PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

NATIONAL SECURITY BILL

Eighth Sitting

Tuesday 19 July 2022

(Afternoon)

CONTENTS

CLAUSES 35 and 36 agreed to.
SCHEDULE 5 agreed to.
CLAUSES 37 to 40 agreed to.
Adjourned till Tuesday 6 September at twenty-five minutes past Nine o'clock.
Written evidence reported to the House.

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 23 July 2022

The Committee consisted of the following Members:

Chairs: Rushanara Ali, † James Gray

† Bell, Aaron *(Newcastle-under-Lyme)* (Con)
Eagle, Maria *(Garston and Halewood)* (Lab)
† Elmore, Chris *(Ogmore)* (Lab)
† Everitt, Ben *(Milton Keynes North)* (Con)
† Hart, Sally-Ann *(Hastings and Rye)* (Con)
Higginbotham, Antony *(Burnley)* (Con)
Hosie, Stewart *(Dundee East)* (SNP)
Jones, Mr Kevan *(North Durham)* (Lab)
† Jupp, Simon *(East Devon)* (Con)
† Lynch, Holly *(Halifax)* (Lab)
† McPartland, Stephen *(Minister for Security)*
† McDonald, Stuart C. *(Cumbernauld, Kilsyth and Kirkintilloch East)* (SNP)
† Mann, Scott *(North Cornwall)* (Con)
Mohindra, Mr Gagan *(South West Hertfordshire)* (Con)
† Mumby-Croft, Holly *(Scunthorpe)* (Con)
† Phillips, Jess *(Birmingham, Yardley)* (Lab)
Sambrook, Gary *(Birmingham, Northfield)* (Con)

Huw Yardley, Bradley Albrow, Simon Armitage, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 19 July 2022

(Afternoon)

[James Gray *in the Chair*]

National Security Bill

2 pm

Clause 35

Prior permission of the court

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to consider the following:

Clause 36 stand part.

That schedule 5 be the Fifth schedule to the Bill.

Clause 37 stand part.

Clause 38 stand part.

Holly Lynch (Halifax) (Lab): Clause 35 sets out the function and powers of the court on the application by the Secretary of State to obtain permission from the court before imposing measures on an individual, as required under condition E in clause 33(5).

Subsection (4) provides that the court may consider the Secretary of State's application without the individual on whom the measures would be imposed being aware of the application or having the opportunity to make representations. That feels to be at odds with the rest of the justice system; however, given the nature of the risks we are attempting to manage and supress with the measures, the clarity in the explanatory note that this is

"to avoid a risk of the individual absconding"

is a sobering reality.

We welcome subsections (7), (8) and (9), which provide powers for the court in various scenarios. Clear tests are set out for the courts in subsection (3)(a), under which the court has to determine whether the Secretary of State's decisions are "obviously flawed". That standard is also used in schedule 5, under clause 36.

I sought a legal opinion about "obviously flawed" and, although there is a similar test in schedule 2 of the Counter-Terrorism and Security Act 2015, the sense from lawyers was that "obviously flawed" sets an unusual standard—for example, decision making might be found to be flawed only upon scrutiny, but not obviously so. Will the Minister clarify the standard? Is he in a position to confirm how many times the Secretary of State's decisions have been deemed to be "obviously flawed", so that we can consider any learning from that?

Clauses 37 and 38 provide for a directions hearing and a review hearing. Under clause 37(2), on giving the Secretary of State permission to impose measures the court must give directions for a directions hearing. According to subsection (3), those directions must not be served on the individual in a case in which permission has been granted until the part 2 notice has been served.

We will come to the importance of the ongoing review in clauses 39 and 40, which I expect will feed into the processes set out in clause 37. I am reassured that the operability of the whole of part 2 will be considered by an independent reviewer, as outlined in clause 49, in addition to the review hearing and the ongoing assessment of individual circumstances.

