officer is therefore entitled under this Schedule to retain the document while the matter is considered by a senior police officer.

This does not apply if the constable or qualified officer expects the application for authorisation to be dealt with immediately, or if sub-paragraph (4) has been complied with.

(4) An immigration officer or customs official to whom a direction is given under paragraph 2(9) must tell the person to whom the travel document in question relates that—

(a) the person is suspected of intending to leave Great Britain or (as the case may be) the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom, and

(b) a constable is therefore entitled under this Schedule to retain the document while the matter is considered by a senior police officer.

This does not apply if the immigration officer or customs official expects the application for authorisation to be dealt with immediately.

(5) If an application for authorisation is granted—

(a) the travel document must be passed to a constable if it is not already in the possession of a constable, and

(b) paragraph 5 applies.

(6) If an application for authorisation is refused, the travel document must be returned to the person as soon as possible.

(7) A senior police officer may grant an application for authorisation only if satisfied that there are reasonable grounds for the suspicion referred to in paragraph 2(1) or (2).

(8) An authorisation need not be in writing.

(9) Sub-paragraphs (1)(b) and (6) are subject to paragraph 7 and to any power or provision not in this Schedule under which the document may be lawfully retained or otherwise dealt with.

Retention or return of documents seized

5 (1) Where authorisation is given under paragraph 4 for a travel document relating to a person to be retained, it may continue to be retained—

(a) while the Secretary of State considers whether to cancel the person's passport,

(b) while consideration is given to charging the person with an offence,

(c) while consideration is given to making the person subject to any order or measure to be made or imposed by a court, or by the Secretary of State, for purposes connected with protecting members of the public from a risk of terrorism, or

(d) while steps are taken to carry out any of the actions mentioned in paragraphs (a) to (c).

(2) But a travel document may not be retained under this Schedule after the end of the period of 14 days beginning with the day after the document was taken ("the 14-day period"), unless that period is extended under paragraph 8 or 11(3).

(3) The travel document must be returned to the person as soon as possible—

(a) once the 14-day period (or the 14-day period as extended under paragraph 8 or 11(3)) expires;

(b) once the power in sub-paragraph (1) ceases to apply, if that happens earlier.

This is subject to paragraph 7 and to any power or provision not in this Schedule under which the document may be lawfully retained or otherwise dealt with.

(4) The constable to whom a travel document is passed under paragraph 2(9) or 4(5)(a), or who is in possession of it when authorisation is given under paragraph 4, must explain to the person the effect of sub-paragraphs (1) to (3).

(5) The constable must also tell the person, if he or she has not been told already under paragraph 2(8) or 4(3) or (4), that the person is suspected of intending to leave Great Britain or (as the case may be) the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom.

Review of retention of travel documents

6 (1) This paragraph applies where—

(a) authorisation is given under paragraph 4 for a travel document relating to a person to be retained, and

(b) the document is still being retained by a constable at the end of the period of 72 hours beginning when the document was taken from the person ("the 72-hour period").

(2) A police officer who is—

(a) of at least the rank of chief superintendent, and

(b) of at least as high a rank as the senior police officer who gave the authorisation,

must carry out a review of whether the decision to give authorisation was flawed.

(3) The reviewing officer must—

(a) begin carrying out the review within the 72-hour period,

(b) complete the review as soon as possible, and

(c) communicate the findings of the review in writing to the relevant chief constable.

(4) The relevant chief constable must consider those findings and take whatever action seems appropriate.

(5) If a power under paragraph 2 was exercised in relation to the travel document by an immigration officer or customs official designated under paragraph 17, the reviewing officer must also communicate the findings of the review in writing to the Secretary of State.

(6) In this paragraph—

"reviewing officer" means the officer carrying out a review under this paragraph;

"relevant chief constable" means—

(a) (except where paragraph (b) or (c) applies) the chief officer of police under whose direction and control is the constable retaining the document;

(b) the chief constable of the Police Service of Scotland, if the constable retaining the document is under that chief constable's direction and control;

(c) the chief constable of the Police Service of Northern Ireland, if the constable retaining the document is under that chief constable's direction and control.

