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Case No: PTA/05/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before:

MR JUSTICE CHAMBERLAIN

Between:

TL

Respondent/
Appellant

– and –

**SECRETARY OF STATE FOR HOME
DEPARTMENT**

Applicant/
Respondent

Ben Watson KC and Steven Gray (instructed by Government Legal Department)
for the Respondent/Appellant

Tim Moloney KC and Jude Bunting KC (instructed by Bindmans LLP) for the
Applicant/Respondent

Tim Buley KC and Rachel Toney – Special Advocates

Hearing dates: 20, 21 and 27 September 2022

OPEN JUDGMENT

This judgment was handed down remotely at 10.30am on 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Chamberlain:

Introduction

- 1 On 11 March 2021, the Secretary of State for the Home Department applied *ex parte* to this Court, pursuant to s. 6 of the Terrorism Prevention and Investigation Measures Act 2011, for permission to impose Terrorism Prevention and Investigation Measures (“TPIMs”) on the respondent. I gave that permission, ordered that the respondent be anonymised as “TL” and gave directions for subsequent proceedings. The TPIM notice was served on 16 March 2021.
- 2 There have been a number of delays, for reasons which it is not necessary to rehearse. The result has been that the review hearing required by s. 9 of the 2011 Act did not take place until after the decision had been taken, on 15 March 2022, to extend the TPIM notice for a further 12 months under s. 5(2) of the 2011 Act. As a result, directions were given for the review hearing to take place simultaneously with TL’s appeal, pursuant to s. 16 of the 2011 Act, against the extension decision.
- 3 The hearing was due to take place on 25-27 July 2022 but both sides agreed to an adjournment because one of the Secretary of State’s key witnesses became unavailable due to the serious illness of a close family member. The hearing was re-arranged for September 2022.

The Secretary of State’s OPEN case

- 4 The Secretary of State’s OPEN case is that TL is an Islamist extremist who has collaborated with Shakil Chapra, a senior leadership figure in Al-Muhajiroun (“ALM”) with a long history of extremist activity, and that TL has engaged in conduct which gives encouragement to the commission, preparation or instigation of acts of terrorism by posting extremist material online and attempting to radicalise other associates and family members. The Secretary of State assesses that TL may aspire to carry out an Islamist extremist attack in the UK and says that the TPIM notice and the measures it contains are and always have been necessary and proportionate to the national security risk which TL poses.
- 5 It is not necessary to set out the whole of the OPEN evidence relied upon, but it includes extensive evidence of extremist social media posts, a video assessed to have been made jointly by TL and Chapra, reposts by TL of Chapra’s videos and messages sent to family members promoting extremist views.

TL’s OPEN grounds for review

- 6 TL’s case in response is that he was simply exploring what it means to be a good Muslim and did not understand, and sometimes did not read, the material he was sharing online. He did not realise that the people he knew as “brothers from London” were ALM members until told so by the Security Service. TL advanced four OPEN grounds for review, each of which is said to vitiate the decision to impose, maintain and extend the TPIM:
 - (a) The Secretary of State has failed to have regard to a material consideration in assessing the extent to which conditions A-E in s. 3 of the 2011 Act are met, namely, TL’s mental health disorders.

- (b) There is no recent OPEN evidence to support the decisions on 16 March 2021 or 15 March 2022 that conditions A-E are met.
- (c) Insofar as there is such evidence in CLOSED, TL has still to be given disclosure of it that is sufficient to enable him to answer the case against him.
- (d) The measures continue to have a serious deleterious effect on TL's mental health and family relationships. There is no meaningful mechanism to enable him to demonstrate that conditions A-E are no longer met. There are serious inadequacies in the Desistance and Disengagement Programme ("DDP"), with the result that the Secretary of State failed to comply with her duty under s. 11 of the 2011 Act to keep the TPIM notice under review. In the circumstances, the maintenance of the TPIM is disproportionate.

The law

- 7 There is no dispute about the overarching legal principles to be applied. Section 2 of the 2011 Act empowers the Secretary of State by a notice to impose specified TPIMs on an individual if conditions A to E in s. 3 are met.
- 8 Condition A is that the Secretary of State is satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity. Condition B is that some or all of the relevant activity is new terrorism-related activity. 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 TPIMs to be imposed on the individual. Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified TPIMs to be imposed on the individual. Condition E relates to the procedure by which the TPIM notice is served and it is common ground that it is satisfied here.
- 9 Where a TPIM notice is the first in force in respect of an individual, the definition of "new terrorism-related activity" in s. 3(6) covers any terrorism-related activity. So, in this case, Condition B is not in issue if Condition A is met.
- 10 "Terrorism related activity" is defined in s. 4 to include any one or more of (a) the commission, preparation or instigation of acts of terrorism, (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so, (c) conduct which gives encouragement to the commission, preparation or instigation of acts of terrorism, (d) conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraph (a). "Terrorism" is broadly defined in s. 30 and includes "any or all military attacks by a non-state armed group against any or all state or inter-governmental organisation armed forces in the context of a non-international armed conflict": *R v Gul Mohammed* [2013] UKSC 64, [2014] AC 1260.
- 11 Section 11 requires the Secretary of State to keep under review whether conditions C and D are met. Section 5 provides that a TPIM notice remains in force for a year but may be extended for a year at a time, but only if conditions A, C and D are met. By s. 16(1)(a), there is a right of appeal against such an extension.

