

**OPERATION PATHWAY**

**REPORT FOLLOWING REVIEW**

**By Lord Carlile of Berriew Q.C.**  
**Independent Reviewer of**  
**Terrorism Legislation**



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## Purpose of this report

1. As the current independent reviewer of the Terrorism Act 2000 [TA 2000] as amended, I have the statutory responsibility of reviewing the operation of the Act from year to year. I prepare annual reports<sup>1</sup>. Throughout the year I observe the activities of the authorities working to counter terrorism. I receive a great deal of comment and information from those authorities, from interested and affected groups, organisations and individuals, and from the public at large.
2. On Wednesday 8 April 2009 the North-West Counter-Terrorism Unit [NWCTU], working with Merseyside Police, Greater Manchester Police, Lancashire Constabulary and the Metropolitan Police arrested twelve men under section 41 [s41] of the TA2000. Five of the arrests were in Manchester, five in Liverpool, and two in Clitheroe in Lancashire.
3. The police operation involved is known generally as Operation Pathway. For consistency I shall use this label throughout this report.
4. One of the men was released within a short time, without being taken to a police station; he does not feature further in this report. The other eleven were detained under the TA2000. By the 22 April, however, all had been released from detention under the Act, none having been charged. Ten of the eleven were transferred into immigration custody: one, Hamza Khan Shenwari, is a UK national and so could not be detained under immigration provisions; he was simply released.
5. I am not responsible for reviews of custody under immigration powers nor, in this report, do I report on anything which occurred after the 22 April. I note that the cases of ten of the men were before the Special Immigration Appeals Commission [SIAC]; and that in the context of SIAC bail

is available (see paragraphs 93-94 below). None of these men were granted bail by SIAC. Most have dropped their appeals and returned to Pakistan.

6. The arrests were followed immediately by a considerable amount of speculation and comment. Even the Prime Minister commented on the importance of the arrests and the underlying allegations said to found them. The release without charge thereafter of every one of the men gave rise to adverse public comment about the use of the TA2000 powers in the case. Consequently, I decided that the circumstances of Operation Pathway provided a useful opportunity for a case study, or 'snapshot review' (as I called it at the time), of the working of TA2000.

## Methodology

7. In the context of this review, I contacted and have received cooperation from the police forces named above, the Security Service [SyS], the Home Office, the Crown Prosecution Service, interested community groups, and from some of those detained and their solicitors.
8. I wrote twice to all the detainees, and once to all of their known solicitors (and in the case of some, more than once): I have been permitted to see and interview three, and am grateful to them for their frankness and willingness to engage with me. In so far as I have not spoken to detainees, this is because I received no reply from them or their solicitors. I should have preferred to have seen them all.
9. I regret that some of the solicitors failed entirely to respond to correspondence, despite my making it clear that not replying would leave me with no option but to conclude that they had no complaint about their clients' experience in the case.

<sup>1</sup> Available via [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

10. I have followed an evidential approach, analysing the material I received and applying to it the statutory provisions in TA2000. My purposes have been to ascertain (i) whether TA2000 was used correctly, and (ii) whether the Act was fit for purpose in an inquiry of this kind.

11. I am aware that some of the detainees have made claims for Judicial Review, questioning the lawfulness of their arrests and detention, and the compatibility of certain parts of TA2000 with the European Convention on Human Rights [ECHR]. Nothing in this report is intended to

affect those proceedings, and I trust that this report can be made public without prejudicing in any way any decision in such proceedings. The utility or otherwise of this report for those proceedings will be a matter for the parties and the court.

### The detainees

12. Most of the detained men were students, or would-be students, of adult age. Apart from Hamza Khan Shenwari, all ten are nationals of Pakistan, and one a dual Pakistan/Afghanistan national. They fell into two groups for the purposes of the arrests:

Name	Place of Study
<b>Manchester group</b>	
Abid Naseer	John Moores University Liverpool BSc Computer Studies
Sultan Sher	Leicester University MSc in Advanced Software Engineering
Hamza Khan Shenwari	[n/r UK national]
Tariq Ur-Rehman	Claimed an intention to study for a postgraduate diploma in Business Management at Cambridge College of Learning (a school de-registered by the government in December 2008)
<b>Liverpool group</b>	
Ahmad Faraz Khan	Applied to study MSc in Computing at John Moores University Liverpool
Janas Khan	Liverpool Hope University
Mohammed Ramzan	Accepted for study at CECOS London College, London E1
Abdul Wahab Khan	John Moores University Liverpool MSc in Computer Network Security
Mohammed Umer Farooq	Accepted for study at Kings College of Management Manchester for graduate diploma in business administration
Mohammed Rizwan Sharif	Accepted for study at Liverpool College of Management Sciences, London SE1
Shoaib Khan	Kaplan Financial Manchester ACCA accountancy qualification.

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13. I comment in paragraphs 108-110 below on the scrutiny of student status and academic institutions.

14. All except Tariq Ur-Rehman had experience of part-time work as security guards (a popular form of work for male students), or at least were registered as security guards under statutory and industry requirements.

### The basis of the arrests

15. In summary, at the time of the arrests the police and the SyS believed that Abid Naseer was the central figure. They were in possession of intelligence that indicated strongly that he was the common link between the Manchester group and the Liverpool group. Meetings involving members of both groups occurred at an identified address. He was connected to an Al Qaeda source situated overseas and assessed by the authorities to be linked to Al Qaeda's operations outside Pakistan. There was intelligence to suggest that he might be involved in planning operational activity in the UK, and was in direct contact with a significant attack planning group situated outside the UK. Analysis of intelligence material on a wide front suggested strongly to the services concerned that this might well be part of a very significant international plot.

16. If the above was correct, the potential threat posed to national security was grave.

17. A very large number of investigators were involved in the operation. It placed a strain on resources, and co-operative counter terrorism arrangements between police forces were deployed. There had been surveillance of the suspects for some time before the arrests. They had met in sub-groups and as a whole group during February and March 2009. There was activity around an internet café in Manchester. Sultan

Sher and Tariq Ur-Rehman both frequented the café. It was close to the home of Abid Naseer and Hamza Khan Shenwari. Abid Naseer used the café for internet activity assessed as suspicious.

