Case No: PTA/8/2013, 1/2014, 2/2014, 4/2014

Neutral Citation Number: [2015] EWHC 1681 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2015

Before :

MR JUSTICE COLLINS

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Between :

DD	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Ms Charlotte Kilroy and Mr Alex Gask (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
Mr Jonathan Hall, QC and Ms Kate Grange (instructed by the **Treasury Solicitors**) for the **Respondent**
Special Advocates: Ms Helen Mountfield, QC and Mr Zubair Ahmad

Hearing dates: 21st April 2015 – 24th April 2015

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Judgmen

tMr Justice Collins:

1.The appellant was made subject to a notice under the Terrorism Prevention and Investigation Act 2011 (hereafter referred to as a TPIM) on 3 October 2012. A TPIM is in force for one year but can be extended for a further year so that normally there is a limit of 2 years: TPIM Act s.5. However, the limit of 2 years can effectively be extended if a TPIM is revoked but later revived in accordance with s.13 of the Act. In this case, the appellant breached terms of his TPIM on a number of occasions which led to his conviction and the imposition of prison sentences. While he was in prison, since obviously his activities were controlled so that he was considered to pose no risk, the TPIM was revoked and was revived on his release from prison. The terms of imprisonment resulting in periods during which the TPIM was not in force have meant that the TPIM is now due to expire on 6 October 2015.

2.A TPIM can only be imposed, revived or extended if a number of conditions are met. The conditions required for imposition are set out in s.3 of the TPIM Act as A to E. Prior to 12 February 2015, Condition A required that the respondent reasonably believed that "the individual is or has been involved in terrorism-related activity" (which I shall refer to as TRA): s.3(1). Since 12 February 2015, s.3(1) has been amended by s.20(1) of the Counter-Terrorism and Security Act 2015 so that the respondent has to be satisfied on the balance of probabilities that the individual is or has been involved in TRA. Condition B (s.2(2)) requires that any such TRA is 'new TRA'. That is defined in s.3(6) to mean in the case of a first TPIM any TRA and in the case of any subsequent TPIM, TRA which occurred since the original TPIM came into force. Condition C is contained in s.3(3), which reads:-

> 3. "Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual".

4. S.3(4) deals with Condition D and reads:-

> 5. "Condition D is that the Secretary of State reasonably considers that it is necessary for the purposes connected with preventing or restricting the individuals involvement in [TRA], for the specified [TPIM] to be imposed on the individual".

6. Condition E is not material for the purposes of this case.

7.Conditions A, C and D must be met if a TPIM is to be revived in accordance with s.13 of the Act. There are in fact four appeals before me which have to be determined. An appeal against the original imposition of the TPIM in 2012 was withdrawn while the appellant was in prison in 2013. There are however appeals against each of the revivals following revocations while the appellant was serving a term of imprisonment. In addition, there is an appeal against the decision of the respondent to extend the TPIM pursuant to s.5(2) of the Act for a further year on 7 October 2014. It is in addition necessary to consider whether now the relevant conditions are still met and whether the amendment to s.3(1) which heightened the standard required to meet Condition A means that that condition is now not met.

8. Section 5 of the TPIM Act is headed "Two year limit for TPIM notices". A notice is in force for a period of one year (s.5(1)(b)) but can be extended for a further year (s.5(2)), provided that Conditions A, C and D are met (s.5(3)). However, the heading is somewhat misleading since s.5 is subject in particular to sections 13 and 14. Section 14 is not material for the purposes of this case but section 13 is. It enables the respondent at any time to revoke a TPIM and to revive it if conditions A, C and D are met. If revived, it remains in force for the period for which the TPIM would have continued in force if it had not been revoked (s.13(9)(b)(ii)). There can be more than one revocation and revival during the currency of a TPIM: s.13(7)(a). Thus, while a TPIM may be revoked and so not cover an individual for periods, control over an individual can have effect for more than two years if, as in this case the individual is in prison while the TPIM was revoked. But the limit of 2 years is relied on by the appellant as a relevant consideration in deciding whether on the facts of this case the TPIM should be quashed.

9. Section 16 of the TPIM Act deals with rights of appeal. Section 16(1) provides:-

> 10. "if the Secretary of State extends or revives a TPIM notice…..
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> 11. (a) the individual to whom the TPIM notice relates may appeal to the court against the extension or revival, and
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> 12. (b) the function of the court on such an appeal is to review the Secretary of State's decisions that Conditions A, C and D were met and continue to be met".

13. There may in addition be an appeal against a refusal by the Secretary of State to vary measures contained in a TPIM (s.16(3)). Section 16(6) requires the court to apply the principles applicable on an application for judicial review. The court may quash an extension or revival of a TPIM or quash any measure contained in it (s.16(7)) if it decides that an appeal should succeed. In this case, I am asked to quash the notice or in the alternative to quash some of the measures contained in it.

14. It is to be noted that s.16(7) states that the only power of the court in the case of appeals such as these is to quash. There is only one TPIM which has in this case been extended. Thus I have to consider whether it or any measures contained in it should be quashed at a material time relating to one of the four appeals. This is particularly material since the appellant is due to stand trial on 26 May 2015 on charges relating to alleged breaches of measures which occurred in May 2014, only a day after his release from prison on licence. If the TPIM should not then have been revived or either of the measures allegedly breached should be quashed, the prosecution cannot proceed.

15. While not conceding that condition A was met, certainly before 2014, since it refers to past TRA as well as present, no positive argument was put forward in relation to it by the appellant. The real case on behalf of the appellant is that the effect of the TPIM on his mental health is and has been such as has breached Article 3 of the ECHR since it has amounted to inhuman or degrading treatment. In the alternative, it has been submitted that to have maintained the TPIM is disproportionate in terms of Article 8 both in its effect on the appellant's family and private life and that of his wife and children. He has always denied that he has been involved in TRA and it is submitted that his mental state is such that he would not in any event be someone who could be regarded

as having any influence over others who might otherwise have been persuaded by him to engage in TRA.

16. The Article 3 claim led to a preliminary issue being sought and obtained from Cranston J "whether the imposition of a TPIM on DD is a breach of his rights under Art:3 ECHR and consequently a breach of s.6 of the Human Rights Act". That was I regret to say an unfortunate decision. It depended on assuming that the imposition and maintenance of the TPIM was properly based on assessments made by the Security Service. Those were broadly that he was a supporter of the Somali based terrorist organisation Al-Shabaab and had until the imposition of the TPIM in 2012 been involved in sending funds and equipment to support its activities and radicalising, recruiting, assisting and funding individuals to travel to Somalia for TRA. He had contributed to, indeed had been involved in setting up, extremist websites. He raised money for Al-Shabaab and intended to travel to Somalia for TRA purposes. Whether or not those assumptions are correct and the question whether the TPIM or any of its measures breach any article of the ECHR needs to be determined when all the material evidence, both in open and closed hearings, is considered and evaluated.

17. The preliminary issue was heard by Ouseley J in October 2014. In a judgment given on 20 November 2014 he dismissed the appellant's application that Article 3 was breached. He did not consider any closed evidence since, as I have indicated, the assumption was made that the case made by the Security Service was accepted. The application depended on medical evidence of the effect that the TPIM had had and would be likely to have on the appellant's mental health. The only advantage of the hearing before Ouseley J lies in him having heard the two psychiatrists who gave evidence of the appellant's mental health and the effect of the TPIM measures on it. His conclusions have been accepted on behalf of both the appellant and the respondent and I will apply them. I have heard additional evidence from one of the doctors to deal with the appellant's present state and the continuing effect of the TPIM measures on his mental health.