- 12 The court's role under s. 9 is to review the decisions of the Secretary of State that the relevant conditions were and continued to be met. In doing so, the court is required to apply the principles applicable in an application for judicial review. It must assess the situation at the date of the hearing as well as when the Secretary of State made her decisions: *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin), [24] and *Secretary of State for the Home Department v LG* [2017] EWHC 1529 (Admin), [8]-[10] and [34]-[44]. The intensity of review differs according to the condition under review: *LG*, [43]-[52]. As to condition A, the court considers whether the Secretary of State was satisfied of the relevant matters and also whether the court itself is so satisfied. When considering conditions C and D, however, the court must bear in mind that assessing the proportionality of the measures imposed involves a judgment and on this question the Secretary of State's judgment must be given weight. This is particularly so, given that the judgment is made in the national security context: *R (Begum) v Secretary of State for the Home Department* [2021] AC 765, [60], [62]. Although *Begum* concerned SIAC proceedings, the same approach has been applied to the High Court: *QX v Secretary of State for the Home Department* [2022] EWHC 836 (Admin), [32].
- 13 On an appeal under s. 16, the court must also apply the principles applicable on an application for judicial review. The same approach as outlined in the case law on s. 9 applies.

Ground (a)

- 14 For TL, Tim Moloney KC argued that an understanding of TL's mental health difficulties was key to the issues to be determined. The expert reports of Dr Picchioni establish that TL suffered from childhood autism and developed a non-organic psychosis, following which he has continued to experience a range of persecutory experiences, some of which should be interpreted as delusions. He suffered from a temporary dissociative state in February 2022 driven by emotional and physiological hyperarousal and post-traumatic stress disorder. He has a mild learning disability with a co-existing recurrent depressive disorder. Dr Lilley's report dated February 2022 contains conclusions broadly congruent with these.
- 15 Dr Galappathie interviewed TL in January and February 2022 and observed that he was experiencing symptoms of recurrent distressing memories, flashbacks, feeling tense and jumpy, anxiety, shakes and sweats and that his mood was volatile and he had self-harm and suicidal thoughts. At the time, he considered that TL did not have capacity to litigate. Dr Picchioni's report of April 2022, however, noted a slight improvement, but said that the TPIMs were having a significant effect on his mental health and functioning abilities and were "ongoing stressors" which reduced the beneficial impact of his psychiatric treatment. The Secretary of State's expert, Dr Silva, does not agree that the proceedings have had an impact on TL's condition.
- 16 These reports post-date the decision to impose TPIMs in March 2021. But Mr Moloney's case is that the Secretary of State had clear indications of his mental ill health, but nonetheless, failed properly to factor these into the decision-making process.

- 17 I can deal with this ground relatively briefly, because in my judgment, it is clearly not well-founded. The evidence shows that decision-makers did consider what was known about TL's mental health difficulties at every stage.
- 18 In her first witness statement for these proceedings, made on 16 March 2021, Jessica Deacon (Head of the TPIM and Royal Prerogative Team at the Home Office) made clear that the Secretary of State had been made aware that TL had been diagnosed with a mental illness and that medical assessment by the DWP showed him to be suffering from PTSD/first episode psychosis (see para. 7). At para. 8, she said that this had been taken into account in deciding whether to impose the TPIM, alongside the seriousness of the conduct in which he was believed to have been engaged.
- 19 On the day on which the TPIM notice was served, there was an email indicating that TL had presented with mental health issues and was having difficulties in processing the simplest of instructions. Subsequent emails show that careful attention was paid to his mental health difficulties, though at that stage the police were unsure whether the symptoms were being "put on".
- 20 In her second statement, dated 12 August 2021, Ms Deacon explains what was done to ensure that TL understood what was required of him by the TPIM notice. At paras 17-18, she notes that the police had visited him on many occasions immediately following the service of the notice (including to serve variations of the TPIM notice) and that at no time did TL say that he did not understand the effect of the TPIMs.
- 21 In her fifth witness statement, dated 21 April 2022, Ms Deacon notes that TL was invited to make representations as to whether the TPIM notice should be extended. Among the matters sent in on TL's behalf were the reports of Dr Galappathie, Dr Lilley and Dr Picchioni. Ms Deacon makes clear at paras 11-13 that the reports were considered. The conclusion was that there was nothing in them which suggested that TL's mental health difficulties impacted on the risk to national security which he is assessed to present; and that in the absence of any less disruptive methods of addressing that risk, it was assessed as necessary and proportionate to extend TL's TPIM notice.
- 22 In her sixth witness statement, Ms Deacon explains in para. 5 et seq. that on 27 May 2022 TL's representatives wrote to the Home Office enclosing a report from a community psychiatric nurse indicating that he and a psychiatrist had assessed TL and found him to be in a distressed and agitated state, having been asked to leave the family home by his wife. A care plan had been agreed which would involve a move to a different address and an increase in medication. A request was made for a variation of the TPIMs to permit TL to move. The initially identified accommodation proved not to be suitable, but there was a meeting on 31 May 2022 to consider the ongoing necessity, proportionality and management of the TPIM in the light of these developments. The view was taken that the TPIMs continued to be necessary and proportionate, but that ongoing consideration should be given to the question of how to minimise the impact on TL of the TPIM on TL's mental health. Dr Silva's report of 17 May 2022 was considered. Alternative accommodation was identified and the Home Office agreed to a variation of the TPIMs to enable him to live there on 20 June 2022. Certain other requests for variation to enable him to spend more time with his family were also agreed.

