



Scott, P. F. (2017) Authority to carry in the United Kingdom: the right to travel, the privatisation of security and the rule of law. *European Public Law*, 23(4), pp. 787-810.

This is the author accepted manuscript.

There may be differences between this version and the published version. You are advised to consult the publishers' version if you wish to cite from it.

The published version is available:

<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=EuRO2017044>

<http://eprints.gla.ac.uk/130375/>

Deposited on: 12 September 2018

# Authority to carry in the United Kingdom: the right to travel, the privatisation of security and the rule of law

Paul F Scott\*

**Abstract:** The rights to enter and exit the United Kingdom are limited in a number of ways which have in common a desire to protect the national security of the country. One of the relevant mechanisms, the legal basis of which has recently been overhauled, is that of ‘authority to carry’ schemes, which require transport companies to request permission to bring persons in and out of the UK and punish them if they do so without permission. This article outlines the relevant law and considers it from two points of view: first, the rule of law issues raised by the past and present operation of the relevant schemes and, second, the lessons of authority to carry schemes for the privatised enforcement of national security norms and the possible attenuation of the scope for legal accountability for their operation.

## 1. Introduction

The legislative response to threats to national security has evolved significantly in recent years, reflecting the growing threat posed by those who leave the United Kingdom in order to fight in conflicts abroad and, perhaps, return to the country in order to carry out terrorist attacks. Prominent now, therefore, are legal mechanisms which seek, in one way or another, to prevent particular individuals from travelling to or from the United Kingdom. To this suite of overlapping powers, the Counter-Terrorism and Security Act 2015 added another, placing on a statutory footing the power to create an ‘authority to carry’ (ATC) scheme – what in other contexts is described as a ‘no fly list’ – whereby transport carriers are required to seek authority from the executive in order to bring certain categories of person into or out of the country and penalised for doing so without authority.<sup>1</sup> This article examines the background to, as well as the nature and constitutional implications of, the current ATC scheme. It argues first that the substance of that scheme persistently blurs the boundaries of the individual’s legal rights in the name of national security – giving rise to significant rule of law concerns – and, secondly, that the placing of the burden of enforcement upon private parties in this way makes possible the decoupling of the effective exercise of state power from its practical consequences, potentially frustrating efforts to achieve accountability for the operation of the ATC scheme. Though ATC as it currently exists is subject to adequate legal control, the scheme might also have been (consistently with the terms of the 2015 Act)

---

\* School of Law, University of Glasgow, Glasgow, United Kingdom, G12 8QQ; [paul.scott@glasgow.ac.uk](mailto:paul.scott@glasgow.ac.uk). My thanks to Marta Iljadica and to two anonymous reviewers for very helpful comments on an earlier draft.

<sup>1</sup> Counter-Terrorism and Security Act 2015, sections 22-24.

operated in a manner of which that was not true. Using the scheme as an example, this paper shows that the more closely privatised security powers hew to the underlying structures and categories through which public power is exercised, the less constitutionally problematic is the privatisation of the state's security function; conversely, the creation of free-standing categories and structures would render such privatisation intolerable regardless of how it is effected in law.

## 2. Background: the right to travel, national security, and carrier sanctions

In this first part, I explain the relevant background to the ATC schemes, in terms of those limits which exist upon the right to travel in support of national security ends, the system of sanctions which compels private carriers to act as the state's agents in the execution of immigration control, and the alleged gap left by the interaction of these two phenomena which is used to justify the existence of the ATC schemes themselves.

### a. Security limitations on the right to travel

One's right to travel (by which I mean, for present purposes, the right to enter and to exit the United Kingdom) varies with the citizenship which one possesses. Though the common law position of citizens is contested,<sup>2</sup> particularly as regards the right to leave the United Kingdom,<sup>3</sup> such persons now enjoy a statutory right of abode by virtue of the Immigration Act 1971.<sup>4</sup> Those who possess that right are "free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person."<sup>5</sup> In particular, the 1971 Act provides that a person may be required to provide to an immigration officer "either a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship".<sup>6</sup> This starting point assures that the rights of UK nationals to enter and to exit the United Kingdom can be removed only

---

<sup>2</sup> See, for example, the discussion in Daniel C. Turack, 'Early English Restrictions to Travel', in Charles Henry Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of Nations*, Martinus Nijhoff (1970). Though the right is guaranteed (except to certain categories of person) by clause 42 of Magna Carta of 1215, it is not included in the 1297 version found in the statute books, which preserves only the related clause referring specifically to the right of merchants.