18. The appellant appealed Ouseley J's decision. Due it seems to an unfortunate failure by the Court of Appeal listing office to liaise with the Administrative Court, the appeal was only put before the Court on 16 April 2015, this appeal before me being listed for 21 April. Once appraised of this and the need not to adjourn this substantive appeal before me, the Court of Appeal persuaded those representing the appellant that the sensible course was to withdraw the appeal. That was done. It seems that it was believed that Ouseley J had indicated that even if the effect of the TPIM was to breach Article 3 the interests of national security could prevail. He did not so indicate nor would it have been a correct application of the law if he had as will become apparent when I deal with the correct approach to Article 3.

19. Before setting out the material circumstances which led to the imposition of the TPIM, I should refer to Section 4 of the TPIM Act which identifies what is meant by involvement in TRA. As originally enacted, it read:-

> 20. "For the purposes of this Act, involvement in [TRA] is any one or more of the following –
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> > 21. (a) the commission, preparation or instigation of acts of terrorism;

22. (b) conduct which facilitates the commission, preparation or instigation of such acts;

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

24. (d) conduct which gives support or assistance to individuals who are known or believed by the individuals by the individual concerned to be involved in conduct falling within the above paragraphs and for the purposes of this Act it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general".

25. The Counter-Terrorism and Security Act 2015 s.20(2) amended paragraph (d) above with effect from 12 February 2015 so that it was limited to conduct falling within paragraph (a). That Al-Shabaab was at all material times a terrorist organisation cannot be and is not doubted. Thus any conduct by the appellant which fell within s.4 would have justified the imposition and maintenance of the TPIM, provided that until 12 February 2015 there was a reasonable belief and since then it is established on the balance of probabilities that he was involved in TRA within the meaning of s.4.

26. The appellant is now 39 years old, having been born in Somalia on 1 May 1976. He came to this country in 2003. He claimed asylum which was granted on 15 November 2003 when he was given indefinite leave to remain. He is here with his wife and seven children. His eldest son who is 19 has mobility and speaking problems and is subject to special needs. His 17 year old daughter is a student at college. His 16 year old son is doing his GCSEs and his 12 year old son and his 5 year old son are at school. The two youngest are 2 and 1 respectively. The appellant's wife has a relatively poor command of English as does the eldest son. The two youngest speak Somali at home but it is expected that they will become, as their 5 elder siblings, fluent in English.

27. Despite having been granted asylum on the basis that he feared persecution in Somalia, the appellant paid a visit to Somalia in August 2007. He had had contact with individuals in Sweden and had travelled to Somalia via Sweden. All were extremists who were members of or sympathetic to the aims of Al-Shabaab. The appellant returned to this country in September 2007. In May 2008 he was arrested together with a close associate whom I shall call Yusef and both were charged with two offences. These were, first, the dissemination of terrorist publications contrary to Section 2 of the Terrorism Act 2006. Broadly the allegation was that the two defendants provided material to others intending to encourage those others to involve themselves in TRA. The second charge was contrary to Section 15(2) of the 2006 Act. It alleged that the defendants received money or other property knowing or having reasonable grounds to suspect that it would be used for the purposes of terrorism.

28. A man named Baynah, an Al-Shabaab member based in Sweden with whom Yusef had communicated, had intended to establish a radio station and a Somali and Arabic website for the opposition in Somalia, namely Al-Shabaab. The appellant was to be deputy head, Yusef being head. The appellant was chosen because of his involvement in other media websites. A website entitled Al Qimmah had been registered by a Sweden-based Somali in September 2007 just after the appellant's visit there. This site became, as a UN report in March 2010 stated, "an integral part of Al-Shabaab's

da'wa (propagation) apparatus". At his criminal trial, the appellant denied that he had played any part in the creation or maintenance of this site. On his arrest in May 2008, computers seized showed frequent access to the site. Correspondence seized from Yusef's home listed the appellant as one of the workers in the site and there was evidence that a person assessed to be the appellant had on 1 April 2008 posted that "the management brothers of the network" should take action to protect the website from 'enemy action'. There was thus powerful evidence to show the appellant's involvement in at least the maintenance of the website which was giving support to Al-Shabaab.

29. The appellant admitted that he had used a name under which extremist views had been posted on the website. Some of the postings encouraged jihad and praised martyrdom. Further, when he was arrested, a video cassette was found in the boot of his car which contained footage of armed men praising jihad and encouraging those who could not fight to make a financial contribution to the cause. Although this video did not explicitly refer to Al-Shabaab or Somalia, the assessment that it was intended by the appellant to motivate individuals to assist Al-Shabaab was entirely reasonable.

30. There were two other websites which were expressing extremist views in which it was assessed that the appellant was involved. One of those was registered in his name in January 2008 and was used to express support for Al-Shabaab. Another detailed Al-Shabaab activities. In addition, a website called Paltalk, an internet forum containing a number of chatrooms which focus on specific topics, was referred to by the appellant in an e-mail in the following terms, namely "one of the rooms of the Islamic rooms in Paltalk which supports the Mujahidin and the Somali nation".

31. Between 2006 and 2008 the appellant was engaged in raising money which was sent to Al-Shabaab. An e-mail from him to Yusef in January 2008 showed that about $150,000 had been collected of which 50% should be sent to Al-Shabaab. Examination of his financial records seized on his arrest showed that he had between 2006 and 2008 sent money to a total of $20,390 on sixty-six occasions to thirty-three individuals mainly in Somalia but also Ethiopia, Yemen, Egypt, Syria and Sweden. In his defence he asserted that this money was for members of his family or for humanitarian relief in Somalia. It was not for Al-Shabaab.

32. The appellant was acquitted on 29 July 2009. The jury failed to agree on his co-defendant Yusef. A subsequent jury also failed to agree and so Yusef was discharged in October 2010. The appellant's acquittal means no more than that the jury was not satisfied of his guilt beyond reasonable doubt. While Al-Shabaab had become a proscribed terrorist organisation in the United States in February 2008, it was not proscribed in this country until March 2010. It did not then have the reputation which it now has and so the appellant's case may have seemed more plausible. That he had and maintained extremist views and was at least sympathetic to Al-Shabaab was confirmed when in January 2011 he was interviewed by the Somali based radio station Al Furqan. In the course of the interview he said that he was a supporter of Al-Shabaab, was happy with the Jihad/Mujahideen and agreed with Al-Shabaab fighting the Somali government and AMISOM. AMISOM was the African Union Mission conducting a peace support operation in Somalia. He was also an Imam and as such had considerable influence among fellow Muslims who were likely to be swayed by his rhetoric.

33. The Security Service has assessed that the appellant was involved in and played a leading role in bodies of extremists based in Leicester and Birmingham. Through these bodies he has raised funds for Al-Shabaab and has disseminated propaganda designed to radicalise, recruit and fundraise for Al-Shabaab. I have no doubt that that assessment of his activities between the acquittal and the imposition of the TPIM on 3 October 2012 is fully supported by evidence which I have considered in closed hearing. But it is also entirely consistent with the evidence disclosed in the open statements which, in this case, give the appellant very considerable detail of the material relied on against him.

34. A report in the papers of January 2009 by a Canadian expert sets out the history of Al-Shabaab. It seems to have emerged as the armed youth wing (its name means 'the Youth') of the Islamic Court Union (ICU). When it was designated a proscribed terrorist organisation in the USA in 2008, its spokesman responded with pride, saying how happy they were to be "recognised as terrorists who terrify the enemy of God and know that our humble jihad terrifies and weakens them". It has frequently made clear that it will settle for nothing less than an Islamic State which is not confined by colonialist boundaries. A report of the Monitoring Group on Somalia set up by the United Nations of 10 March 2010 identified Al-Shabaab as one of the principal threats to peace in Somalia and noted that it had employed targeted killings, improvised explosive devices and suicide bombings. The report also noted the use of Al Qimmah website to which I have already referred.