Detention of document for criminal proceedings etc

7 (1) A requirement under paragraph 4 or 5 to return a travel document in the possession of a constable or qualified officer does not apply while the constable or officer has power to detain it under sub-paragraph (2).

(2) The constable or qualified officer may detain the document—

(a) while the constable or officer believes that it may be needed for use as evidence in criminal proceedings, or

(b) while the constable or officer believes that it may be needed in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971.

Extension of 14-day period by judicial authority

8 (1) A senior police officer may apply to a judicial authority for an extension of the 14-day period.

(2) An application must be made before the end of the 14-day period.

(3) An application may be heard only if reasonable efforts have been made to give to the person to whom the application relates a notice stating—

(a) the time when the application was made;

(b) the time and place at which it is to be heard.

(4) On an application—

(a) the judicial authority must grant an extension if satisfied that the relevant persons have been acting diligently and expeditiously in relation to the matters and steps referred to in sub-paragraph (5);

(b) otherwise, the judicial authority must refuse to grant an extension.

(5) In sub-paragraph (4) "the relevant persons" means—

(a) the persons responsible for considering whichever of the matters referred to in paragraph 5(1)(a) to (c) are under consideration, and

(b) the persons responsible for taking whichever of the steps referred to in paragraph 5(1)(d) are being taken or are intended to be taken.

(6) An extension must be for a further period ending no later than the end of the 30-day period.

(7) "The 30-day period" means the period of 30 days beginning with the day after the document in question was taken.

9 (1) The person to whom an application under paragraph 8 relates—

(a) must be given an opportunity to make oral or written representations to the judicial authority about the application;

(b) subject to sub-paragraph (3), is entitled to be legally represented at the hearing.

(2) A judicial authority must adjourn the hearing of an application to enable the person to whom the application relates to obtain legal representation where the person—

(a) is not legally represented,

(b) is entitled to be legally represented, and

(c) wishes to be legally represented.

(3) A judicial authority may exclude any of the following persons from any part of the hearing—

(a) the person to whom the application relates;

(b) anyone representing that person.

10 (1) A person who has made an application under paragraph 8 may apply to the judicial authority for an order that specified information upon which he or she intends to rely be withheld from—

(a) the person to whom the application relates, and
(b) anyone representing that person.

(2) A judicial authority may make an order under sub-paragraph (1) in relation to specified information only if satisfied that there are reasonable grounds for believing that if the information was disclosed—
(a) evidence of an offence under any of the provisions mentioned in section 40(1)(a) of the Terrorism Act 2000 would be interfered with or harmed,
(b) the recovery of property obtained as a result of an offence under any of those provisions would be hindered,
(c) the recovery of property in respect of which a forfeiture order could be made under section 23 or 23A of that Act would be hindered,
(d) the apprehension, prosecution or conviction of a person who is suspected of being a terrorist would be made more difficult as a result of the person being alerted,
(e) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted,
(f) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with,
(g) a person would be interfered with or physically injured, or
(h) national security would be put at risk.

(3) The judicial authority must direct that the following be excluded from the hearing of an application under this paragraph—
(a) the person to whom the application under paragraph 8 relates;
(b) anyone representing that person.

11 (1) A judicial authority may adjourn the hearing of an application under paragraph 8 only if the hearing is adjourned to a date before the expiry of the 14-day period.

(2) Sub-paragraph (1) does not apply to an adjournment under paragraph 9(2).

(3) If an application is adjourned under paragraph 9(2) to a date after the expiry of the 14-day period, the judicial authority must extend the period until that date.

12 (1) If an extension is granted under paragraph 8 for a period ending before the end of the 30-day period, one further application may be made under that paragraph.

(2) Paragraphs 8 to 11 apply to a further application as if references to the 14-day period were references to that period as previously extended.

Restriction on repeated use of powers

13 (1) Where—
(a) a power under paragraph 4 or 5 to retain a document relating to a person is exercised, and
(b) powers under this Schedule have been exercised in the same person's case on two or more occasions in the previous 6 months,

this Schedule has effect with the following modifications.

(2) References to 14 days (in paragraph 5(2) and elsewhere) are to be read as references to 5 days.