Stuart C. McDonald (Cumbernauld, Kilsyth and Kirkintilloch East) (SNP): As the shadow Minister says, these clauses put in place some important oversight and a scrutiny mechanism in relation to state threats prevention and investigation measures. On the whole, the oversight and scrutiny mechanisms appear to work, but I have some questions to put to the Minister for clarification.

First, to pick up on a point made by the shadow Minister, why is it the function of the court to determine whether the Secretary of State's decision was "obviously flawed"? I was slightly surprised by that standard and not familiar with it at all. What is the difference between an "obviously flawed" decision and one that is merely "flawed"? Is not the simple requirement in clause 35(6) to apply judicial review principles in itself sufficient to let the court know what it is supposed to do?

Secondly, clause 35(4) allows the court to have its hearing on the Secretary of State's application "in the absence of" the relevant individual and even without that person being notified of that happening. I can well understand that there will be some reasons why that may appear to be necessary, but the Bill does not provide any guidance at all to the courts as to when it would or would not be appropriate to proceed in that way. That struck me as quite a strange way to do things. It just says that the court may consider the application

"in the absence of the individual",

without providing any guidance as to when that would be appropriate and the reasons the court should have for doing that.

That question is even more pertinent when the court hears an urgent case under schedule 5, which says that the Secretary of State must serve the part 2 notice on the individual and then, immediately after, refer the measures to the court. Given that the part 2 notice has been served on the individual and is enforced because of urgency, it seems strange that there would be justification for the court to consider the reference under the part 2 notice without the individual being present or even aware of the hearing. The individual will have been served the notice, so why does the hearing then need to proceed without them even being aware of it? Why would that power be necessary?

Finally, on the review hearing, clause 38(3) gives the court a broad power to simply

"discontinue the review hearing in any other circumstances."

There is not much in the Bill that sets out why the court might want to do that and what factors would prompt a court to behave in that way. When is it envisaged that that would be necessary and why is there no more detail about that in the Bill?

The Minister for Security (Stephen McPartland): I will respond to the questions as I go through my speech. I am always happy to take interventions.

Clause 35 mirrors the terrorism prevention and investigation measures and sets out the function and powers of the court on an application by the Secretary

of State to obtain permission before imposing measures on an individual, as required under condition E of clause 33. The clause means that the court must apply judicial review principles and consider

"whether the relevant decisions of the Secretary of State are obviously flawed".

The hon. Member for Halifax asked how many times decisions have been considered "obviously flawed" by the court and the answer is never; hopefully that gives some reassurance.

The Secretary of State will put the draft part 2 notice before the court. If the court considers that the decisions that conditions A, B or C are met were obviously flawed, it may not give permission to impose the notice. If the court considers that the decisions relating to condition D were obviously flawed, the court can give directions to the Secretary of State on the specific measures while otherwise permitting the notice to be imposed—again, there are more safeguards.

The court may assess the Secretary of State's application without the potential subject of the measures being aware. That is important because, as the hon. Member for Halifax made clear, it prevents the individual from receiving notice that the measure could be imposed on them and obviously stops them running away and absconding.

Once the measures are imposed, the subject will of course have the right to an automatic full review by the High Court where the individual will be present and have legal representation. For any closed proceedings in the review hearing, there will be a special advocate to act in the subject's interest. I have checked that the special advocate cost will be met by the Home Office for both parties. The review hearing is where the court will apply a high level of scrutiny to the Secretary of State's decisions. The Government feel it is right that, rather than at the initial stage of obtaining court permission, the full scrutiny takes place at the second stage of court review, after the individual has had an opportunity to seek legal advice. We will come on to that in more detail.

Clause 36 gives effect to schedule 5, which makes provision for urgent cases in which the Secretary of State may, under clause 33(5)(b), impose measures on an individual without first obtaining the permission of the court. This provision has long-standing precedents: there are similar provisions relating to TPIMs in the Terrorism Prevention and Investigation Measures Act 2011 and to control orders in the Prevention of Terrorism Act 2005.