35. In February 2012 Al-Shabaab was formally given the support of Al Qaeda. Thus its aims are similar to those of Al Qaeda and, although primarily involved in activities in East Africa, it will support action against western powers including the UK. In September 2013 it was responsible for an attack on the Westgate Shopping Centre in Nairobi, which led to a number of deaths of innocent shoppers. In June 2014 there were attacks on hotels near Lamu on the Kenya coast and on 2 April 2015 the appalling attack on the university in Garissa in Kenya. That it is and has always been an organisation which espouses extreme Muslim views and is prepared to kill those who do not agree with its aims, particularly if they are not Muslims, is clear. It is a thoroughly dangerous terrorist organisation and anyone supporting it in any way will clearly be involved in TRA.

36. I have no doubt that all conditions set out in s.2 of the TPIM Act were met when the TPIM was imposed on 3 October 2012. Permissible restraint measures are set out in Part 1 of Schedule 1 to the TPIM Act. There are 12 separate headings. Paragraph 1 is an overnight residence measure under which the appellant was required to stay in his address between 9pm and 7am, unless he received permission from the Home Office to leave it. Paragraph 2 is a travel measure under which the appellant was required to surrender all travel documents to a police officer and was prohibited from leaving the UK without permission from the Home Office. Paragraph 3 is an exclusion measure under which the appellant was forbidden without permission of the Home Office to enter two areas in Leicester and Birmingham respectively and a number of specified places. Paragraph 4 required him to comply with any directions of a police officer which were made in accordance with the provisions of that paragraph. Paragraph 5 is a financial services measure which broadly requires him to give full financial information to the Home Office and to maintain only nominated accounts. It also limits the amount of cash he could possess. This was £100: it has since been increased

to £200 on the appellant's request. Paragraph 6 is a property measure which forbids transfers of property and requires information to be given of all possessions.

37. Paragraph 8 is an association measure. Under it the appellant is prohibited from associating or communicating with a number of named individuals who by and large were those with whom he had been involved in his activities to support Al-Shabaab in Leicester and Birmingham. The TPIM in paragraph 8.2 states:-

> 38. "You must not meet any other person (including at your residence or by attending any meeting or gathering) unless:
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> 39. (a) (for a person) you have notified the Home Office of the name and address of the person and the time and location of the meeting at least two working days before the first time you meet them….."

40. There are exceptions for such as emergency services or healthcare persons, his legal representatives, his wife and family and for a child aged 11 or under.

41. Paragraph 9, a work or studies measure, limits fields in which the appellant can work without Home Office permission and requires him to provide information as to any employment or study. Paragraph 10 requires him to report to a police station on days and times to be notified. Originally these were every day but that has been relaxed to require only 4 days each week. Paragraph 11 requires him to submit to being photographed at a time and place notified by the Home Office.

42. I have so far omitted the two measures which have caused the most anxiety for the appellant and have affected his mental health. Paragraph 12 of the first schedule headed 'Monitoring measures' enables the respondent to "impose requirements for the individual to co-operate with specified arrangements for enabling the individual's movements, communication or other activities to be monitored by electronic or other means". Under that paragraph the TPIM requires the appellant to wear an electronic monitoring tag at all times. He must keep it charged and must not remove or tamper with it.

43. The tag is slightly larger than a sports watch. It is mounted on a single band of soft material which can allow a sock to be worn beneath it but is small enough so that it cannot slip off the foot. It is waterproof. It transmits a signal which can be picked up by a monitoring box which should be kept on an immovable item in the appellant's residence. Outside the residence the tag records its location. At all times the information is relayed to the monitoring company. Thus it can indicate, for example, if the appellant were to enter any area which he was prohibited from entering.

44. In order to comply with the obligation to keep the tag charged, the appellant must attach it to a charging unit which is connected to a mains socket. When the TPIM was imposed, the appellant was informed that he should charge the tag once in the morning and once in the evening. Each occasion should take between 30 minutes and one hour. Once charged, the unit will show a solid green light. If the tag is not charged regularly, a red light will come on if the battery is too low and then it could take up to 2½ hours to recharge it.

45.The appellant has stated that it normally takes him 2½ hours to charge his tag fully. This was said on behalf of the respondent to be inconsistent with the way in which the tag should work. Some further evidence was produced after the hearing. This included a history of the appellant's charging between 6 and 22 April 2015. This showed that the appellant was not charging in morning and evening sessions, but at irregular intervals. In some cases, it seems that he kept charging albeit the tag was fully charged. On occasions, he seems to have continued to charge virtually overnight. It is clear that he has not been following a proper charging routine. This may have something to do with his view of the tag resulting from his mental state. I shall have to deal with this in detail since it is the need to wear a tag which has had the most damaging effect on the appellant's mental health.

46.Paragraph 7 of Part 1 of Schedule 1 to the TPIM Act enables the respondent to impose restrictions on the possession and use of electronic devices. Paragraph 7(1) reads:-

47. "The Secretary of State may impose either or both of the following –

48. (a) restrictions on the individual's possession or use of electronic communication devices;

49. (b) requirements on the individual in relation to the possession or use of electronic communication devices by other persons in the individual's residence".

50. An individual must be allowed a telephone connected to a fixed line, a mobile phone which cannot access the internet and a computer which provides access to the internet by connection to a fixed line.

51.The electronic communication device measure is set out in Paragraph 7 of the TPIM. Paragraph 7.2 allows him the devices which are permitted by the Schedule as set out in the previous paragraph of this judgment. Paragraph 7.3 is important since it has an effect on his wife and in particular those of his children who need to use computers for school work. It reads:-

52. "You may permit another person to bring the following devices into the residence whilst you are in the residence, provided the devices are switched off (where applicable) and not used in any time whilst you are in the residence:

53. (a) mobile telephones and associated SIM cards;

54. (b) recordable disks; and

55. (c) models of the following devices which are not capable of connecting to the internet:

i. memory sticks;

ii. digital music players;

iii. digital cameras;

iv. dictating machines; and

v. pagers.

56. This measure has created serious problems for his children. His eldest daughter attends a two year course at a college in Birmingham which commenced in September 2014. Her first year is entirely based on coursework and she needs to use a computer at the college, but the times available for her to use them are limited. At home, she has to compete with her siblings for the use of the one very slow computer which the appellant is permitted to use. She cannot even use the second best access through her mobile phone when the appellant is, as he normally is, at home. Furthermore, the college is shut over the weekend so that her ability to catch up on work is severely restricted. The appellant's 16 year old son is also badly affected. His school gave iPads to his class, but he is unable to make use of this offer. He too is at a disadvantage in his schoolwork and is unable to keep in touch with his friends in the way that most children do through electronic devices.

57. The family is also affected by the association measure. In particular, the children have found that friends are reluctant to visit since it is believed that no-one over 11 years of age can visit unless his or her name and address is supplied to the Home Office at least two working days in advance of a proposed visit. In fact the measure (paragraph 8.2) only prohibits the appellant from meeting a person at his residence unless prior notification is given. Thus, provided that any friend of his family does not meet with him in the house, no prior notification is required. No doubt this may be difficult to apply and it will require the appellant to stay in a different room, but it can eliminate the need for prior notification.