(3) Paragraph 8 has effect as if the following were substituted for sub-paragraph (4)—

"(4) On an application, the judicial authority must grant an extension if satisfied that—

(a) the relevant persons have been acting diligently and expeditiously in relation to the matters and steps referred to in sub-paragraph (5), and

(b) there are exceptional circumstances justifying the further use of powers under this Schedule in relation to the same person.

Otherwise, the judicial authority must refuse to grant an extension."

Persons unable to leave the United Kingdom

14 (1) This paragraph applies where a person's travel documents are retained under this Schedule with the result that, for the period during which they are so retained ("the relevant period"), the person is unable to leave the United Kingdom.

(2) The Secretary of State may make whatever arrangements he or she thinks appropriate in relation to the person—

(a) during the relevant period;

(b) on the relevant period coming to an end.

(3) If at any time during the relevant period the person does not have leave to enter or remain in the United Kingdom, the person's presence in the United Kingdom at that time is nevertheless not unlawful for the purposes of the Immigration Act 1971.

Offences

15 (1) A person who is required under paragraph 2(5)(a) to hand over all travel documents in the person's possession commits an offence if he or she fails without reasonable excuse to do so.

(2) A person who intentionally obstructs, or seeks to frustrate, a search under paragraph 2 commits an offence.

(3) A person guilty of an offence under this paragraph is liable on summary conviction—

(a) to imprisonment for a term not exceeding 6 months, or

(b) to a fine, which in Scotland or Northern Ireland may not exceed level 5 on the standard scale,

or to both.

16 A qualified officer exercising a power under paragraph 2 has the same powers of arrest without warrant as a constable in relation to an offence under paragraph 15.

Accredited immigration officers and customs officials

17 (1) For the purposes of this paragraph, a qualified officer is an "accredited" immigration officer or customs official if designated as such by the Secretary of State.

(2) Sub-paragraphs (1), (2) and (3)(a) of paragraph 2 apply to an accredited immigration officer or customs official as they apply to a constable.

(3) In paragraph 2(3)(b) and (4) "qualified officer" does not include an accredited immigration officer or customs official.

(4) In paragraphs 2(9) and 3 "immigration officer or customs official" does not include an accredited immigration officer or customs official.

(5) Paragraph 4(1) has effect, in relation to a travel document that is in the possession of an accredited immigration officer or customs official as a result of the exercise of a power under paragraph 2 by that officer or official, as if the reference to the relevant constable were a reference to that officer or official.

Code of practice

18 (1) The Secretary of State must issue a code of practice with regard to the exercise of functions under this Schedule.

(2) The code of practice must in particular deal with the following matters—

(a) the procedure for making designations under paragraphs 1(4) and 17;

(b) training to be undertaken by persons who are to exercise powers under this Schedule;

(c) the exercise by constables, immigration officers and customs officials of functions conferred on them by virtue of this Schedule;

(d) information to be given to a person in whose case a power under this Schedule is exercised;

(e) how and when that information is to be given;

(f) reviews under paragraph 6.

(3) A constable, immigration officer or customs official must perform functions conferred on him or her by virtue of this Schedule in accordance with any relevant provision included in the code by virtue of sub-paragraph (2)(c) to (e).

(4) The failure by a constable, immigration officer or customs official to observe any such provision does not of itself make him or her liable to criminal or civil proceedings.

(5) The code of practice—

(a) is admissible in evidence in criminal and civil proceedings;

(b) is to be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.

19 (1) Before issuing the code of practice the Secretary of State must—

(a) publish it in draft,

(b) consider any representations made about the draft, and

(c) if the Secretary of State thinks it appropriate, modify the draft in the light of any representations made.

(2) The Secretary of State must lay a draft of the code before Parliament.

(3) Anything done before the day on which this Act is passed is as valid as if done on or after that day for the purposes of sub-paragraphs (1) and (2).

(4) Once the code has been laid in draft before Parliament the Secretary of State may bring it into operation by regulations made by statutory instrument.

(5) The first regulations under sub-paragraph (4) cease to have effect at the end of the period of 40 days beginning with the day on which the Secretary of State makes the regulations, unless a resolution approving the regulations is passed by each House of Parliament during that period.

(6) A statutory instrument containing any subsequent regulations under sub-paragraph (4) may not be made unless a draft of the instrument has been laid before each House of Parliament and approved by a resolution of each House.