- 23 In her seventh witness statement, Ms Deacon explained that, on 29 July 2022, TL's representatives had forwarded to the Home Office a further letter from TL's psychiatric nurse indicating that TL was again in a distressed and agitated state and had reported suicidal thoughts. He had commented that he did not feel safe in his current accommodation and was asking to move. There was also a request for a variation of the residence measure so as to allow him to access the communal outdoor space in the flat where he lived between 2100 and 0700 hrs. This was considered and refused, although certain exceptions were made to allow TL to go outside at night for short periods during the August heat wave. On 25 August 2022, a new property was offered – this time a three bedroom property in the West Midlands with its own outside space, which TL could access between 2100 and 0700 hrs. Reporting requirements were also relaxed to require in person reporting on one day only.
- 24 There are in principle two respects in which TL's mental health could be relevant to the Secretary of State's decision-making. The first is in interpreting the conduct upon which the Secretary of State relied in reaching the conclusion that Condition A is met. Conduct which, in a person with no mental health difficulties, might appear to show active involvement in TRA might, in a person with serious mental health conditions, be seen in a different light. TL's history of autism and his complex constellation of other diagnoses, could in principle be relevant in this respect. But the relevance depends on the conduct in question. In this case, the evidence of that conduct consists of both OPEN and CLOSED material. I am entirely satisfied that the evidence demonstrates that the complex and developing picture as to TL's mental health was at all stages properly factored into the Secretary of State's decision-making process. I am also satisfied, on the basis of all the evidence, that the Secretary of State concluded, and was entitled to conclude, that it had no material bearing on the conclusion that TL was or had been engaged in TRA.
- 25 I have myself considered the medical evidence in its entirety and in the light of that evidence I remain satisfied that TL was or had been involved in TRA in all of the ways alleged in the Secretary of State's OPEN case.
- 26 The second way in which evidence of TL's mental health difficulties could be relevant was in deciding the necessity for and proportionality of the TPIMs. Again, the evidence demonstrates that full consideration was given, at each relevant stage, to the emerging medical evidence, as it related to the necessity for and proportionality of the TPIMs. The preponderance of the medical evidence indicates that the TPIMs have acted as a stressor and have probably exacerbated some of TL's symptoms. Nonetheless, in view of the risk which TL was properly assessed to pose to national security, the Secretary of State was fully entitled to conclude that the TPIMs were proportionate. I have no hesitation in reaching the same conclusion myself and would have done so even if it had not been necessary to attach weight to the Secretary of State's view.
- 27 The Secretary of State's response to the evidence in May 2022 of a deterioration in TL's mental health and his need to be relocated was impressively conscientious and reasonably prompt, given the need to consult many different persons and bodies. TL was relocated relatively quickly after it became clear that his wife had asked for that to happen. The offer of relocation in August 2022 was also made relatively quickly after the request, given the need to consult, locate a suitable property and consider security arrangements. At each stage when relaxations in the TPIM requirements had been sought, they had been considered properly, relatively timeously and on several occasions (though not all) agreed.

28 Ground (a) therefore fails.

Ground (b)

29 Ground (b) is that there is no recent evidence of TRA. That would not supply a freestanding basis for challenging the TPIM, because condition A does not require the TRA to have been recent and (for reasons already explained) Condition B is of no relevance here. The timing of the TRA is, however, relevant to the necessity and proportionality of the TPIMs. I am satisfied on the basis of all the evidence that, notwithstanding the lack of OPEN evidence of TRA in the period following TL's meeting with Chapra in February 2020, the imposition of TPIMs in this case was both necessary and proportionate. I would have reached that view even if I were not required to give weight to the Secretary of State's view. Conditions C and D are met.