This urgent and exceptional power has never been used since the TPIMs regime was introduced. In all cases, it has been possible to obtain court permission in advance, and that will always be the preferred option. We do not expect the regime in this Bill to operate any differently. We have tried to put in place safeguards throughout the whole Bill. As I have said, the STPIMS are a last resort and it is all about trying to find other ways to prosecute.

As we know, the power will be used in rare and exceptional cases when there is an operational need to avoid any delay in taking measures that are considered necessary to protect the UK from a foreign power, threat or activity. We will come to oversight in later deliberations on this part of the Bill. To help the hon. Member for Halifax, I will say that I absolutely expect the person appointed to review the operation of this part to comment on the appropriateness of any use of the urgency process. I hope that provides reassurance.

Clause 37 ensures that there is timely and clear progress towards a full High Court review. The basis of the clause is, in essence, to ensure that in each case, when measures are imposed, a prompt and clear timeline is put in place, with the steps that need to be taken towards the subsequent full High Court review. The directions hearing must take place within seven days of a part 2 notice being served on the individual or, in an urgent case, within seven days of the notice being confirmed. Directions must then be set for a full review hearing to take place as soon as possible. The proceedings leading up to the full review hearing will be agreed by all parties.

The clause is not about the court considering the restrictions or the nature of the evidence; it is there more to ensure the speedy process of the approach to the full hearing. It is important that the hearing takes place speedily within that seven-day period, so that there is a direction of travel to ensure that subsequent oversight is well prescribed.

On clause 38, the involvement of the court is an important safeguard for the rights of the individual subject to the measures, and full judicial oversight of the process of imposing measures is key. As I alluded to earlier, clause 38 provides for a full High Court review to take place automatically in every single case in which state threat prevention and investigation measures are imposed. This will happen automatically, with no need for the individual to initiate the proceedings, in each case in which measures are imposed, subject only to the provisions that allow the discontinuance of proceedings included in subsection (3)—for example, if the person does not want the review to take place. Only the individual or court may make the decision to discontinue the proceedings, and the individual will always be able to make representations in respect of a proposal to discontinue.

At the full review, the function of the court is to review the decisions of the Secretary of State that conditions A, B, C and D were met at the time she made the decision and continue to be met at the time of the review. To remind the Committee, the decisions are that they reasonably believe the individual is or has been involved in foreign power threat activity; that some or all of that activity is new foreign power threat activity; that they reasonably consider that the imposition of STPIMs is necessary to protect the UK from the risk of action that constitutes foreign power threat activity; and finally, that they reasonably consider that it is necessary, for purposes connected with preventing or restricting the individual's involvement in foreign power threat activity, for the specified measures to be imposed on the individual.

Clause 38 requires the courts to apply the principles that are applicable on an application for judicial review. As Committee members will be aware, the courts take the view that judicial review is a flexible tool that allows for differing degrees of intensity of scrutiny, depending on the circumstances and the impact of the decision in question on the individual concerned.

As well as setting out the functions of the court in a review, clause 38 sets out the powers available to the court, which may overturn the Secretary of State's

[Stephen McPartland]

decisions in their entirety if it finds that they were unlawful. If the court finds that it was necessary to impose measures but one or more of the measures imposed was unlawful, the Bill is clear that the court may quash the particular measures or direct that they be varied, while also directing that the rest of the notice comes into force. That will provide a balance between being able to protect the UK and ensuring that the measures imposed represent the minimum necessary interference with the rights of the individual.

In addition to the function and powers of the court, clause 38 also makes provision for circumstances in which the review may be discontinued. The court must discontinue the review if the individual requests it—for example, if they do not wish to challenge the case against them. However, as a further safeguard, the Bill specifies that before the court may discontinue proceedings under the power the individual subject to the measures and the Secretary of State must have the opportunity to make representations.

It is imperative that the correct checks and balances are in place to govern the operation of STPIMs, and the Government consider that clause 38, together with other provisions in the Bill that provide the requirement for court permission before the imposition of measures and subsequent rights of appeal, will deliver rigorous end-to-end judicial oversight of the decisions taken by the Secretary of State in the exercise of her powers. The continuous involvement of the court will provide a key, important safeguard for the rights of the individual subject to the measures.