18. Although meetings of the suspects were observed, there was little intelligence or information as to what was discussed at those meetings.

19. Intelligence was gained concerning meetings at an address in Liverpool, where three of the Liverpool group lived. There was also intelligence about photography of a suspicious nature, in intelligence terms.

20. On the 3rd April 2009 a number of significant events occurred. One of those events was found on investigation to be the sending of an email (see box below). At a time evidentially compatible with the sending of the email, Abid Naseer was observed sitting at a keyboard in the café and Tariq Ur-Rehman was behind the counter. Abid Naseer then walked from the café to another place and Hamza Khan Shenwari was seen to be present in the same building. Though they shared lodging (and indeed a room) at the time, and were good friends, on this occasion they did not acknowledge each other at all.

21. The email read:

*Hi Buddy*

*I am sure my email will find you in good health and all your family members are enjoying them self.*

*I am doing well as usual and having good time. The weather is getting warmer here and we have loads of things to enjoy. You know how is it over here when its summer. People out to the beaches and going on holidays. Well we had some short trips to riverside as well. My mates are well and yes my affair with Nadia is soon turning in to family life. I met*

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*with Nadia family and we both parties have agreed to conduct the Nikkah after 15th and before 20th of this month. I have confirmed the dates from them and they said you should be ready between these dates. I am delighted that they have strong family values and we will have many guests attending the party. I am sure Nadia was the right choice for me at this time because I was getting older day by day LOL. Anyways I wished you could be here as well to enjoy the party. That's all from here, nothing new to write down. Pay my love to Hassan and regards to all your family members.*

*Thanks*

*Kind regards*

The word Nikkah refers to an Islamic ceremony, compatible with a wedding, although not necessarily involving a civil marriage ceremony.

22. The date references in the email were a matter of uncertainty. If the Islamic calendar was applied, the "Nikkah" or event would occur earlier than the 15-20 April, in fact during the Christian Easter holiday period commencing on Good Friday the 11th April.

23. The intelligence assessment of the email was founded on the experience of several years of intense scrutiny and policing of Al Qaeda in the UK and, in co-operation with others, around the world. Throughout the period of police etc interest in the group, no women had been seen, and there had been absolutely no signs of wedding preparations. Similar coded language had been used previously in relation to 2 major terrorism conspiracies which had resulted in trials and convictions.

24. The email taken together with other intelligence in this context gave rise to the assessment that early stage attack planning may be taking place; and possibly that there was a state of readiness to commit

a terrorist attack in the UK, which might include the use of explosives.

25. I refer to the post-arrest interviews in more detail at paragraph 74 below; in summary it is to be noted that in none of them did any of the suspects provide information about a Nikkah or wedding; nor were the suspects able or willing to identify Nadia or any person consistent with being she.

26. The authorities had no specific information as to where the suspected terrorist event was to occur, nor any precise knowledge as to its nature. Nevertheless, they believed that they had reasonable grounds to suspect a terrorism plot planned to be brought to fruition at the imminent holiday time. Therefore, after extensive consultation, they decided to carry out the arrests. The decision to arrest was made on Monday 6th April by an Executive Liaison Group chaired by the National Co-ordinator of Terrorist Investigations, Deputy Assistant Commissioner McDowall. All decisions, and the reasons for them, were recorded in a decision book by the Senior Investigating Officer [SIO], Detective Superintendent Mark Smith.

27. The initial priorities of the investigation were first, the safe arrest and detention of the suspects, and secondly to recover any materials that might be used in a terrorist attack.

28. All were arrested in the early evening of Wednesday 8th April 2009.

29. The main events which led to the arrests of the individuals can be summarised in each case as including one or more of the following:

- Information about links to Al Qaeda contacts in Pakistan
- Attendance at one or more known meetings in Liverpool

- Presence in photographs of potential attack locations
- Travel patterns, especially abroad
- General association with each other leading to the conclusion they were a group.

30. None of the arrests was made on a full evidential foundation, as at the time of the arrests no specific offence had been identified. The decision to arrest was made

on the basis of the intelligence assessment provided and in the perceived interests of public safety.

31. The following table sets out some specific factors taken into account in addition to the matters in paragraphs 27-30 above.

Suspect	Summary
Abid Naseer	Co-ordinator to AQ contacts. Links in Pakistan. Travel patterns in UK and overseas. Suspicious pen drive containing Hi buddy email in his possession. Other suspicious documentation. Suspicious behaviour in relation to Hamza Khan Shenwari.
Sultan Sher	Worked in the internet café. Close associate of Abid Naseer. Shared a room with Tariq Ur-Rehman
Hamza Khan Shenwari	Shared lodgings with Abid Naseer. Worked for a hair products company and had access to peroxide products capable of use for bomb-making purposes. Had registered a hair care company at Companies House.
Tariq Ur-Rehman	Travel pattern and location. Close to Abid Naseer. Frequented the internet café. Shared a room with Sultan Sher.
Ahmad Faraz Khan	Close to Abdul Wahab Khan and Mohammed Ramzan: shared lodging with them.
Janas Khan	Close to Shoaib Khan and Mohammed Umer Farooq: shared lodging with them.
Mohammed Ramzan	Close to Abdul Wahab Khan and Ahmad Faraz Khan: shared lodging with them.
Abdul Wahab Khan	Close to Ahmad Faraz Khan and Mohammed Ramzan: shared lodging with them.
Mohammed Umer Farooq	Close to Shoaib Khan and Janas Khan; shared lodging with them.
Mohammed Rizwan Sharif	[no particular material in addition to being part of the group]
Shoaib Khan	Close to Mohammed Umer Farooq and Janas Khan: shared lodging with them.