(7) If regulations cease to have effect under sub-paragraph (5)—

(a) the code of practice to which the regulations relate also ceases to have effect, but

(b) that does not affect anything previously done, or the power to make new regulations or to issue a new code.

(8) For the purposes of sub-paragraph (5), the period of 40 days is to be computed in accordance with section 7(1) of the Statutory Instruments Act 1946.

20 (1) The Secretary of State may revise the code of practice and issue the revised code.

(2) Paragraph 19 has effect in relation to the issue of a revised code as it has effect in relation to the first issue of the code.

SCHEDULES

SCHEDULE 2

Section 3

URGENT TEMPORARY EXCLUSION ORDERS: REFERENCE TO THE COURT ETC

Application

1 This Schedule applies if the Secretary of State—

(a) makes the urgent case decisions in relation to an individual, and

(b) imposes a temporary exclusion order on the individual.

Statement of urgency

2 The temporary exclusion order must include a statement that the Secretary of State reasonably considers that the urgency of the case requires the order to be imposed without obtaining the permission of the court under section 3.

Reference to court

3 (1) Immediately after giving notice of the imposition of the temporary exclusion order, the Secretary of State must refer to the court the imposition of the order on the individual.

(2) The function of the court on the reference is to consider whether the urgent case decisions were obviously flawed.

(3) The court's consideration of the reference must begin within the period of 7 days beginning with the day on which notice of the imposition of the temporary exclusion order is given to the individual.

(4) The court may consider the reference—

(a) in the absence of the individual,

(b) without the individual having been notified of the reference, and

(c) without the individual having been given an opportunity (if the individual was aware of the reference) of making any representations to the court.

(5) But that does not limit the matters about which rules of court may be made.

Decision by court

4 (1) In a case where the court determines that any of the relevant decisions of the Secretary of State is obviously flawed, the court must quash the temporary exclusion order.

(2) If sub-paragraph (1) does not apply, the court must confirm the temporary exclusion order.

(3) If the court determines that the decision of the Secretary of State that the urgency condition is met is obviously flawed, the court must make a declaration of that

determination (whether it quashes or confirms the temporary exclusion order under the preceding provisions of this paragraph).

Procedures on reference

5 (1) In determining a reference under paragraph 3, the court must apply the principles applicable on an application for judicial review.

(2) The court must ensure that the individual is notified of the court's decision on a reference under paragraph 3.

Interpretation

6 (1) References in this Schedule to the urgency condition being met are references to condition E being met by virtue of section 2(7)(b) (urgency of the case requires a temporary exclusion order to be imposed without obtaining the permission of the court).

(2) In this Schedule "the urgent case decisions" means the relevant decisions and the decision that the urgency condition is met.

(3) In this Schedule "the relevant decisions" means the decisions that the following conditions are met—

(a) condition A;

(b) condition B;

(c) condition C;

(d) condition D.

SCHEDULES

SCHEDULE 3

Section 12

TEMPORARY EXCLUSION ORDERS: PROCEEDINGS

Introductory

1 In this Schedule—

"appeal proceedings" means proceedings in the Court of Appeal or the Inner House of the Court of Session on an appeal relating to TEO proceedings;

"the relevant court" means—

(a) in relation to TEO proceedings, the court;

(b) in relation to appeal proceedings, the Court of Appeal or the Inner House of the Court of Session;

"rules of court" means rules for regulating the practice and procedure to be followed in the court, the Court of Appeal or the Inner House of the Court of Session;

"TEO proceedings" means proceedings on—

(a) an application under section 3,

(b) a reference under Schedule 2,

(c) a review under section 11, or

(d) an application made by virtue of paragraph 6 of this Schedule (application for order requiring anonymity).

Rules of court: general provision

2 (1) A person making rules of court relating to TEO proceedings or appeal proceedings must have regard to the need to secure the following—

(a) that the decisions that are the subject of the proceedings are properly reviewed, and

(b) that disclosures of information are not made where they would be contrary to the public interest.