58. The effect of the various measures in the TPIM on the appellant's family has been put forward in a statement from a social worker. She spoke at some length with the appellant, his wife and elder children on 4 February 2015. The lack of access to the internet through laptops and the difficulties in communicating with friends were noted. The educational difficulties I have already indicated. All the children demonstrated distress, humiliation and sadness about the situation as they felt cut off from normal interaction. The appellant's mental state creates added problems since they cannot release their stress through normal adolescent peer interaction. The situation has inevitably meant that their mother has become very low. The social worker records that she did not smile once, she looked old for her years and was slow and lethargic in her movements.

59. On 8 April 2013 the appellant was arrested and charged with breaches of the TPIM. He was remanded in custody to HMP Belmarsh. On 25 April 2013 the TPIM was revoked. On 18 June 2013 the appellant withdraw his appeal against the imposition of the TPIM and on 21 June 2013 he pleaded guilty to three counts and was sentenced to 9 months imprisonment. The breaches were entering an internet café and using the internet, attending a pre-arranged meeting and appearing in a television programme. He was released from prison on 23 August 2013 whereupon the TPIM was revived. The first appeal is against that revival.

60. On 20 September 2013 the appellant was arrested for two further breaches of the TPIM by an unauthorised meeting and use of a computer at the address where he held that meeting. He was remanded in custody and on 8 October 2013 the TPIM was revoked. Concerns about the appellant's mental health were first drawn to the attention of the Security Service and the respondent in January 2014 when at his plea and case

management hearing the issue was raised. This led to an order by a judge at the Central Criminal Court on 14 March 2014 that a mental health assessment should be carried out. There was also a review carried out of the necessity and proportionality of reviving the TPIM following the criminal proceedings.

61. On 16 April 2014, following his plea of guilty, the appellant was sentenced to 15 months imprisonment for the two breaches. Time served on remand meant that he was released on licence on 6 May 2014. The TPIM was revived. The second appeal is against that revival. On 8 May 2014 he was again arrested for two breaches committed the previous day by having installed in his house a television set ordered from Argos to replace the existing set which had broken. The new television could access the internet albeit the appellant asserted that neither he or his wife was aware of that and in any event it lacked the necessary component to achieve such access. It seems that the police were present at the house when the set was delivered and the officers, it is said, allowed the service provider to enter the house to provide a satellite link. The charges, I was told, relate to the installation of the television and the meeting with the service provider without prior notification.

62. The appellant's licence was revoked and he was remanded in custody to Belmarsh. The TPIM was again revoked. On 3 July 2014 he was released under licence and subject to bail conditions and the TPIM was again revived. The third appeal is against that revival. On 27 August 2014 he was again arrested for breaches but it was decided by the CPS that to charge him was not in the public interest. On 7 October 2014 the TPIM was extended for a further year. The fourth appeal is against that extension.

63. The appellant is due to stand trial for the alleged breaches on 7 May 2014 on 26 May 2015. It is not for me to reach any conclusions on that. Suffice it to say that I am surprised that it was thought necessary to charge the breach of association measures by allowing the service provider in the house. So far as the television is concerned, unless there is some cogent evidence to show that the appellant's contentions are not acceptable, having regard to his mental state, I doubt that any jury would convict and, if they did, since he was in custody as a result for some 2 months, no substantive penalty would be likely.

64. On 12 March 2015 the appellant was arrested for four alleged breaches of the TPIM by failing on four occasions to contact the monitoring company. He provided a statement giving his excuses for the failure and, while the view was taken that those excuses were not sufficient, it was decided not to prosecute. However, the police found and seized a number of items including a number of mobile phones, a computer, three internet routers, £4680 in cash and a MP4 player. So far as the routers are concerned, the Security Service witness, JZ, agreed that all three had been returned by the police to the appellant. Miss Kilroy put to JZ that two of the routers were broken. JZ accepted it was possible to use one, but he did not know the status of the others. At present no charges have been brought in respect of the apparent breaches. However, the findings by the police are worrying since they appear to support the contention that the appellant has continued to ignore the prohibitions imposed on him in material ways, namely an ability to contact those whom he should not contact (the mobile phones), probable access to the internet through a medium unknown to the authorities (the computer). In addition, the large sum of money, which far exceeds the amount the appellant is permitted to possess, is of concern in the light of the assessment that he retains his desire to provide financial assistance to Al-Shabaab.

65.Mr Hall QC has in his final submissions made the point that the appellant has not provided any evidence himself to explain his breaches or the items found on 12 March 2015 nor has he put forward any rebuttal of the case against him. Absence of evidence from him does not prove the truth of the allegations against him, but he has of course knowledge of what he has done and why he has done it and could have engaged in the case against him. His mental illness is not such as deprives him of the ability to address the material disclosed against him.

66.I must now consider the medical evidence relating to the appellant's mental health. In his judgment ([2014] EWHC 3820 (Admin)) Ouseley J heard evidence from the two doctors who provided reports, one instructed by the appellant's, the other by the respondent's solicitor. Dr Quentin Deeley, instructed on behalf of the appellant, is a consultant psychiatrist at the Maudsley Hospital and a senior lecturer at the Institution of Psychiatry at King's College, London. Professor Fahy, instructed on behalf of the respondent, is a professor of forensic medicine at the same institution and had been a consultant at the Maudsley. Dr Deeley had provided four reports at the time of the hearing before Ouseley J in October 2014, the first being provided in January 2014 and prepared while the appellant was in Belmarsh. The appellant's solicitors had become concerned about his mental health and the attending psychiatrist at Belmarsh had, it was said, been sufficiently concerned to think in terms of a transfer to Broadmoor Hospital.

67.I do not propose to repeat the details so clearly and exhaustively set out in Ouseley J's judgment stating the findings and opinions of the doctors in their various reports and their evidence. The appellant had when 14 or 15 experienced the murder of his uncle, aunt and two cousins and their bodies had been left to rot in his family home since the warlords responsible for their murder would not permit them to be buried. In 1996 the appellant left Somalia for Dubai where he worked as an Imam. He lived in Denmark between 2001 and 2003, when he returned to Somalia. His father, older brother and brother in law were murdered in front of him and he was kidnapped and held for ransom by the militia men who had been responsible for some two weeks. On his release, he came to this country and made his successful claim for asylum. He worked here as an Imam. Following the deaths of his brother and mother in 2007, his mood lowered and he began to hear noises and voices associated with his experiences. This was when he returned to Somalia. He returned here and was joined by his wife and family. It is apparent that his experiences in Somalia were such as to affect his mental state and in due course Dr Deeley diagnosed him as suffering from PTSD.

68.There was a joint report from the two doctors before Ouseley, J. Their joint findings are set out and considered in paragraphs 68 to 72 of his judgment. He said:-

> "68. Professor Fahy and Dr Deeley produced a joint report dated 3 October 2014. They agreed that DD had reported clinically significant PTSD symptoms from the events of 1991 and 2003, and at times had merited a diagnosis of PTSD. Professor Fahy, but not Dr Deeley, thought that they had reduced to the extent that such a diagnosis was not warranted, but could increase at times of stress. They agreed that DD had developed a psychotic illness with auditory hallucinations and paranoid beliefs, with symptoms evolving from 2007, but unreported to medical staff as DD attributed the symptoms to jinns or evil spirits. The difference in diagnostic labelling was agreed not to be significant for these purposes. The causes were multifactorial, in which the positive family history of

mental disorder, and the series of stressors in Somalia and after his detention, were important.

69. They agreed that they had found no evidence that DD had deliberately exaggerated his psychiatric symptoms, partly because of his relatively good response to medication, the nature of the symptoms and previous reticence in disclosing symptoms lest he be labelled as mentally ill.