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## Timing of the arrests

32. It was not intended originally that arrests should take place as early as they did. In the event, all were arrested on the 8 April, between 1730 and 1836 hours, apart from Hamza Khan Shenwari who was arrested at 2110.

33. The reason for this was that on Wednesday 8 April 2009 a briefing meeting had taken place at 10 Downing Street. Assistant Commissioner Bob Quick, a very highly regarded officer and one of the most senior figures in the effort to counter terrorism, was seen and photographed by the media entering the front door of number 10. He was carrying papers which were not contained in a briefcase or blank folder. This was in breach of clear instructions to all public servants carrying highly confidential material. Some sensitive operational detail about the investigation was visible in press photographs and television footage taken of his arrival.

34. It is not part of this review to deal with that incident save as it directly affected the arrests. It did. It caused them to be brought forward by several hours from the original plan to arrest during the night, as the suspects might have been alerted by the media coverage. It removed from the authorities the possibility of postponing the arrests in the light of developments, discretion normally available and which doubtless they would have wished to retain. Consequently Mr Quick's behaviour materially affected the locations of the arrests, and thereby possibly increased community tension and concern to the general public. However, I have found no evidence that the change in arrest time led to failure to find or the loss of any material evidence.

35. I am aware that there is more than one entrance to 10 Downing Street. By process

of deduction it is clear that some present at the meeting attended by Mr Quick entered and left by another entrance, not available for photography by the media. I recommend that, in future, all persons attending meetings concerned with national security, wherever they occur, should seek to avoid places where it is suspected cameras may be present, in the absence of a clear decision that publicity would in no way harm national security.

36. Mr Quick honourably realised the seriousness of his error, and resigned from the Metropolitan Police on the following day. His resignation was a significant loss to effective counter terrorism policing.

## Prime Minister's comment

37. On the 9 April 2009 the Press Association reported that the Prime Minister, whilst visiting Carlisle, had said :

*"We are dealing with a very big terrorist plot. We have been following it for some time. There were a number of people who are suspected of it who have been arrested. That police operation was successful. We know that there are links between terrorists in Britain and terrorists in Pakistan. That is an important issue for us to follow through and that's why I shall be talking to President Zardari about what Pakistan can do to help us in the future. I think we must not forget that the police have been successful in carrying out their arrests and, of course, what happens in the next few days is a matter for the police inquiries; but we had to act pre-emptively to ensure the safety of the public and the safety of the public is the paramount and utmost concern in all that we do."*

38. It has been suggested to me that that statement was potentially prejudicial to any future criminal proceedings that might take place, and that it should not have been made in that form. Certainly it is unusual for the

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Prime Minister to say anything about arrests that have just taken place, especially where the suspects have not been charged.

39. A lawyer drafting the statement might have commenced it with the word 'allegedly'. However, taking the statement as a whole and in the context of a press enquiry which was connected to Mr Quick's resignation, in my view it is absurd to suggest that any future jury might have been prejudiced by it, had they become aware of it.

40. Understandably, senior police officers regard statements by politicians about recent arrests and current operations to be an unwelcome distraction. This will have to be borne in mind by those advising Ministers and Ministers themselves in determining the content of any statements, though it is not realistic to erect a wall of silence around them when events of great media interest occur.

#### Warrants, searches, arrests.

41. Warrants were obtained from Justices of the Peace under TA2000 section 42(2) which authorised the entry and search of specified premises for the purposes of arresting a suspect under section 41.

42. The arrests themselves, under section 41, if proper did not require warrants. This is because under section 41(1) a constable may arrest without a warrant a person whom he reasonably suspects to be 'a terrorist'. Arrest pursuant to this provision brings into play the provisions of TA2000 Schedule 8, which deals with the arrested person's detention and treatment, and contains special procedures for review and extension of detention.

43. TA2000 section 40(1)(b) includes in the definition of 'a terrorist' :

'a person who is or has been concerned in

the commission, preparation or instigation of acts of terrorism'

44. Search warrants were obtained from the Justices under TA2000 Schedule 5 Part 1 paragraph 1 to enter and search 20 premises and 9 vehicles in the North-West. Such warrants provide a power to enter and search the named premises and any person found there, and to seize and retain any relevant material found during the search. Four of the search warrants were returned unexecuted but the others were all executed and property was removed from several addresses. This included documents, computers and computer equipment.

45. I am aware that the procedure by which search warrants were obtained, including the adequacy of the information given to the issuing justices, is the subject of an application for judicial review on behalf of some of the suspects. That will be a matter for the Administrative Court to determine, and is not part of this report. For present purposes I assume that the search warrant procedure was followed correctly.

46. Under TA2000 sections 32-39, cordons were authorised in relation to the addresses searched. This was an appropriate use of the statutory cordons procedure.

#### Crown Prosecution Service ("CPS")

47. The CPS has a specialist group of fully vetted lawyers who are expert in counter-terrorism prosecutions. The head of this group is Susan Hemming O.B.E., who is based at CPS Headquarters in London. By the time of the arrests, and unconnected with Operation Pathway, a specialist office had been established in Leeds, with a lawyer available at all times.

48. The CPS involvement in Operation Pathway commenced on Tuesday 7 April 2009, the day before the arrests, as a result

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of a telephone call to a lawyer in the Leeds office. However, this was not an approach by the SIO, but an unofficial approach from another source informing the CPS lawyer that the CPS would be asked for advice at some stage. This information was provided to me from carefully kept CPS records. The police did not keep notes or records of conversations with the CPS.

49. The lawyer was told that the arrests were to take place the following day. The lawyer contacted the SIO on the 8 April and said she was available at any time. Again on the 13 April, she confirmed her availability, and said that she wanted to discuss possible warrants for further detention. Thereafter, on the 15 April, the CPS lawyer visited the relevant police office to review the investigation. The responsibility of the CPS after arrests is not to be part of the investigation team, but to examine the evidence against each arrested person as an individual, in order to determine whether there are grounds for charge or continued detention. However, the CPS lawyers are available to give advice to the police at any stage in the process. In some other counter terrorism inquiries they have been consulted well before arrests have taken place. The Greater Manchester Police recollect discussing the arrests with the CPS, but there is no record of their having sought advice. If advice was sought and shared by the officers concerned, plainly one would expect a written record.