In summary, clauses 35, 36, 37 and 38 are exceptionally important for the Bill and I urge the Committee to support them.

Question put and agreed to.

Clause 35 accordingly ordered to stand part of the Bill.

Clause 36 ordered to stand part of the Bill.

Schedule 5 agreed to.

Clauses 37 and 38 ordered to stand part of the Bill.

Clause 39

Criminal investigations into foreign power threat activity

Question proposed, That the clause stand part of the Bill.

Holly Lynch: Clause 39 creates a requirement on the Secretary of State to consult the chief officer of the police force that is investigating or would investigate any offence, acts or threats in clause 26(3) that could fall to have been committed by the individual, on whether there is evidence that could realistically be used to prosecute the individual. During the evidence session, it was asked whether STPIMs would be easier to secure than a prosecution, so I welcome the provision in clause 39 that a prosecution has to be considered before the move to a part 2 notice—to be fair to the Minister, he was clear about that earlier in today's discussion. The clause will also give the chief officer a statutory duty to consult the relevant prosecuting authority.

I am mindful that there is a difference between consulting a chief constable for the purposes of information gathering with a view to securing a prosecution and the ongoing necessity of managing someone in their force area who is subject to an STPIM. Will the Minister confirm whether the Civil Nuclear Constabulary or Ministry of Defence police, for example, would be consulted under subsection (2), given their roles in protecting prohibited places, regardless of the fact that they do not have any of the regular responsibilities of the other forces in England and Wales beyond their specific duties? The chief officer must also keep the investigation of the individual's conduct under review, with a view to bringing a prosecution for an offence, acts or threats under clause 26(3), and must report on that to the Secretary of State while the part 2 notice remains in force.

2.15 pm

If we get clauses 39 and 40 right, they will mitigate some of the concerns raised by the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East in the debate on clause 34. Although work of this nature must be undertaken if we are to keep the public safe, I note that the Home Office impact assessment gives indicative costs of anywhere between a low-cost estimate of £0.1 million and a high estimate of £1 million per TPIM. As I say, although I recognise the invaluable nature of the work, there would need to be a consultation between the Home Office and a regional force about the resources required to allow for effective monitoring and investigations to take place when the top-end costs are so significant.

We will come on to the importance of ongoing review in our debate on clause 40. Although there is a distinct lack of detail about the formal structures for a review process in either clause 39 or clause 40, the references in this clause are certainly welcome. I hope to push for more detail on the specifics in the debate on the next clause.

Stephen McPartland: Clause 39 sets out the detailed requirements relating to the interaction between criminal investigations and the imposition of the STPIM notice. I want to make it very clear that it is always the Government's preference and priority to seek the prosecution of those engaged in state threat activity. Where we can prosecute, we will. However, we accept that there are and will continue to be dangerous individuals whom, despite our best efforts, we cannot prosecute, which is why we need preventive measures to protect the UK from the threat posed by that small number of dangerous individuals. We believe the provisions in the Bill represent the most appropriate, proportionate and effective powers for dealing with this risk.

The commitment to prosecution is properly reflected in clause 39, which deals with criminal investigations. It requires, before the imposition of an STPIM notice, prior consultation with the police as to whether there is

"evidence available that could realistically be used for the purposes of prosecuting the individual for an offence"

relating to state threats. The police must consult with the relevant prosecuting authority on the same matter before responding to the Secretary of State. The provision will ensure that STPIM notices are not imposed on an individual when prosecution for state threat offences is viable instead. The police will continue to investigate and will refer the case to the prosecuting authorities if sufficient evidence comes to light.

Clause 39 makes the ongoing review of the investigation of the individual's conduct with a view to prosecution a statutory requirement. As mentioned, there should be absolutely no doubt about our absolute and unwavering commitment to prosecute individuals where possible, which is reflected in the clause. The counter-terrorism police will continue to have full responsibility for overseeing this matter but, if necessary, they will engage with all other forces to ensure a full case for prosecution. The better our chance of getting a full prosecution, the better our chance of not having to use a STPIM notice.