70. They agreed that appropriate treatment included medication for the foreseeable future, psycho-educational, practical and psychological support from a community mental health team of consultant psychiatrist, psychiatric nurse with specialist psychological help, if required.

71. The conditions of the TPIM were agreed to be stressful and burdensome, and likely to be more burdensome for someone with mental health problems; the TPIM was likely to exacerbate psychotic symptoms. The tag caused a specific exacerbating problem for someone with paranoid psychosis, and it had exacerbated DD's symptoms. Although Professor Fahy thought that the problem had reduced to an extent at the time of his interview, he accepted that, based on Dr Deeley's latest assessment, the tag had exacerbated the psychotic symptoms. The TPIM was a focus for anxiety and pessimism, with DD fearing that innocuous behaviour could lead to recall to prison, and his withdrawal from many social and religious activities, which did not help recovery from his mental illness.

72. They continued:

> "We agree that the strain on DD's mental health could be eased by the removal of the electronic tag, reducing the restrictions on the amount of cash he can withdraw or hold, and by investigating measures that could provide the children with access to necessary educational use of computer equipment and internet access. Dr Deeley adds that removal of the condition of signing on at the police station would also be helpful, because this condition is associated with severe anticipatory anxiety and lowering of mood. In Professor Fahy's opinion, the removal of this condition is unlikely to make a substantial difference to DD's psychiatric symptoms. We make these comments on in [sic] a clinical capacity and we do not offer an opinion about the necessity for such restrictions in terms of security concerns.""

69. Professor Fahy was somewhat more optimistic about the appellant's ability to cope than was Dr Deeley. However, there was an incident in September 2014. The permissible computer had broken down and the appellant and his wife, believing mistakenly that the children were prohibited from accessing websites without prior notification to and permission of the Home Office, had decided not to retain it. Once the mistaken belief was corrected, they decided to retain it but it took the police a substantial time to fit the necessary security cabinet. This led to the children being behind in their work and being distressed as a result. This exacerbated the appellant's mental health difficulties and led him to threaten suicide by throwing himself under a train in a note his wife found. She followed him and brought him home. His mental health team had him

taken to hospital. This incident was put to the doctors when they gave evidence. Professor Fahy accepted that the picture it showed was of a crisis which was acutely distressing to the appellant with the possibility of committing suicide contrary to his religious beliefs while unaware of what he was doing. He had deteriorated significantly and Professor Fahy accepted that he had been too optimistic in his report. He would, Professor Fahy stated, be prone to crises from the TPIM and family problems.

70. The major factor which was likely to exacerbate the appellant's condition was the tag. He had psychotic and unusual beliefs that the tag was there to punish him, that it contained a camera and a bomb and that voices and noises emanated from it. Professor Fahy's view was that tags were inappropriate for acutely paranoid offenders since the tag would be likely to become a focus of the paranoia and so exacerbate the condition. Ouseley, J summarised Dr Deeley's views in paragraph 85 of his judgment in these words:-

> "85. The care which DD needed at the moment was in the community, but it was debateable whether the events of mid-September required admission, or daily visits at home. He needed an allocated psychiatrist, a psychiatric nurse, with regular appointments, perhaps with a psychologist. The frequency and level of care would be dictated by symptoms. If he remained on the TPIM, but received the full treatment in the community which he needed, that would provide more of a safety net in the event of a crisis; it could provide a sense of moral support, but his symptoms and the burden of the illness would remain the same, even if improved to some extent. However much the health services tried to help, the perpetuation of the conditions predisposing the mental illness would remain, so it would be unlikely or impossible to remove the mental illness. DD's mental state was at its worst now. The longer an episode of severe illness continued, the harder the prospect of full recovery. Removal of the tag would improve his symptoms, as it was particularly difficult for someone with paranoid psychosis to wear, due to its intrusiveness and its constant reminder of his perceived persecution."

71. Both doctors accepted that the appellant was not exaggerating his symptoms. Mr Hall put to Dr Deeley in cross examination that he had not adopted the necessary scepticism in his reports. I am satisfied that this was not made out and that there can be no doubt about the damaging effect that the TPIM is having on the appellant's mental health.

72. In summary, Ouseley, J accepted that the TPIM had exacerbated the symptoms of the appellant's mental illness, namely PTSD and either paranoid schizophrenia or a schizo-affective disorder, depressive type. His delusions and symptoms fluctuated but the TPIM measures caused severe anguish and he had a significant burden of suffering. He required treatment in the community with risk assessment, the support of a community psychiatric nurse, regular appointments and a psychologist if necessary. The longer the TPIM remained in force the worse the prognosis and the more difficult the eventual recovery. In paragraph 114, he concluded thus:-

> "114. I accept that the fact of the TPIM, about which DD maintains the delusion that it is a punishment by the Security Service, and which risks a cycle of breach, custody, release, revival and breach again, leads to an understandable sense of hopelessness. I accept that four of the restrictions are identified as more significant than the others in their specific effects, with the tag being the most

troubling to DD's mental state by a considerable margin. All of these effects are significantly more serious for DD than they would be for a person of normal mental health and insight."

73. Ouseley J, after considering the law applicable, decided that the level of suffering was not such as breached Article 3. His view was that the legitimacy and need for and proportionality of the material restrictions was relevant in assessing whether the suffering caused amounted to treatment which breached Article 3. He rejected what he described as the essential premise of counsel's submissions that the question was simply whether the degree of suffering had reached a level of intensity which required the actions to cease, regardless of their purpose, legitimacy, intent, alternatives and care provided.

74. Dr Deeley provided two further reports, the first in February 2015 following an interview with the appellant at his solicitor's offices on 21 January 2015. The second is dated 14 April 2015 following an interview with the appellant by telephone on 1 April 2015. In his first report, Dr Deeley records that the appellant described hearing voices and women and children crying. They intensified if he was under stress. He is on medication, namely an anti-depressant and anti-psychotic. Dr Deeley took him through the TPIM measures and sought his comments on each. The association restrictions made him feel very isolated since friends would be reluctant to visit him or allow him to meet with them when details had to be given to the Home Office. The tag was the main problem. He had real concern that he would damage it accidentally and repeated his conviction that it contained a bomb. The second major problem arose from the electronic communication device prohibition. This seriously affected his children. His eldest daughter needed to use a laptop for her college course. His 13 year old son had had a Playstation removed by the police. His 15 year old could not make use of the iPad provided by his school.

75. Dr Deeley confirmed his opinion that the appellant continued to experience clinically significant symptoms of PTSD and schizoaffective disorder depressive type. The symptoms ranged from severely debilitating and distressing to milder and included "intrusive recollection of traumatic experiences, auditory hallucinations, delusional thinking and cogitative and bodily symptoms of depression and anxiety fluctuate (sic) in severity". He believed the appellant should be reviewed more frequently by those responsible for his mental care and by a psychiatrist to monitor the efficacy and side effects of his medication. The TPIM would continue to have an adverse effect.

76. Dr Deeley's second report followed the appellant's arrest on 12 March 2015 and search of his residence. On 25 March 2015 when playing with him his 4 year old jumped on him and as the appellant believed, trod on and might have damaged the tag. This caused him very great stress and led to nightmares and an increase in the voices which he heard. He was unable to sleep and was unable to obtain a response from the Zinnia Centre (the body responsible for his mental care). He felt suicidal. He suffered from severe insomnia. In addition, he would bang his head against the wall or on the floor when he heard the loud voice of the man who talked to him and this conduct was observed by his children. This was particularly distressing both for him and them.