50. I comment in paragraphs 59-82 below on the events which took place after the suspects' arrests, including the issues surrounding warrants of further detention. I have concluded that even if there were no issues anticipated about further detention, it was unwise of the police in this case not to actively seek legal advice from the CPS during the process of planning the arrests; such advice should in fact have been sought

in advance, even in the compressed time-period in which all were working because of various events in the Operation. It is self-evident that the CPS would have been able to give potentially helpful advice as to the lawfulness of arrest and search warrants, the exercise of statutory powers, and evidential considerations. In addition, given the complexity of terrorism cases, it makes sense for the CPS to have as much time as possible in which to prepare for possible Court hearings which may take place during the arrest/detention process. In several earlier investigations the CPS had been briefed fully and advised pre-arrest, to the advantage of all.

51. I recommend that the CPS should at the very least be kept informed of counter-terrorism operations and asked to provide any material advice as soon as arrest of identified individuals is seen as likely. Indeed, common sense and good judgement demand that they should be involved in an advisory capacity before arrest. Immediately following the arrests in this Operation steps were taken by the police services and the CPS to ensure such co-operation in future. However, one has to recognise that occasionally there will be situations in which events move so fast that it will prove impossible to obtain advice before arrest.

### Conduct of the arrests

52. I am satisfied that I have obtained accurate evidence as to the mode of the arrests. Four of the men were arrested relatively discreetly at their homes, but others were not. By way of example, Shoaib Khan told me that he was arrested outside the front door of his home in Liverpool in the late afternoon whilst returning from college. He was alone, and was unlocking the front door. Armed police, in combat uniforms, seized him and forced him to lie prone on the ground in the street, with his

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arms handcuffed behind his back. After a few minutes lying in the road he was placed in a police van and taken to a police station. He was told early in the process that he was being arrested for terrorism under the Terrorism Act.

53. Others were arrested in more open public places where there were members of the public going about their normal business. In all cases the arrests were performed with force and with at least the appearance of the officers being armed. In no case was the suspect asked without any show of force (as it has been suggested to me they might have been) simply to accompany police officers to a vehicle or a police station.

54. Had the incident involving Mr Quick not occurred, all would have been arrested at their homes during the night. This would have involved cordoning and disruption in the streets concerned, and some disturbance to local residents. However, situations of that kind lend themselves to more successful community reassurance, and cause fewer disturbances to the activities of other people, than arrests in the daytime in full public view.

55. As it was, absolutely no chances were taken by the police, the policy being to ensure that there was no risk to the public from the suspects being armed themselves or otherwise being able to harm others. As the Merseyside Police emphasised to me, they were concerned about various possible threats including –

- The potential for suicide bombing
- The potential for detonation of explosive devices by use of a mobile telephone
- The threat to arresting officers, in the light of the murder of DC Stephen Oake in Manchester during the “ricin plot” arrests
- The potential effect on, and danger

to, the public in a densely populated neighbourhood.

56. As Merseyside Police said to me, if armed officers are used they “dominate” the arrest situation; the operational judgement was that this was appropriate in this case.

57. Whilst the arrests lacked visual subtlety, it is probably right that in such circumstances no chances should have been taken by the police. That being said, I can understand witnesses to the arrests being concerned by what they saw, and I also understand the objections of those who were arrested. It should be noted that none of them in fact offered any resistance.

58. I emphasise that such combat-style arrest will not be justified for every terrorism suspect. Each case should be considered on its own merits, and every effort should be made to cause as little distress and disruption as possible to the wider community. Arrests at home premises at night or in the early morning are least likely to disrupt the public.

#### Post-arrest detention and arrest law

59. As will be seen in the paragraphs which follow, an issue arose as to the adequacy of the information given by the police to the suspects, and consequently the lawfulness of their detention. This came about because of tension between the initial grounds for arrest as provided by TA 2000 section 41, and general principles of jurisprudence as contained both in the common law and the Human Rights Act 1998.

60. As stated in paragraph 42 above, an arrest under TA2000 section 41 is for being “a terrorist”. This is a curiosity almost if not entirely unique to terrorism legislation. A person can be arrested on suspicion of being “a terrorist”, but could not be arrested on suspicion of being, for example, “dishonest”. Although section 41 provides grounds for

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arrest, as far as conviction of an offence is concerned it should be noted that being a generic “terrorist” is not a crime, any more than it is an offence to be generally dishonest.

61. The foundation of the modern law concerning arrest is to be found in the speech of Lord Simonds in *Christie v Leachinsky* :<sup>2</sup>

*“the arrested man is entitled to be told what is **the act** for which he has been arrested.”* (emphasis added).

62. Article 5(2) of the European Convention on Human Rights provides:

*“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest **and of any charge** against him.”* (emphasis added).

63. In *Fox, Campbell and Hartley v United Kingdom*<sup>3</sup> the European Court of Human Rights held:

*“Paragraph (2) of Article 5 contains the elementary safeguard that any person should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph (2), any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest so as to be able, if he sees fit, to apply to a court to challenge its lawfulness”.*

64. Thus TA2000 section 41 may provide the reasons, or the essential legal grounds, for an arrest; but not the factual grounds or any possible charge. It follows that at some point between arrest and the end of his detention period the suspect must be told the offence or offences of which he is suspected. The grounds of arrest pursuant to section 41, namely being a terrorist, is

no more adequate for this purpose than is the general description of being dishonest in a case falling under the Theft Act 1968. This places section 41, and the period of detention under that section, in tension with the general law.

65. The point at which the suspect has to be given this information varies according to the facts and circumstances of the case, and has been the subject of discussion between the police and the CPS in the context of this operation.