(2) Rules of court relating to TEO proceedings or appeal proceedings may make provision—

(a) about the mode of proof and about evidence in the proceedings;

(b) enabling or requiring the proceedings to be determined without a hearing;

(c) about legal representation in the proceedings;

(d) enabling the proceedings to take place without full particulars of the reasons for the decisions to which the proceedings relate being given to a party to the proceedings (or to any legal representative of that party);

(e) enabling the relevant court to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party);

(f) about the functions of a person appointed as a special advocate (see paragraph 10);

(g) enabling the relevant court to give a party to the proceedings a summary of evidence taken in the party's absence.

(3) In this paragraph—

(a) references to a party to the proceedings do not include the Secretary of State;

(b) references to a party's legal representative do not include a person appointed as a special advocate.

Rules of court: disclosure

3 (1) Rules of court relating to TEO proceedings or appeal proceedings must secure that the Secretary of State is required to disclose—

(a) material on which the Secretary of State relies,

(b) material which adversely affects the Secretary of State's case, and

(c) material which supports the case of another party to the proceedings.

(2) This paragraph is subject to paragraph 4.

4 (1) Rules of court relating to TEO proceedings or appeal proceedings must secure—

(a) that the Secretary of State has the opportunity to make an application to the relevant court for permission not to disclose material otherwise than to the relevant court and any person appointed as a special advocate;

(b) that such an application is always considered in the absence of every party to the proceedings (and every party's legal representative);

(c) that the relevant court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be contrary to the public interest;

(d) that, if permission is given by the relevant court not to disclose material, it must consider requiring the Secretary of State to provide a summary of the material to every party to the proceedings (and every party's legal representative);

(e) that the relevant court is required to ensure that such a summary does not contain material the disclosure of which would be contrary to the public interest.

(2) Rules of court relating to TEO proceedings or appeal proceedings must secure that provision to the effect mentioned in sub-paragraph (3) applies in cases where the Secretary of State—

(a) does not receive the permission of the relevant court to withhold material, but elects not to disclose it, or

(b) is required to provide a party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.

(3) The relevant court must be authorised—

(a) if it considers that the material or anything that is required to be summarised might adversely affect the Secretary of State's case or support the case of a party to the proceedings, to direct that the Secretary of State—

(i) is not to rely on such points in the Secretary of State's case, or

(ii) is to make such concessions or take such other steps as the court may specify, or

(b) in any other case, to ensure that the Secretary of State does not rely on the material or (as the case may be) on that which is required to be summarised.

(4) In this paragraph—

(a) references to a party to the proceedings do not include the Secretary of State;

(b) references to a party's legal representative do not include a person appointed as a special advocate.

Article 6 rights

5 (1) Nothing in paragraphs 2 to 4, or in rules of court made under any of those paragraphs, is to be read as requiring the relevant court to act in a manner inconsistent with Article 6 of the Human Rights Convention.

(2) The "Human Rights Convention" means the Convention within the meaning of the Human Rights Act 1998 (see section 21(1) of that Act).

Rules of court: anonymity

6 (1) Rules of court relating to TEO proceedings may make provision for—

(a) the making by the Secretary of State or the relevant individual of an application to the court for an order requiring anonymity for that individual, and

(b) the making by the court, on such an application, of an order requiring such anonymity;

and the provision made by the rules may allow the application and the order to be made irrespective of whether any other TEO proceedings have been begun in the court.

(2) Rules of court may provide for the Court of Appeal or the Inner House of the Court of Session to make an order in connection with any appeal proceedings requiring anonymity for the relevant individual.

(3) In sub-paragraphs (1) and (2) the references, in relation to a court, to an order requiring anonymity for the relevant individual are references to an order by that court which imposes such prohibition or restriction as it thinks fit on the disclosure—

(a) by such persons as the court specifies or describes, or

(b) by persons generally,

of the identity of the relevant individual or of any information that would tend to identify the relevant individual.

(4) In this paragraph "relevant individual" means an individual on whom the Secretary of State is proposing to impose, or has imposed, a temporary exclusion order.

Initial exercise of rule-making powers by Lord Chancellor

7 (1) The first time after the passing of this Act that rules of court are made in exercise of the powers conferred by this Schedule in relation to proceedings in England and

Wales or in Northern Ireland, the rules may be made by the Lord Chancellor instead of by the person who would otherwise make them.