77. Dr Deeley was concerned about what he regarded as an increased risk of suicide. On 7 April 2015 the appellant's solicitor relayed to him information she had been given by the appellant's daughter that he had been behaving very strangely all weekend and

had been banging his face onto the wall and screaming. He had withdrawn from the family and was not speaking and her mother had found him with a belt round his neck. Arrangements were made for a crisis team to attend the appellant's house to administer medication.

78. Dr Deeley stated that the appellant's mental health had significantly deteriorated. All symptoms were worse and self-harm had intensified and had taken place in the children's presence. His belief that suicide would lead to eternal damnation acted as a disincentive to killing himself, but as the previous episode in September 2014 showed, suicide was possible because he could act in a disassociated state. He had had no recollection of that episode. This led Dr Deeley to state:-

> 79. "…..[This] may represent a psychological reaction under extreme stress that allows him to circumvent the Islamic prohibition on suicide increasing his risk of completed suicide. Consequently, he must be considered at a high risk of a serious suicide attempt in the context of his current deterioration in mental health".

80. Dr Deeley also expressed concern at the effect of his conduct on his wife and children.

81. The appellant's terms of imprisonment for breaches is also an aggravating factor. He believes that MI5 and the authorities are persecuting him. This has led to the hearing of voices making continuing threats from MI5 and the police. He believes that his arrest in March 2015 was for minor breaches. Dr Deeley also considered that the appellant's existing care was insufficient. He was shocked to hear from the nurse he spoke to at the Zinnia Centre that the appellant was considered too high a risk to be visited at home. This is nonsense and must not be used as an excuse not to carry out home visits rather than placing the onus on the appellant at all times to visit the Centre.

82. Dr Deeley was an impressive witness. He was taken through the medical notes produced from the Zinnia Centre in cross-examination. He said they showed an approach which amounted to crisis management. His condition fluctuated and was prone to deterioration and consideration had to be given to what treatment would address that deterioration. He has a serious illness in the context of unusually stressful life circumstances and so an increase in care and resources was needed. The tag in Dr Deeley's view was an extremely intense element of the continuing persecutory role of the state in his life. He could get little relief because it was always there. Mr Hall suggested that he was wrong to conclude there was a high risk of suicide. But I accept Dr Deeley's conclusions.

83. The respondent's view was at all material times and remains that the appellant is a longstanding extremist who has been involved and would if not subject to TPIM measures continue to be involved in radicalisation, recruitment and fund raising. This activism would be for the purpose of supporting Al-Shabaab, a prohibited organisation. Clearly any such activities would amount to TRA. As a trained Imam, he would, it is said, have an influential role in persuading others to support Al-Shabaab. I have already dealt in some detail with the appellant's activities and the evidence against him prior to the imposition of the TPIM in October 2012. I have no doubt that

he held extremist views and was a supporter of Al-Shabaab. Indeed, in the broadcast in 2011 he admitted such support.

84. It was considered that he had made a powerful contribution to Al-Shabaab media campaign. He played a key role in the websites which displayed support for extremist views in general and Al-Shabaab in particular. The open evidence supporting that view I have already referred to. He has been forbidden to have contact with a number of named individuals. These are considered extremists many of whom were in the group in Leicester and Birmingham. The appellant gave those groups leadership and was highly influential in them. Since his TPIM has been imposed, those groups and the individuals comprising them have largely lost their cohesion and effectiveness. It is considered that the appellant would if able to re-engage with them and so provide further support for Al-Shabaab.

85. He was, it was said, intending to travel overseas. He would engage in TRA, whether in Somalia or elsewhere. It was accepted that the intention to travel had lessened since the imposition of the TPIM. He had travelled to Somalia in 2007, but had not since then engaged in foreign travel. That concern now carried less weight. However, the travel restrictions are justified if a TPIM is itself justified since the appellant's extremist mindset and continuing support for Al-Shabaab may lead him to try to take further action abroad if he cannot take any effective action here. As will become apparent, I am satisfied that the assessment that he still has an extremist mindset and supports Al-Shabaab is correct. I have, of course, considered closed material in my conclusion as to the correctness of the assessment.

86. One of the breaches of which he was convicted on 21 June 2013 resulted from his appearance on Royal TV when he denounced Al-Shabaab and said that he no longer maintained his support of or his belief in the organisation. The trigger for that was the killing of someone he respected as a teacher. The security services' witness, JZ, accepted that he may well have been genuinely upset by the killing of someone he respected. The assessment is that, whatever may have been his state of mind in the immediate aftermath of his knowledge of the killing, the denouncement was not true but was an attempt by the appellant to conceal his extremist mindset from the authorities. His extremist views are unlikely to have been affected by the killing, but his support for Al-Shabaab may have been. However, extremism and such support are likely to go together. Again, evidence in the closed hearing supports the assessment made.

87. Reliance has been placed by the security service on the appellant's association with extremists in Belmarsh. He himself volunteered to a member of the West Midland's Management Team that he had engaged in conversation with Moazzem Begg. He had not known him before meeting Begg in prison and, he said, he had greeted Begg warmly. The assumption is made that he was well regarded amongst the extremists in prison and was respected as an Imam. In 2013 his mental state had not deteriorated to any significant extent and that imprisonment followed his breach by appearing on Royal TV. It is said on his behalf that since he was remanded to Belmarsh which contained a number of those who were charged with or had been convicted of TRA and who were extremists, it would have been difficult for him not to have associated with them and he might have wanted to curry favour with them. He has chosen not to explain the association on which reliance is placed. JZ in evidence said that he could

go into more evidence in closed session. Again, I have taken into account evidence in closed and I am satisfied that the assessment made in the open statement is valid.

88. There have been a significant number of breaches of the TPIM. While JZ accepted in cross-examination that the appellant's mental health provided some explanation for the breaches, he maintained the view set out in the open statement that that was not a complete explanation. The breaches included entering internet cafes, accessing his e-mail account from associates' houses and meeting prohibited associates. The items found during the search on 25 March 2015 are of concern, in particular the cash and the mobile phones. There is no direct evidence why the appellant chose to breach since he must have realised that breaches if discovered could lead to imprisonment. This does lead me to wonder whether his schizophrenic problems may have led him to take such actions which would be damaging to him. But that would be to speculate and I have to recognise that my approach must be to apply judicial review principles. I cannot say that the approach accepted by the respondent was flawed.

89. The main ground relied on in the appellant's behalf is his mental health and the damage which has been caused by the TPIM. The latest report and evidence from Dr Deeley shows that the appellant's mental health has deteriorated since the doctor gave evidence before Ouseley J. There is now a heightened concern that the tag in particular could lead to suicide. Ms Kilroy has submitted that insufficient information about the effect of the TPIM on the appellant's mental health was put to the respondent when decisions had to be made, particularly that in relation to the extension of the TPIM in October 2014. Ms O'Sullivan, who was called on behalf of the respondent, is the head of TPIM in the Office for Security and Counter Terrorism in the Home Office. As such, she is responsible for management of TPIM cases. In considering whether the TPIM should be revived following the appellant's release from prison on 3 July 2014, Dr Deeley's report, which had been submitted by the appellant's solicitor, was included in the material considered by the Minister. When it came to deciding on the extension, there was in addition the report of Professor Fahy. The decision was made on each occasion that the TPIM should continue in force. It was known that the doctors' view was that the TPIM had impacted substantially on the appellant's mental health. But it was apparent that that impact resulted in the main from particular measures rather than the existence of the TPIM. Dr Deeley recorded that the appellant was really concerned at three of the measures, namely, in order of severity, the tag, the electronic communication compiled with the association in so far as it affected his family, reporting to the police and holding cash. The last two have been modified. It is unnecessary to go into detail: So far as his mental health was concerned, Professor Fahy's statement of August 2014 concluded thus:-

> 90. "It is evident, based on my assessment of DD, that his condition has improved substantially since he started appropriate antipsychotic medication. At the time of the assessment he also expressed relief at his recent release from prison. It is likely that continued treatment will reduce some of the stressful effects of the TPIM measures (for example, persecutory ideation focused on the electronic monitoring tag has already reduced). The other inconvenience and stresses caused by the TPIM measures can be viewed as generic, and likely to cause a burden and stress for ordinary resilient individuals. This effect is somewhat exaggerated in DD's case owing to his mental illness, probably giving rise to a modest exacerbation of residual symptoms."