66. TA2000 Schedule 8 makes provision for the detention period after a section 41 arrest, and a Code of Practice [known as PACE Code H] has been issued to assist all involved in such detentions. Section 23 of the Terrorism Act 2006 amended Schedule 8 to extend to 28 days the maximum time for which persons arrested under section 41 can be held before being charged.

67. Code H is consistent with the case law and ECHR Paragraph 5(2). Paragraph 10.2 of the Code provides:

*“A person who is arrested, or further arrested, must be informed at the time, or as soon as is practicable thereafter, that they are under arrest and the grounds for their arrest, ...”*

68. Section 41 (3) allows for detention of up to 48 hours from the time of arrest. The detention period may then be extended in accordance with the forms of review and authorisation set out in Schedule 8.

69. Schedule 8 Paragraphs 29-37 provide for warrants of further detention [WFD]. These have to be considered and adjudicated upon by a judicial authority, rather than by the police (who have to conduct statutory reviews during the initial 48 hour period).

70. The initial statutory reviews by the police are provided for under TA2000

<sup>2</sup> [1947] AC 573 at p.593

<sup>3</sup> [1991] 13 EHRR 157 at para 40

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Schedule 8 para 23. The officer concerned may authorise detention if he is satisfied that it is necessary to do so for one or more of the statutorily specified reasons. In order to be satisfied, he must know enough about the suspect and the case to reach a reasoned decision.

71. In this case, the custody records contain insufficient detail to inform a review as to whether the custody officers went through the correct thought process. I recommend that there be better recording of the custody officer reviews and their decisions.

72. TA2000 Schedule 8 para 24 provides that police reviewing officers for this purpose must be of at least inspector rank, and should be unconnected with the investigation. In relation to some of the suspects, it would appear that at least the first reviews were carried out by officers of lower rank. This should not occur again. However, there is no basis for saying that a more senior officer would not have authorised further detention, indeed this is what occurred at subsequent reviews.

73. The judicial authority for the period from 48 hours to 14 days after arrest is a District Judge (Magistrates Courts) [DJM].

The application before the DJM is on notice, with defence representation present. No special advocate is involved at any stage of the Schedule 8 processes, which means that nobody representing the interests of the suspect can see material kept closed on grounds of national security. The DJM must be satisfied that the investigation is being conducted both diligently and expeditiously. The extension must be necessary, for certain limited purposes: to obtain relevant evidence, to preserve relevant evidence, or pending the result of the examination of relevant evidence. After 14 days the judicial authority is transferred to a senior judge, normally a High Court Judge [HCJ], who applies the same criteria. The HCJ has the power to extend the detention by 7 additional days, or until 28 days after arrest (whichever is the earlier).

74. In this case, after their arrests, some pre-interview disclosure was given to the suspects' solicitors, with CPS advice on some aspects of disclosure. All the suspects were interviewed and questioned for several hours. I summarise the tenor of the interviews over the whole period until their release from police custody as follows :

<b>Suspect</b>	<b>Response in interviews</b>
Abid Naseer	Interviewed on 7 days (33 tapes). No comment throughout.
Sultan Sher	Interviewed on 6 days (17 tapes). In first interview answered questions about the internet café, saying that he had worked there for 3-4 months. At a later interview produced a prepared statement. Otherwise no comment
Hamza Khan Shenwari	Interviewed on 6 days (21 tapes). With the exception of a single question about the contents of a bag, he made no comment. He became very agitated when shown the “Hi buddy” email.
Tariq Ur-Rehman	Interviewed on 8 days (30 tapes). Answered all questions. Described association with other suspects; spoke about associations and computers; and about work as security guard. Confirmed that he had bought a postgraduate diploma. Through solicitor complained that he did not understand what was alleged against him. Stated that Abid Naseer was trying to obtain a wife via the internet, but that the girl was too young and this had been ended. Knew nothing of Nadia or a Nikkah.
Ahmad Faraz Khan	Interviewed on 7 days (21 tapes). Answered questions about association with others, computer issues, and mobile phones. Said Abid Naseer had been planning to marry but had changed his mind. Had taken photographs because of his interest in architecture (Trafford centre reminded him of Dubai). Not heard of Nadia.
Janas Khan	Interviewed on 6 days (17 tapes). Solicitor made Article 5 complaint. Answered questions about associations, computers, and finances. Knew nothing about a Nikkah or Nadia.
Mohammed Ramzan	Interviewed on 5 days (13 tapes). Answered most questions and admitted associations: denied any terrorism. Said he hated the Taliban. Refused to answer questions about or connected with the Hi buddy email.
Abdul Wahab Khan	Interviewed on 8 days (23 tapes). Answered questions about home, associations, mobiles and computers. Confirmed shared passwords, and that he studied computer security. Met Abid Naseer when AN worked in Visa office in Peshawar. Said that Abid Naseer had stayed with him and used AWK’s computer, as had others. Abid Naseer had been planning to marry but changed his mind 1-2 months ago, no wedding/Nikkah planned. Knows a Nadia from a Yahoo chat room, might be male or female. The suspects had given each other money.
Mohammed Umer Farooq	Interviewed on 5 days (15 tapes). Declined to answer any questions.
Mohammed Rizwan Sharif	Interviewed on 5 days (15 tapes). Declined to answer any significant questions.

Shoaib Khan

Interviewed on 8 days (17 tapes). Answered questions. Denied knowing 3 of the suspects but had met Abid Naseer twice. Met others socially. Knew nothing of Nadia or a Nikkah. No explanation of the Hi buddy email.

75. On Friday 10 April separate applications were made before DJM Workman, the Senior DJM, and his Deputy DJM Wickham respectively, for WFDs in respect of all 11 arrested men. These were granted for a period until 7 days from the arrests, to the 15 April.

76. The police had contacted the CPS after the arrests, on the 9 April, to make them aware that the arrests had taken place, and of the envisaged time scale of the detention process. On the 15 April a CPS lawyer met the police for the first time in relation to this investigation, and started to prepare the case for further WFD applications.