(2) Before making rules of court under sub-paragraph (1), the Lord Chancellor must consult—

(a) in relation to rules applicable to proceedings in England and Wales, the Lord Chief Justice of England and Wales;

(b) in relation to rules applicable to proceedings in Northern Ireland, the Lord Chief Justice of Northern Ireland.

(3) But the Lord Chancellor is not required to undertake any other consultation before making the rules.

(4) A requirement to consult under sub-paragraph (2) may be satisfied by consultation that took place wholly or partly before the passing of this Act.

(5) Rules of court made by the Lord Chancellor under sub-paragraph (1)—

(a) must be laid before Parliament, and

(b) if not approved by a resolution of each House before the end of 40 days beginning with the day on which they were made, cease to have effect at the end of that period.

(6) In determining that period of 40 days no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

(7) If rules cease to have effect in accordance with sub-paragraph (5)—

(a) that does not affect anything done in previous reliance on the rules, and

(b) sub-paragraph (1) applies again as if the rules had not been made.

(8) The following provisions do not apply to rules of court made by the Lord Chancellor under this paragraph—

(a) section 3(6) of the Civil Procedure Act 1997 (parliamentary procedure for civil procedure rules);

(b) section 56(1), (2) and (4) of the Judicature (Northern Ireland) Act 1978 (statutory rules procedure).

(9) Until the coming into force of section 85 of the Courts Act 2003, the reference in sub-paragraph (8)(a) to section 3(6) of the Civil Procedure Act 1997 is to be read as a reference to section 3(2) of that Act.

Use of advisers

8 (1) In any TEO proceedings or appeal proceedings the relevant court may if it thinks fit—

(a) call in aid one or more advisers appointed for the purposes of this paragraph by the Lord Chancellor, and

(b) hear and dispose of the proceedings with the assistance of the adviser or advisers.

(2) The Lord Chancellor may appoint advisers for the purposes of this paragraph only with the approval of—

(a) the Lord President of the Court of Session, in relation to an adviser who may be called in aid wholly or mainly in Scotland;

(b) the Lord Chief Justice of Northern Ireland, in relation to an adviser who may be called in aid wholly or mainly in Northern Ireland;

(c) the Lord Chief Justice of England and Wales, in any other case.

(3) Rules of court may regulate the use of advisers in proceedings who are called in aid under sub-paragraph (1).

(4) The Lord Chancellor may pay such remuneration, expenses and allowances to advisers appointed for the purposes of this paragraph as the Lord Chancellor may determine.

9 (1) The Lord President of the Court of Session may nominate a judge of the Court of Session who is a member of the First or Second Division of the Inner House of that Court to exercise the function under paragraph 8(2)(a).

(2) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise the function under paragraph 8(2)(b)—

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).

(3) The Lord Chief Justice of England and Wales may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise the function under paragraph 8(2)(c).

Appointment of special advocate

10 (1) The appropriate law officer may appoint a person to represent the interests of a party in any TEO proceedings or appeal proceedings from which the party (and any legal representative of the party) is excluded.

(2) A person appointed under sub-paragraph (1) is referred to in this Schedule as appointed as a "special advocate".

(3) The "appropriate law officer" is—

(a) in relation to proceedings in England and Wales, the Attorney General;

(b) in relation to proceedings in Scotland, the Advocate General for Scotland;

(c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland.

(4) A person appointed as a special advocate is not responsible to the party to the proceedings whose interests the person is appointed to represent.

(5) A person may be appointed as a special advocate only if—

(a) in the case of an appointment by the Attorney General, the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990;

(b) in the case of an appointment by the Advocate General for Scotland, the person is an advocate or a solicitor who has rights of audience in the Court of Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980;

(c) in the case of an appointment by the Advocate General for Northern Ireland, the person is a member of the Bar of Northern Ireland.

Relationship with other powers to make rules of court and other proceedings

11 Nothing in this Schedule is to be read as restricting—

(a) the power to make rules of court or the matters to be taken into account when doing so, or

(b) the application of sections 6 to 14 of the Justice and Security Act 2013 (closed material proceedings).