91. Having received Dr Deeley's report, the Home Office commissioned Professor Fahy's report. It was proper to place reliance on this report which was undoubtedly more optimistic than that of Dr Deeley. It is to be noted that in evidence before Ouseley J, Professor Fahy acknowledged that he had been somewhat over optimistic since his anticipation that with treatment the appellant's condition would improve had not been realised: in fact, there had been a significant deterioration. His prognosis was that the appellant would be prone to crises from the TPIM. He said that the appellant's paranoid beliefs about the tag would not necessarily take a different form if the tag were removed. There was, he said, something special about the tag, as a piece of technical equipment, forcibly attached to the body, which with a paranoid person invited suspicion.

92. Ms O'Sullivan said that the Minister had been sent a copy of Ouseley J's judgment. It was put to her in cross-examination that the worsened mental state was not shown in any open material to have been specifically drawn to the Minister's attention. There is of course an obligation to keep under review the need for and the proportionality of the various reasons and, indeed, of the TPIM itself. That is mainly done through what are known as TRG meetings held regularly. Dr Deeley's most recent report had only been received shortly before the meeting but Ms O'Sullivan said that it had been forwarded to the police for them to inform the Mental Health Team (MHT). A response had been requested from the MHT following which any necessary action would be taken.

93. I am satisfied that Ms O'Sullivan was well aware of the need to keep the Minister informed of any significant development in particular in respect of the appellant's mental health. This was done. But the TRG team had to form its view of whether there was a need to vary any measures or, indeed, to maintain the TPIM. It decided that no change was required. It was accepted by Ms O'Sullivan that the latest incident when the appellant had reacted to his 4 year old treading on the tag was of concern, but I do not think she can be criticised for taking the view that the first step should be information from the MHT and, if needed, further medical treatment. It was not for the Home Office to direct the MHT as to what care should be provided nor normally would it provide funding if there were resource problems in the MHT. I found Ms O'Sullivan to be an impressive witness and I am entirely satisfied that she was well aware of her duty of care, as she put it, and would give appropriate advice to Ministers if she felt it necessary to do so. I note in this regard that Ouseley J was not persuaded that the effect on the appellant was sufficiently severe to amount to a breach of his human rights.

94. TPIMs were said by the Home Secretary to be a short term expedient. The two year limit followed Lord Carlile's report that after two years in his view "at least the immediate utility of all but the most dedicated terrorist will seriously have been disrupted". In addition, it will have been known that the individual would be likely to continue to be under some sort of surveillance. The appellant has, as it were, been out of action for some 2½ years now, albeit the TPIM itself has not lasted for that long. However, the lapse of time is a material consideration because of the concerns expressed by Lord Carlile. It certainly does not of itself prevent the TPIM properly being extended and maintained but it may indicate that the appellant's ability, should he try to do so, to engage successfully in TRA in any of the ways feared by the respondent is compromised. An extremist mindset even if coupled with sympathy with Al-Shabaab's aims does not necessarily carry with it an intention to engage in activities

amounting to TRA. However, as I have already said, I cannot say that the decision to maintain the TPIMs is flawed applying judicial review principles.

95. There are still more than four months to run. Nevertheless, having regard to the knowledge that unless there is new TRA the TPIM cannot continue after October, there should be consideration of an exit strategy. In BG v. SSHD 2011 IWLR 2917, at paragraph 53 Ouseley J referred to the desirability of a phased winding down of the order (in that case a control order) in the absence of indications that BG had re-engaged in TRA activities. Any such relaxations, while bringing with them an increased risk, would enable easier reintegration into normal life and would help to show that TRA activities had indeed been abandoned.

96. In SSHD v. MB [2007] QB 415 a very strong court of appeal consisting of Lord Phillips, CJ, Sir Anthony Clarke, MR and Sir Igor Judge, P considered the correct approach to decisions to impose and the measures which should be included in control orders. Since for TPIMs the same statutory requirement that any such order and any measures in it are necessary to protect the public and prevent TRA activities, MB is material. In paragraphs 63 to 65, the court stated:-

> 97. "63. Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism related activities of which he is suspect. They may also depend on the recourses available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.
>
> 98. 64. The Secretary of State is better placed that the Court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State….
>
> 99. 65. Notwithstanding such deference there will be scope for the Court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so….Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the result…"

100. The more grave the impact of any particular measure, the more compelling must be its need. Thus, albeit judicial review principles must be applied, proportionality and not irrationality is material in deciding whether a particular measure is needed. While deference is to be given to the views of the Secretary of State and inevitably to the advice of the Security Service, the court may have had further evidence than that available to them. So here, the medical evidence has been tested before Ouseley J and me and the serious impact on the appellant's mental health is all too clear.

101. The main submission on behalf of the appellant is that the maintenance of the TPIM in general and some of its measures, namely the control of the electronic communication and the association measures in particular, constitute a breach of article 3 of the

ECHR. The treatment of the appellant is, it is submitted, inhuman and degrading. Ouseley J considered those submissions and decided that on the evidence before him such a breach had not been established, provided that the requisite measures to provide for the appellant's care were in place.

102. Article 3 is in absolute terms. If there is a breach of it, that breach cannot be excused by any perceived need for the measure which constitutes such breach. So much is common ground and is clearly established in the ECtHR jurisprudence. Conduct which may not be inhuman or degrading for one person may be for another on whom it has a particular effect. Thus an individual's mental state may make him more vulnerable and so the effect on him of particular conduct will be the more severe. An illustration of this is to be found in H v. Commissioner of Police of the Metropolis [2013] IWLR 3021. The treatment of H, who was suffering from autism, by holding him in conditions which would have been acceptable for a normal healthy individual was considered to breach Article 3. The Court of Appeal decided that in part the treatment was not legitimate since it was in all the circumstances unnecessary and that such part as was necessary was carried out in altogether too humiliating a fashion.

103. The ECtHR has considered a number of cases involving claimed breaches of Article 3 in the conditions under which individuals have been detained. In Ramirez Sanchez v. France (2007) 45 EHRR 49, the Grand Chamber laid down the principles to be applied in such cases. The applicant in that case was a notorious terrorist known as 'the Jackal'. The general principles are set out in paragraphs 116 to 119 as follows:-

> "116. In the modern world States face very real difficulties in protecting their populations from terrorist violence. However, unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999 V; and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3288, § 93). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, judgment cited above, § 79). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (*Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001).
>
> 117. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, for instance, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, p. 65, § 162). In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

118. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, among other authorities, *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-2822, § 55). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, among other authorities, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).

119. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see, among other authorities, *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX; *Indelicato*, cited above, § 32; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 428, ECHR 2004-VII; and *Lorsé and Others v. the Netherlands*, no. 52750/99, § 62, 4 February 2003).