77. On Wednesday 15 April DJM Workman granted an extension of 7 days in respect of seven of the men. However, the lawyers for Hamza Khan Shenwari, Ahmad Faraz Khan, Janas Khan and Mohammed Ramzan (who by this time were detained in Birmingham) argued that they now had the right to know what charges were the cause of their arrest and detention, and that their ECHR Article 5 rights had been breached. The district judge extended the warrants of those four for two days to the 17 April, and required the attendance on that date of the CPS and the SIO to deal with the Article 5 point. As the extension requested would cross the 14 day boundary, that hearing had to be before a High Court Judge, in this case The Hon. Mr Justice Blake [Blake J].

78. Blake J heard a 5 hour application on the afternoon and evening of the 17 April. By this time extensive interviews had been carried out, as described in paragraph

74 above. During those interviews no

accusation had been made of a specific offence whether substantive or inchoate. At the hearing the SIO confirmed his acceptance of this, though the CPS lawyer arguing the case pointed to pre-interview disclosures. The judge concluded that by the 14 April the suspects had been alerted to the substance of the allegation against them. In so deciding he held ECHR Article 5(2) and the decision in *Christie v Leachinsky* to be compatible with each other, and that it is a requirement that the test they lay down be satisfied, namely that the arrested person should, as he put it, “be told of the act for which he is arrested and what it is”.

79. Consequently, Blake J granted an extended WFD for 4 additional days until the 22 April, expiring on the same date as for the other seven detainees. He found grounds for the extension under TA2000 Schedule 8 para 32(1A) (a) and (c) only, namely:

*(a) to obtain relevant evidence whether by questioning or otherwise; and*

*(c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence*

*And the investigation is being conducted diligently and expeditiously.*

80. Blake J added:

*“By Wednesday 22 April matters may have developed significantly ... but if this Court is to be applied to [for a further extended warrant] there must be carefully prepared for service on the detainees and the Court a document setting out the:*

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1. State of the investigation;  
2. Substance of the allegations put to each detainee and the promptness of this being put;

3. If initially deficient information to the detainee is later curable.

*“Those charged with investigating difficult and complex [cases] will need to keep an eye on the clock and the time limit. Twenty-eight days is the maximum, but this does not mean it will be given. The real prospect of evidence emerging needs to be much, much clearer. Although not binding, this is a marker. Turning a plausible hypothesis into an evidence based case has to be balanced with human rights and proportionality.”*

81. During the days following the arrests, and following the hearing on the 17 April, some progress was made in obtaining evidence. However, following advice from the CPS it was decided by Wednesday 22 April that there were no reasonable grounds for believing that further detention was necessary to obtain relevant evidence; and that there was at that time insufficient evidence to provide a realistic prospect of any of the suspects being convicted of a criminal offence arising out of the investigation. Accordingly, they were all released from police custody, some on the 21 April and others on the 22nd.

82. Particular issues informing the decision were:

(a) There was no evidence of the presence of any explosives, other than traces explicable without criminality;

(b) No chemicals were found at any relevant addresses;

(c) The Hi buddy email was very suspicious without an innocent explanation and on its own merits. However, it was too vague to provide the basis of a conviction without significant further evidence;

(d) Photographs were found of potentially iconic buildings: at first sight there was nothing about them to distinguish them from innocuous snaps. I understand that the police have continued to assess these photographs with others recovered subsequently. The police and SyS consider them to be evidence of attack reconnaissance;

(e) Other documents provided low level suspicion but not evidence;

(f) Computer searches were (and still are) ongoing, but nothing had been found by the 20 April to support a charge of a terrorism offence.

#### Effect of arrest law in this operation

83. It will be clear from the above that the law on arrest was a key factor in this operation. There is an important factual distinction to be drawn between this case and Fox, Campbell and Hartley, which I have cited in paragraph 63 above. In that case the suspects were arrested as generic terrorists, which was held to be insufficient to satisfy ECHR Article 5(2). However, following their arrests all the suspects were questioned by the police about their involvement in specific criminal acts and their membership of proscribed organisations. There was no ground for supposing that their interrogations were not such as to enable them to understand why they had been arrested. The interval of a few hours (not exceeding 4½ hours for any of the suspects) did not offend the requirement of promptness.

84. In a very recent case from Northern Ireland, *In the Matter of Colin Duffy and Others* [2009] NIQB 31 Lord Kerr, then the Lord Chief Justice of Northern Ireland, considered the effect on TA2000 section 41 of ECHR Article 5(3). That provision in the Convention deals not with arrest, but

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with bringing a person arrested or detained 'promptly' before a judge: he held that relevant parts of TA2000 Schedule 8 should be read in conformity with the requirements of the Convention. This provides, by analogy, support for the applicability of ECHR Article 5(2) to section 41.

85. Neither DJM Workman nor Blake J ruled that the original arrests were unlawful; but they made it clear that continued detention would be likely to become unlawful if the suspects were not told clearly the offences they were suspected of committing and the reasons for the suspicions leading to their arrests. Blake J affirmed the need for an evidential test to be applied to extended detention.

#### Effect and implications of the legal position

86. Following a detailed review by senior CPS specialists of the progress of the investigation, on Tuesday 21 April they met senior police involved in the operation. The advice given was unequivocally to the effect that there were not the grounds to apply for an extended WFD, as there was insufficient evidence in relation to each of the eleven suspects. The CPS articulated at this meeting the arrest law as described above, and the evidential test affirmed by Blake J. The police were surprised to receive this advice, as their understanding and experience was that it was enough for them to show that more time was needed to convert intelligence to evidence and that the inquiry was being progressed diligently and expeditiously. The CPS responded that the detentions in their view might be held unlawful if continued.

87. The police felt on the 21 April that the earlier application before Blake J had not been prepared sufficiently and lacked structure. I am unclear as to the basis of this complaint, given the very late stage at which

the CPS had been involved in the operation. The police and others in substantial numbers had been working on it for months: the CPS had not been seriously engaged until the 15 April. The delay in involving the CPS was not the fault of the CPS, it was a decision made by the police.