SCHEDULES

SCHEDULE 4

Section 12

TEMPORARY EXCLUSION ORDERS: APPEALS AGAINST CONVICTIONS

Right of appeal

1 (1) An individual who has been convicted of an offence under section 10(1) or (3) may appeal against the conviction if—

(a) a temporary exclusion order is quashed, and

(b) the individual could not have been convicted had the quashing occurred before the proceedings for the offence were brought.

(2) An individual who has been convicted of an offence under section 10(3) may appeal against the conviction if—

(a) a notice under section 9, or a permitted obligation imposed by such a notice, is quashed, and

(b) the individual could not have been convicted had the quashing occurred before the proceedings for the offence were brought.

Court in which appeal to be made

2 An appeal under this Schedule is to be made—

(a) in the case of a conviction on indictment in England and Wales or Northern Ireland, to the Court of Appeal;

(b) in the case of a conviction on indictment or summary conviction in Scotland, to the High Court of Justiciary;

(c) in the case of a summary conviction in England and Wales, to the Crown Court; or

(d) in the case of a summary conviction in Northern Ireland, to the county court.

When the right of appeal arises

3 (1) The right of appeal under this Schedule does not arise until there is no further possibility of an appeal against—

(a) the decision to quash the temporary exclusion order, notice or permitted obligation (as the case may be), or

(b) any decision on an appeal made against that decision.

(2) In determining whether there is no further possibility of an appeal against a decision of the kind mentioned in sub-paragraph (1), any power to extend the time for giving notice of application for leave to appeal, or for applying for leave to appeal, must be ignored.

The appeal

4 (1) On an appeal under this Schedule to any court, that court must allow the appeal and quash the conviction.

(2) An appeal under this Schedule to the Court of Appeal against a conviction on indictment—

(a) may be brought irrespective of whether the appellant has previously appealed against the conviction;

(b) may not be brought after the end of the period of 28 days beginning with the day on which the right of appeal arises by virtue of paragraph 3; and

(c) is to be treated as an appeal under section 1 of the Criminal Appeal Act 1968 or, in Northern Ireland, under section 1 of the Criminal Appeal (Northern Ireland) Act 1980, but does not require leave in either case.

(3) An appeal under this Schedule to the High Court of Justiciary against a conviction on indictment—

(a) may be brought irrespective of whether the appellant has previously appealed against the conviction;

(b) may not be brought after the end of the period of 28 days beginning with the day on which the right of appeal arises by virtue of paragraph 3; and

(c) is to be treated as an appeal under section 106 of the Criminal Procedure (Scotland) Act 1995 for which leave has been granted.

(4) An appeal under this Schedule to the High Court of Justiciary against a summary conviction—

(a) may be brought irrespective of whether the appellant pleaded guilty;

(b) may be brought irrespective of whether the appellant has previously appealed against the conviction;

(c) may not be brought after the end of the period of two weeks beginning with the day on which the right of appeal arises by virtue of paragraph 3;

(d) is to be by note of appeal, which shall state the ground of appeal;

(e) is to be treated as an appeal for which leave has been granted under Part 10 of the Criminal Procedure (Scotland) Act 1995; and

(f) must be in accordance with such procedure as the High Court of Justiciary may, by Act of Adjournal, determine.

(5) An appeal under this Schedule to the Crown Court or to the county court in Northern Ireland against a summary conviction—

(a) may be brought irrespective of whether the appellant pleaded guilty;

(b) may be brought irrespective of whether the appellant has previously appealed against the conviction or made an application in respect of the conviction under section 111 of the Magistrates' Courts Act 1980 or Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)) (case stated);

(c) may not be brought after the end of the period of 21 days beginning with the day on which the right of appeal arises by virtue of paragraph 3; and

(d) is to be treated as an appeal under section 108(1)(b) of that Act or, in Northern Ireland, under Article 140(1)(b) of that Order.

Terrorism Act 2000

2000 CHAPTER 11

PART I

INTRODUCTORY

1 Terrorism: interpretation.

(1) In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government **[**F1or an international governmental organisation**]** or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious **[**F2, racial**]** or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Terrorism Act 2000

2000 CHAPTER 11

PART V

COUNTER-TERRORIST POWERS

Suspected terrorists

40 Terrorist: interpretation.

(1) In this Part "terrorist" means a person who—

(a) has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism.

(2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1.