

TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 9: Review hearing

77. *Subsection (1)* provides that the function of the court is to review the decisions of the Secretary of State that the relevant conditions for imposing measures on an individual (defined by *subsection (8)* as *conditions A, B, C and D* as set out in section 3) were met, and continue to be met.
78. This review must apply the principles applicable on an application for judicial review (*subsection (2)*).
79. The courts take the view that judicial review is a flexible tool that allows differing degrees of intensity of scrutiny, depending on circumstances and the impact of the decision in question on the individual concerned.¹ Control order case law provides for a particularly high level of scrutiny. In relation to the full substantive review of each control order, the Court of Appeal has ruled (*Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*) that the High Court must make a finding of fact as to whether the “reasonable suspicion” limb of the statutory test for imposing a control order is met and must apply “intense scrutiny” to the Secretary of State’s decisions on the necessity of each of the obligations imposed under the control order while paying a degree of deference to the Secretary of State’s decisions. The Court of Appeal also read down (interpreted) the 2005 Act under section 3 of the Human Rights Act 1998 to render it compatible with Article 6 of the ECHR (right to a fair trial) to make clear that the court must consider the necessity of the order at the time of the hearing as well as at the time the Secretary of State made the decision to impose it. The fact that the court’s review must cover both these times was reaffirmed in *BM v Secretary of State for the Home Department [2011] EWCA Civ 366*.
80. The Coalition Government’s review of control orders concluded that this level of judicial oversight, including the enhanced level of scrutiny provided by case law, should apply to the replacement system. The Government considers that section 9 together with reliance on existing case law concerning the level of scrutiny applicable for this type of judicial review implements this.

¹ In *BSkyB and other v Competition Commission and BERR [2010] EWCA Civ 2*, Lord Justice Lloyd stated that ‘It is well established that the courts apply judicial review principles in different ways according to the matter under consideration, and that there are some cases in which the courts apply a greater intensity of review than in others. The main examples of this approach are cases concerned with fundamental human rights under the ECHR.’ See also paragraph 48 of *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*, where Lord Phillips CJ stated ‘So far as procedure is concerned, a court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision maker, if that is what Article 6 requires. An example of the exercise of such powers is *R (Wilkinson) v Broadmoor Special Hospital Authority & Ors [2001] EWCA Civ 1545, [2002] 1 WLR 419*. Section 3 of the HRA requires that section 3(10) and section 11(2) of the PTA be interpreted, if possible, in a manner that enables the court to carry out a review of the Secretary of State’s decision that complies with the requirements of Article 6. So far as the standard of review is concerned, we can see no difficulty in so reading those sections as to produce this result, whatever those requirements may be.’

*These notes refer to the Terrorism Prevention and Investigation Measures
Act 2011 (c.23) which received Royal Assent on 14 December 2011*

81. *Subsections (3) and (4)* specify that the court must discontinue the proceedings if the individual requests this (for example if he or she does not wish to contest the case against him or her); and that it may discontinue the proceedings in any other circumstances, but in such other circumstances both the Secretary of State and the individual subject to the measures must first have the opportunity to make representations.
82. *Subsections (5), (6) and (7)* set out the powers of the court on the review. The court may quash the TPIM notice itself; quash particular measures specified in the TPIM notice; or, give directions to the Secretary of State for the revocation of the TPIM notice or in relation to the variation of any of the measures. If the court does not exercise its power to quash the TPIM notice or to direct its revocation, it must decide that the notice should continue in force (whether or not it quashes – or makes directions concerning the variation of – any measure imposed under it).