The Government believe prosecuting to be the best way to move forward. The only situation in which prosecution does not result will be when a case has not passed the relevant test in the code for Crown prosecutors. Our ambition is to prosecute at every single stage and use STPIMs as an absolute last resort.

Question put and agreed to.

Clause 39 accordingly ordered to stand part of the Bill.

Clause 40

REVIEW OF ONGOING NECESSITY

Question proposed, That the clause stand part of the Bill.

Holly Lynch: Clause 40 introduces a review of ongoing necessity, meaning that the Secretary of State has a duty to keep under review the necessity of a part 2 notice and the measures imposed under it while the notice is in force. Through case law, a parallel system was established for TPIMs, following the Court of Appeal ruling that

"it is the duty of the Secretary of State to keep the decision to impose a control order under review, so that the restrictions that it imposes, whether on civil rights or Convention rights, are no greater than necessary."

We welcome the clause. In Jonathan Hall's 2020 review of counter-terrorism legislation, he gave a review of the TPIM review group—the TRG—meetings, at which officials from the Home Office, counter-terrorism police and MI5 review the necessity and proportionality of TPIM measures, consider variations, discuss exit strategies, are updated on the prospects of criminal prosecution and consider the outcome of practical and ideological mentoring sessions. He said:

"The Home Office official chairing the meeting injected a proper degree of challenge to the ongoing management of the TPIM subject, including on the possibility of relaxing certain measures, and impact on family members. The TRG is conducted using a draft agenda which now requires consideration of each measure in turn: this is a clear improvement over the previous practice of considering the measures as a whole. Following my observations in previous reports, I am pleased to say that there is greater analysis of whether prosecution for terrorism offending is a reasonable alternative to a TPIM."

In the first oral evidence session, Mr Hall said:

"The first message from the TPIMs is that you need to have a strong chair of the TPIM review group, or the equivalent"—[*Official Report, National Security Public Bill Committee,* 7 July 2022; c. 5, Q2.]

for the STPIMs.

The clause says only that a Secretary of State must keep the notice under review. Will the Minister confirm that an STPIMs review group will be a key feature of the ongoing assessment of an STPIM? How often will it meet? Will he confirm that the review group will be a primary mechanism for providing information to the Secretary of State, allowing them to make informed decisions?

Stephen McPartland: I will detain the Committee on this clause for only about an hour and a half. *[Laughter.]* I can feel the excitement. The Government recognise the disruptive nature of the measures on a person's life. That is why the notice should remain in place only for as long as necessary and the measures imposed should remain tailored to the threat.

Clause 40 provides for an important safeguard by placing a duty on the Secretary of State to keep under review the ongoing necessity of both the STPIM notice itself and the measures specified in it. Regular monitoring to consider how the individual is responding to being on a STPIM, reviewing whether any new evidence has come to light for a prosecution to be possible and considering whether any changes are needed by varying the restrictions will remove any doubt that, while it remains in force, an STPIM notice will be assessed to ensure that it remains necessary at all times.

There were a few questions from the hon. Member for Halifax; I will try to answer them as best I can. There will be quarterly reviews and the individual will be able to appeal, as we discussed earlier in the debate. She is correct that reporting will be done quarterly. The review will be accountable to the Secretary of State and will be chaired by an expert civil servant and attended by operational partners. Here is the bit that the hon. Lady and our friends in the SNP will be most keen to hear about: as with TPIMs, there will be an independent reviewer to ensure that clause 40 and the whole of the STPIMs regime will be implemented correctly. I hope she can support the clause.

Question put and agreed to.

Clause 40 accordingly ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(Scott Mann.)*

2.23 pm

Adjourned till Tuesday 6 September at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

NSB04 Matrix Chambers, Mishcon de Reya, Powerscourt Group