88. The police remain of the view that all the suspects should have been kept in custody longer to allow for continuing questioning and enquiries into the case. However, given the number of questions asked in interview, as is clear from the number of tapes used, I find it very difficult to understand what it is believed that further questioning would have achieved. As to whether further detention would have produced more evidence, in fact the suspects with one exception remained in legal custody, albeit within a different legal context, more than 28 days after arrest. I have not been told of anything of estimable value that emerged during that period. It follows that it is my view that these criticisms made by the police have no substance.

89. Given the long history of arrest law as described above, and the provisions of the ECHR, I am surprised that the police did not anticipate that they would be required to clarify the evidential basis for the arrests before a judge during the period of detention. In relation to arrest and charge, it is a matter for the Courts as to what can properly be characterised as 'promptly' in a particular context: it is likely to be case specific and therefore elastic, but in every case there must be a point at which continued and (particularly) extended detention, far beyond the normal periods for non-terrorism cases, will be subjected to a requirement to set out the evidential basis. In relation to evidence, I doubt that it could seriously be argued that continued detention is proportionate where there is

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no reasonable basis for expecting material evidence to emerge during the extended period of custody applied for.

90. There are two lessons to be drawn in this context; I recommend that the police and the CPS take immediate steps to revise their procedures to reflect them. The first is that all police officers involved in counter-terrorism policing should be trained in the law relating to arrests and its potential effect on detention under TA2000 Schedule 8. The second is that CPS expert and directly vetted lawyers should be informed of ongoing inquiries likely to result in arrests, well before any such arrests take place, and they should be asked to advise on the state of the intelligence, information and evidence as the inquiry in question progresses. I am informed that this was regarded as usual practice, but was not followed in Operation Pathway. Clear steps have now been taken by the CPS and the Police Senior National Co-ordinator to clarify this practice and implement it country wide. Having said that, I acknowledge that, for reasons inappropriate for recitation in a published report like this, the authorities were working to compressed time frames in the days prior to the arrests.

91. Had the recommendations in the previous paragraph been followed in Operation Pathway, although the authorities disagree with this view I consider that one cannot exclude the possibility that fewer men would have been arrested, and that the arrests might have taken place 1-2 days later during which period intensive surveillance and other evidence gathering could take place. I cannot exclude the possibility that in relation to one or more of the suspects no arrest would have taken place; or that the circumstances for extended detention might not have been demonstrated. However, I emphasise that the police and the Security Service have made clear to me that they do not accept this conclusion.

92. I should emphasise that it is not my view that no arrests should have been made. The Hi buddy email and other factors described earlier crossed the threshold of TA2000 section 41, and in the circumstances there was no realistic alternative to arresting at least some of the suspects. Arrests were necessary because of public safety concerns.

93. Once a person has been arrested under TA2000 section 41, they cannot be granted bail during that detention whilst further enquiries continue. This is to be compared with the situation in Northern Ireland, where bail was always available from a High Court judge even when the arrest was in respect of generic terrorism; and with immigration law, under which SIAC has the power to grant bail.

94. I recommend that consideration be given to the amending TA2000 to allow the granting of bail by a judge for a period up to the 28th day following arrest, subject to the full range of conditions available in general crime. This change would not affect any matters of arrest law discussed above. However, in suitable cases it would enable restrictions short of custody to be imposed whilst the inquiry continued, without the inquiry being impeded.

### Intercepts

95. For completeness in this report, I have considered whether the admissibility in court of intercept evidence, currently prohibited by statute, would have led to any of the men being charged. It should not be assumed either that intercepts were or were not used.

96. I am of the clear view that a change in the law would have made no difference in this case, in the sense of assisting either the prosecution or the suspects.

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97. I take the opportunity of this report to comment upon some tendentious public assertions made following the recent end of the second Operation Overt trial.

98. There was a surge of comment from outside the Government suggesting that intercept evidence from domestic public telephone sources would have secured convictions at the first trial and would secure other convictions; and that somehow the admissibility of intercepts would be a 'silver bullet' to enable the ending of control orders.

99. As independent reviewer, I have repeatedly said that I am not opposed in principle to the admissibility of intercept if this can be achieved without (a) affecting national security, and (b) decreasing the effectiveness of the criminal trial process.

100. I have considered myself whether the admissibility of intercept would or even might have led to the prosecution of any controlees since control orders were introduced in 2005. I have examined each control order during that period.

101. I understand from the Interception Commissioner's latest report that operational and legal testing of intercept as evidence models highlighted the real difficulties inherent in using intercept as evidence in the UK. This is not surprising given the substantial burden that the Criminal Procedure and Investigations Act imposes on investigators to disclose all relevant material to the defendant. Imposing such a significant resource burden on intercepting agencies whose time would be best spent combating serious crime and terrorism seems to me wholly at odds with the national interest.

102. Outside commentators have made comparisons with other jurisdictions where intercept is admissible. For a single

reason these comparisons are ill-informed and misleading. That reason is that in our adversarial legal system the requirements of disclosure of material by the prosecution to the defence (there being no equivalent requirements on the defence) are far more demanding and revealing than in the jurisdiction of any comparable country. For example, in France a great deal of material is seen by the juge d'instruction but not disclosed to the defence, because of the inquisitorial nature of the criminal process there. We already disclose more than elsewhere.

103. Other difficulties can be found in the resource problems mentioned above, and in the fact that in some countries the amount of potentially valuable intercept carried out on terrorism suspects is curtailed by the prospect of having to record and transcribe many thousands of calls/pages in every case.

104. Intercept is an extremely valuable and important tool in the detection, interdiction and gathering of information about terrorists. It is used often as the foundation for solid admissible evidence, for example by human surveillance or other physical and electronic means. Despite my willingness for it to be introduced in appropriate circumstances, I have yet to see material to justify the conclusion that the permitting of such evidence in terrorism cases would do more good than harm.