In that connection, the Court notes that measures depriving a person of his liberty may often involve such an element. Nevertheless, Article 3 requires the State to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see *Kudła v. Poland* cited above, § 94; and *Kalashnikov v. Russia* no. 47095/99, § 95, ECHR 2001-XI). The Court would add that the measures taken must also be necessary to attain the legitimate aim pursued.

Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II)."

104. It is to be noted that in paragraph 117 the court applied a high threshold and required there to be proof beyond all reasonable doubt that there had been a violation of Article 3. In Dybeku v. Albania (Case No 41/53/2006), the court in paragraph 36 made the point that the assessment of the level of severity which would breach Article 3 was relative, depending on all the circumstances of the case 'such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'. The question whether there was an intent to humiliate or debase the victim is material, but the absence of such intention cannot rule out a violation of article 3. The court in paragraph 37 noted that treatment had been held by the court to be inhuman "because, inter alia, it was premeditated, was applied for hours at a

stretch and caused either actual bodily injury or intense physical and mental suffering". The arousing of feelings of fear, anguish and inferiority capable of humiliating or debasing an individual could be regarded as degrading. In paragraph 42 the court observed:-

> 105. "There are three particular elements to be considered in relation to the compatibility of the applicant's health with his stay in detention, (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measures in view of the state of health of the applicant".

106. Mutatis mutandis, those considerations are material in this case.

107. Ouseley J, having considered the relevant authorities, stated that there was a need to consider the need and proportionality of the measures. Detention which was clearly appropriate when, for example, a dangerous criminal had to be dealt with might well have a serious effect on the individual but that would not necessarily amount to a breach of Article 3. Hence the existence of appropriate care measures in the case of mentally ill persons can mean that even severe effects of legitimate action to protect the public will not breach Article 3. As Ouseley J in my view correctly stated (paragraph 125) the question is not simply whether the degree of suffering has reached a level of intensity which requires the actions to cease, regardless of their purpose, legitimacy, intent, alternatives and care provided. It is, he said, contrary to all sense to ignore the reasons behind what is a legitimate and necessary form of treatment for an admitted risk.

108. The electronic communication and the association measures impact on the appellant's family. Thus their Article 8 rights are interfered with. Article 8 can be interfered with if the interference is proportionate within Article 8.2. Ms Kilroy submitted that the prohibition on use by his family of devices when the appellant was in the house was not permitted by the TPIM Act provisions. TPIM measures were limited to the individual the subject of the TPIM and not to any other party. Paragraph 7(1)(b) of Part 1 of Schedule 1 enables the respondent to impose "requirements on the individual in relation to the possession or use of electronic communication devices by other persons in the individual's residence". Paragraph 7 of the TPIM provides, so far as material:-

> 109. "7.1 ….[Y]ou must not (directly or indirectly)….
>
> > 110. (c) knowingly permit another person to bring into the residence any electronic communication device…unless the Home office has from you permission to do so….
>
> 111. 7.3 You may permit another person to bring the following devices into the residence whilst you are in the residence provided the devices are switched off (where applicable) and not used at any time whilst you are in the residence".

112. One such device is a mobile phone, but other devices which can connect to the internet such as iPads and laptops are not permitted under 7.3.

113.No doubt, there might be problems if the individual subjected to a TPIM is not the one who can control the actions of others in the residence. Paragraph 7(1)(b) of the Schedule in my view permits the restrictions which are imposed by paragraphs 7.1(c) and 7.3 of the TPIM. But, since the family members' Article 8 rights are interfered with, the restrictions must be proportionate with Article 8.2.

114.JZ in evidence emphasised the importance of the tag. It is, as the open statements indicate, integral to the enforcement of the TPIM. Association with extremists and avoidance of entry to prohibited areas had to be monitored and this the tag could achieve. It would act as a deterrent to any breaches occasioned by such entry. JZ in answering questions about what information could be obtained from the tag which might help in enforcement of measures said that he could give more information in closed. I accept that a tag is a most useful tool for the control of an individual.

115.I have set out the material medical evidence in some detail. There has clearly been a deterioration in the appellant's mental health. There can be no doubt that the tag may produce further deterioration and incidents such as that when his young child trod on the tag may well produce a crisis. Even if a greater degree of medical treatment is provided, there is a real concern that such deterioration will result in serious self harm by the appellant. While I see no reason to dissent from Ouseley J's view, in my judgment the situation now is such that there is a breach of Article 3. There is reason to believe that the appellant's ability to take any effective TRA is lessened. Evidence was produced that certainly some Islamic sects will not accept a person who is mentally ill as an Imam. The appellant's mental state will be likely to be known by those it is feared he may seek to radicalise. Further, it has not been said that any of the breaches of the TPIM amount to TRA nor is there any suggestion that his wife or children have been radicalised by him or hold extremist views.

116.The electronic communication measure is having a serious effect on the children. It is not only affecting their education but also, in conjunction with the perceived difficulties in having friends visit, has led to problems in making and maintaining friendships. It has led to a feeling of isolation. Paragraph 8.2 of the TPIM prohibits only the meeting of another person by the appellant so that, as I have said, his family can invite friends without informing the Home Office provided that those friends do not meet with the appellant.

117.It is regarded as important that the appellant's access to the internet and the ability to communicate should be limited to one computer and one telephone land line. He has breached by going to an internet café and any communication can further his aims. The family is entitled to bring mobile phones into the residence but they cannot be used while the appellant is in the house. JZ accepted in his evidence that a single slow internet connection at home was adversely affecting the children's ability to engage in schoolwork. He also accepted that the inability to use mobile phones interfered with their social life. He agreed that the children's ability to access the computer to contact any website meant that trust had to be placed on them. It was put to him that mobile phones could do anything laptops could do so far as access to the internet was concerned. He agreed that mobile phones could have the phone connection switched off and still operate on wireless.

118.He said an attempt had been made to make the measures as proportionate as possible. Since the internet might have been used to access extremist material, it was important

to restrict the ability to achieve such access as far as possible. When asked why if the children could be trusted to turn off mobile phones, the same should not apply to laptops, that would, he said, in theory be possible.

119.He was asked why the children could not be allowed access to wireless with a password. He replied that the assessment was that, if that was allowed, the children would provide the password to their father. He accepted that the appellant could use his children's mobile phones but the risk had to be weighed against the proportionality of denying the children their phones.

120.I was not impressed with that evidence. It was accepted that there was no indication that the children had in any way assisted the appellant to access forbidden sites or make forbidden communications. It is necessary to consider the 2½ years during which the restrictions have applied and to recognise that they will have to come to an end in October, subject, I suppose, to what in my view is the highly unlikely conviction and imprisonment of the appellant following his trial due on 26 May.

121.I think that it has now become disproportionate to continue to bar the possession of laptops and iPads together with wireless connection to the internet, albeit only one for each child should be permitted. I think too that there is no good reason why they should not be allowed to use their mobile phones and laptops or iPads when the appellant is in the house. It must be made clear to them that they must on no account allow their father to use any of the devices and that, if they did, it would render him liable to arrest and imprisonment and they too could be committing a criminal offence by aiding and abetting him to breach a measure of his TPIM. Whether or not a password or some other restrictions are needed I shall leave for any argument when this judgment has been considered.

122.It follows that I shall quash the monitoring measures. The electronic communication measures must be varied as I have indicated. The other measures can in my view remain as they are.

123.I would only add this postscript. Since the appellant has the delusion that there is a bomb in his tag which will be detonated so that MI5 can kill him if a judge allows his appeal, great care should be taken in dealing with the removal of the tag. It may be considered sensible not to inform him of my decision that the tag must go until on some pretext the tag has actually been removed.