<sup>3</sup> Blackstone said that "[b]y the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the King's leave" Blackstone, *Commentaries*, I, 265. David Williams observes that Blackstone's claim is less absolute than it may seem: "he retracts from this by reciting categories of people under restraint even under the commonly, and then concludes, rather less certainly, that 'at present every body has, or *at least assumes*, the liberty of going abroad when he pleases.'" David W Williams, 'British Passports and the Right to Travel', (1974) *International and Comparative Law Quarterly* 642, 646.

<sup>4</sup> Immigration Act 1971, s.2.

<sup>5</sup> Immigration Act 1971, s.1(1).

<sup>6</sup> Immigration Act 1971, Schedule 2, paragraph 4(2)(a).

under statutory authority which strips those persons of their nationality and associated right of abode, or which – leaving citizenship in place – either creates an explicit exception to the right of abode, or impliedly repeals the 1971 Act to the extent that they are incompatible. It is possible, however, that the 1971 Act is a ‘constitutional statute’ and so, in accordance with the rule in *Thoburn*, liable only to express (rather than merely implied) repeal.<sup>7</sup> Several statutes provide relevant authority in the context of national security. The British Nationality Act 1981 permits deprivation of citizenship where the Secretary of State is satisfied that to do so would be “conducive to the public good”.<sup>8</sup> This applies, however (subject to one highly exceptional set of circumstances)<sup>9</sup> only to dual-citizens, it not being permitted in the normal course of events to exercise the power if doing so would have the effect of making a person stateless.<sup>10</sup> To these powers, the Counter-Terrorism and Security Act 2015 adds the possibility of making a Temporary Exclusion Order (“TEO”), which requires an individual not to return to the United Kingdom except in accordance with a permit issued by the Secretary of State.<sup>11</sup> The criteria for the making of such an order include that the individual has the right of abode in the United Kingdom; that he or she is a person who would otherwise, by virtue of the 1971 Act, be entitled to come to the country at will, subject only to the immigration controls described above.<sup>12</sup> From the point of view of limiting the citizen’s right of exit, conversely, the key mechanism is that of Terrorist Prevention and Investigation Measures (“TPIMs”) which can be imposed on both nationals and non-nationals by the Secretary of State where certain conditions are met, the most important being that “the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity” and that the imposition of the TPIM is necessary for “purposes connected with protecting members of the public from a risk of terrorism”.<sup>13</sup> Such measures can include ‘travel measures’, which place restrictions on the individual’s ability to leave a specified area, which must be one of the United Kingdom, Great Britain, or Northern Ireland.<sup>14</sup> The restrictions which might be imposed include, but are not limited, to a requirement not to

---

<sup>7</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin). See now on the question of implied repeal in the national security context *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib 15\_110-CH, [50]-[53].

<sup>8</sup> British Nationality Act 1981, s.40.

<sup>9</sup> British Nationality Act 1981, s.40(4A), which permits naturalised citizens to be deprived of their citizenship if the Secretary of State is satisfied the deprivation of that person’s citizenship is “conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory” and has reasonable grounds for believing that the person in question “is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory”. See also *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62.

<sup>10</sup> British Nationality Act 1981, s.40(4).

<sup>11</sup> Counter-Terrorism and Security Act 2015, s.2. For commentary, see Jessie Blackbourn and Clive Walker, ‘Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015’ (2016) 79 *Modern Law Review* 840.

<sup>12</sup> Counter-Terrorism and Security Act 2015, ss.2(2)-(7).

<sup>13</sup> Terrorist Prevention and Investigation Measures Act 2011, ss.2 and 3. On the 2011 Act, see Clive Walker and Alexander Horne, ‘The Terrorism Prevention and Investigation Measures Act 2011: One Thing but Not Much the Other?’ [2012] *Criminal Law Review* 421, and Helen Fenwick, ‘Redefining the role of TPIMs in combating “home grown” terrorism within the widening counter terrorism framework’ [2015] *European Human Rights Law Review* 41.

<sup>14</sup> Terrorist Prevention and Investigation Measures Act 2011, Schedule 1, para 2.

leave the area without the permission of, or without giving notice to, the Secretary of State,<sup>15</sup> or to surrender one's passport.<sup>16</sup> This last power exists alongside one under the 2015 Act, exercisable only for short periods, to search for, seize and retain the travel documents of persons suspected of involvement in terrorism.<sup>17</sup> Withdrawal or refusal of a UK passport is an exercise of a prerogative power,<sup>18</sup> exercisable (according to current Home Office policy) in relation to, amongst others, "a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest."<sup>19</sup> Unlike the various measures canvassed above, the withdrawal of a passport (which leaves citizenship intact) does not have a strict legal effect upon the existence of the right to enter or leave the United Kingdom.<sup>20</sup> In practice, however, a passport will often be the sole acceptable means of proving one's identity and nationality; though the 1973 Act makes references to "some other document" which might be accepted in lieu, there is no obligation to accept anything else.<sup>21</sup> Moreover, even if some other identification is acceptable to the domestic immigration authorities, there is no reason that it must suffice for their foreign equivalent, or for an airline or other carrier. For those reasons, the withdrawal or refusal of a passport will frustrate that right to such an extent that it probably ceases to have any value whatsoever.<sup>22</sup>