105. I believe that this debate should now be drawn to a conclusion, against the introduction of intercept evidence in terrorism cases, but with an undertaking to keep the matter under review in the light of any changing circumstances. This might be achieved by a continuation of the Chilcot process on a standing basis; or by the appointment of a scaled down successor to the Chilcot process; or possibly by including such a review in the activities of the independent reviewer of terrorism

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legislation from, say, 2011.

106. In any event, in Operation Pathway the admissibility of intercept evidence in Court would make no difference to the prospects of prosecution.

### Community impact

107. In paragraphs 52-58 above I have referred to the community impact of the way in which the arrests were carried out. Here I deal with more general issues arising from the events in Operation Pathway that became very public following the arrests.

108. I have received representations from Community groups, lawyers, individuals, representative Muslim organisations at national and local level, and notably from councillors in the affected areas. Manchester City Council has been of especial assistance, and I enjoyed productive discussion and correspondence with the Leader of the Council and interested councillors.

109. A remarkably detailed consequence management programme centred on Greater Manchester Police's well-established Consequence Management Group [CMG] was put in action immediately following the arrests. One of its many tasks was to minimise any increase in community tension, and - self-evidently - to manage the consequences. This included the timely release of information to the media, community leaders and groups, statutory authorities, Members of Parliament, religious leaders and others. An extensive and relevant list of contacts was prepared prior to the arrests. I have seen the action logs, and commend the work put into this operation by the officer who led the process.

110. The complaint by Manchester's civic leaders was not about the arrests themselves, but rather that nobody in the Council had any prior knowledge of the

arrests, not even a few minutes before they commenced. In addition, they complained that the first 'serious' meeting with the police did not occur for several days following the arrests. One councillor told me that he knew about the operation taking place in his Ward from local residents, before the police telephoned him.

111. I consider, and recommend, that the level of co-operation and sharing of basic information with local authorities could be improved by adding to the responsibilities of the GMP CMG (and its equivalents in other forces) a requirement that basic advance information be given insofar as this is possible without affecting the integrity and necessary secrecy of the operation.

112. One way of achieving better community consequences might be for one or at most two senior officials in every local authority to be vetted and given the responsibility of liaison with the police should counter-terrorism arrests be anticipated. The identity of such persons generally need only be known amongst themselves and to their chief executive. Once an operation was nearing arrests, they would be expected, whilst not compromising national security, to prepare for the event and immediately make themselves available locally to assist with community consequences. I am sure that this type of process would have made a difference in Manchester.

113. The key is to have a more robust and trusting approach in communicating with lead officials in local authorities. This is needed in order to enable partnership activity to be put in place to keep Ward councillors and local community leaders properly informed, and to reassure the community in a timely and appropriate manner. Police Authorities might have a role to play in establishing improved structures in this context.

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114. It would be useful too if a government Minister were to have added to his/her responsibilities the co-ordination of the community consequences of any major counter-terrorism operation.

115. The Muslim Council of Britain drew to my attention concerns about what they say is limited activity between police forces and Muslim communities in relation to terrorism, radicalisation, and post-operational fallout. Some police forces have done a substantial amount of work in this area, and to some effect. I hope that one can assume that the Association of Chief Police Officers will continue to provide a lead on this difficult subject, and will try to ensure that the very best practices become universal.

116. One Imam described to me in graphic terms ways in which prejudice and the fear of prejudice can affect people's lives following the arrest of local Muslims – even those who, like the suspects, were new and little known in the community where they lived: for example, he said, when he takes his small sons into a toyshop he fears that other shoppers may feel prejudiced against him and his family if the little boy shows an interest in toy guns. Co-operative procedures in the community can lessen significantly the pervasiveness of prejudice.

### Colleges

117. This case has thrown up yet further examples of a known problem, that of bogus colleges, non-existent or merely vestigial courses, and poor attendance records.

118. Nobody wishes to discourage legitimate study, or the development of new and valuable colleges and courses in the public and private sectors. However, the increase in courses and the high level of applications from non-UK nationals for permission to join them requires a higher level of vigilance from the authorities than has occurred

hitherto.

119. This is a major issue. I understand that major work is being carried out by UKBA in order that abuses can be reduced and identified. Those providing offending courses should always be prosecuted, and severe penalties imposed in serious cases.

### RECOMMENDATIONS

120. In relation to Operation Pathway I make the following specific recommendations:

- 1. In future, all persons attending meetings concerned with national security, wherever they occur, should seek to avoid places where it can be assumed cameras will be present, in the absence of a clear decision that publicity would in no way harm national security.**
- 2. The police and the CPS should take immediate steps to ensure that their procedures reflect the need for legal advice to the police at an early stage. CPS expert, vetted lawyers should be informed, well before arrests take place, of ongoing inquiries likely to result in arrests. They should be asked to advise on the state of the intelligence, information and evidence as the inquiry in question progresses, with an eye on the implications and challenges post-arrest. I note that this is regarded as normal practice, and as such has been strengthened following Operation Pathway.**
- 3. All police officers involved in counter-terrorism policing should be trained in the law of arrest and its potential effect on detentions under TA2000 Schedule 8.**

- 4. There should be better recording of custody officers' reviews and their decisions.**
- 5. Consideration should be given to amending TA2000 to allow the granting of bail by a judge for a period up to the 28th day following arrest, subject to the full range of conditions available in general crime and in relation to control orders.**
- 6. The level of co-operation and sharing of basic information with local authorities should be improved by adding to the responsibilities of the police a requirement that basic advance information be given, insofar as this is possible without affecting the integrity and necessary secrecy of the operation being conducted.**
- 7. The issue of bogus colleges, courses and poor attendance records should receive fresh strategic attention in order that abuses can be identified. Those providing offending courses should always be prosecuted, and severe penalties imposed in serious cases.**

**Alex Carlile**

**October 2009**