Ground (c)

30 Ground (c) questions the adequacy of the disclosure. However, as Mr Moloney accepted in argument and as I described in my earlier judgment in this case (see [2022] EWHC 825 (Admin)), CPR Part 80 provides a procedure by which disclosure of CLOSED material into OPEN can be sought. The system relies on special advocates to make submissions in the interests of the person subject to the TPIMs. If the special advocates consider that CLOSED material should properly be made OPEN, whether because its disclosure would not harm the relevant public interests or because its disclosure is required by Article 6 ECHR, the court will determine the issue. The system also relies on the assessment of the special advocates as to which points to press and which to leave. In his case, there is – as I said in my earlier judgment – nothing to indicate that the special advocates have made their assessment other than conscientiously and properly. They have kept matters under review as the proceedings have gone on. If TL were entitled to anything further, it must be presumed that they would have applied for its disclosure. The disclosure ground therefore goes no further.

31 In any event, this is not a case where the subject of the TPIMs has been told nothing about the reasons why the TPIMs were considered necessary. There is – by comparison with some other cases – a great deal in OPEN, to which TL has been able to respond.

Ground (d)

32 Mr Moloney draws attention to several aspects of the way the DDP is managed which have given cause for concern over the currency of the TPIM notice in this case. At an earlier stage in the proceedings there was a serious concern about questions asked by the DDP mentors which appeared to invite TL to impart information about his defence to these proceedings. This was originally the subject of a separate ground of review, which is no longer pursued, following the Secretary of State's agreement to destroy previous versions of the mentor reports, only to use versions redacted to remove privileged material and to allow TL's legal representatives to attend mentoring sessions. The presence of TL's legal representatives has revealed further problems: first, that the notes of the mentoring sessions are late and (a related issue) inaccurate; second, that there is too much discussion of irrelevant matters and too little discussion of ideological matters; third, that the mentors have not adapted their methods of communications in the way suggested by Dr Lilley. Mr Moloney says that these criticisms echo those made by Jonathan Hall KC, the Independent

Reviewer of Terrorism Legislation, in his *Report on the Operation of the Terrorism Acts in 2019*: see paras 8.8. and 8.19.

- 33 Mr Moloney says that this is legally relevant because “it cannot be reasonable to require the Respondent to demonstrate that the measures are no longer necessary or proportionate, while putting beyond the Respondent the means of demonstrating this to the Applicant”.
- 34 In my judgment, there is force in the criticisms of the way the DDP has been operated in this case. The invitations to communicate privileged material and the failure in record-keeping are unimpressive, though the evidence suggests both now have been addressed. But the characterisation of the DDP as the only means by which a person subject to TPIMs can demonstrate that the measures are no longer necessary or proportionate is misleading. First, it suggests that it is for TL to “demonstrate” this. It is not. As with any measure interfering with ECHR rights, it is for the Secretary of State to demonstrate that the measure is necessary and proportionate when the TPIM notice is first served, at each stage when it is reviewed and when it is extended. Equally, it is for the Secretary of State to demonstrate that the imposition of the TPIMs is necessary and proportionate. The court must reach its own view about that, albeit giving weight to the Secretary of State’s assessment. The court would not accept an assessment which said “The TPIM notice was necessary and proportionate when imposed and the subject has not demonstrated through the DDP that it has ceased to be so now”.
- 35 Second, although progress (or lack of it) in the DDP is no doubt one matter to which weight can be given in the overall judgment, there are a number of ways in which a judgment might be made that a TPIM notice was no longer necessary or proportionate. The length of time since the last instance of TRA will always be a major consideration, even in the absence of positive evidence of progress. It is also well known that the Secretary of State is likely to have available to her a wide variety of sources of evidence about the current activities and views of an individual subject to a TPIM notice. Moreover, the failures by DDP mentors at earlier stages (in particular in relation to the LPP material and the failures to record sessions accurately) can be factored into the Secretary of State’s and court’s assessment of the overall proportionality of the TPIMs.
- 36 In my judgment, in this case, these failures do not affect the validity of the overall judgment of the Secretary of State that the TPIM notice, and the individual measures it imposes, remains both necessary and proportionate; and they do not affect my judgment, which is to the same effect.

Conclusion

- 37 For these reasons, none of the OPEN grounds succeeds. Nor do I accept that the decision to impose the TPIM notice, or the decision to extend it, is flawed for any of the reasons advanced by the special advocates in CLOSED. The CLOSED material bolsters my conclusion that, at each relevant stage, Conditions A, C and D were met. The application for review and the appeal against the extension are therefore both dismissed.