EEA nationals (those of the EU states and the four non-EU EEA states) and their family members enjoy a prima facie right to enter the United Kingdom under the Immigration (European Economic Area) Regulations 2006.<sup>23</sup> There is an exception to this basic position where that person's exclusion or removal is "justified on grounds of public policy, public security or public health".<sup>24</sup> Though additional limitations are placed upon the exclusion or removal of those with a permanent right of residence,<sup>25</sup> those with ten years' continuous residence,<sup>26</sup> and those under the age of 18,<sup>27</sup> the basic scheme requires

---

<sup>15</sup> Terrorist Prevention and Investigation Measures Act 2011, Schedule 1, para 2(1) and (2).

<sup>16</sup> Terrorist Prevention and Investigation Measures Act 2011, Schedule 1, para 2(3)(d), (4) and (5). In *XH v Secretary of State for the Home Department* [2016] EWHC 1898 (Admin), the High Court rejected the claim that, in enacting the 2011 Act, Parliament intended to abrogate the prerogative power to use passports to manage the threat of terrorism, and that to use the prerogative to that end was therefore a subversion of the statutory scheme.

<sup>17</sup> Counter-Terrorism and Security Act 2015, s.1 and Schedule 1.

<sup>18</sup> On which see *R v Secretary Of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811.

<sup>19</sup> Theresa May, The issuing, withdrawal or refusal of passports, HC Deb 25 April 2013, vol 561 col 68-70WS.

<sup>20</sup> For a discussion of the legal effect of passports, see HWR Wade, *Constitutional Fundamentals*, Sevens & Sons (1980), 50-3.

<sup>21</sup> See the example of journalist Ian Colvin, who attempted to board a plane at London City Airport as part of an experiment testing the possibility of international travel without a passport. Colvin was refused permission to board on the basis that the alternative documentation he offered was insufficient to prove the necessary facts. The matter is discussed in in JUSTICE, *Going Abroad – A Report on Passports*, Barry Rose Publishers (1974), [7].

<sup>22</sup> A point expanded on below. See also the discussion in *R (MR) v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin), where it was held that cancellation of a passport engaged rights under EU law: "the avowed aim of the cancellation was to make it very difficult for MR to travel abroad, and it is clear that it would have that effect" ([16]).

<sup>23</sup> Immigration (European Economic Area) Regulations 2006, reg 11(1).

<sup>24</sup> *Ibid*, 19(1) and (3).

<sup>25</sup> *Ibid*, reg 21 (3)

<sup>26</sup> *Ibid*, reg 21(4)

<sup>27</sup> *Ibid*.

that a decision to exclude or remove be proportionate,<sup>28</sup> and be based solely on the person's conduct,<sup>29</sup> which must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."<sup>30</sup> Third country nationals require leave to enter the United Kingdom, either with or without a visa. One ground on which a person who requires leave to enter the United Kingdom can be refused it is where the Secretary of State has personally directed that the person's exclusion is "conducive to the public good".<sup>31</sup> These powers of exclusion exist alongside similar powers of deportation.<sup>32</sup> And with the exceptions of the powers to strip citizenship and to make a Temporary Exclusion Order and the prerogative power to withdraw or refuse passports, the various measures described above which have the aim of preventing a person from exiting the United Kingdom apply equally to EEA and third country nationals.<sup>33</sup> The right to travel is subject, in a number of ways, to more or less significant restriction on security grounds.

## **b. Carrier sanctions**

Several of the measures described above are part of the system of immigration control in the United Kingdom, as enforced by the state. But the legal framework relevant to the question of the right to travel does not rely purely upon the state to manage the entry of persons into the United Kingdom, seeking instead to prevent persons who will not be admitted from being transported to the United Kingdom in the first place. These rules form a second element of the background to authority to carry schemes. The rules were originally contained in the Immigration (Carriers' Liability) Act 1987, which introduced a system of fines for carriers who transported to the United Kingdom persons who required leave to enter and could not, on request, produce a valid passport or equivalent document and – if required – a valid visa.<sup>34</sup> The Act was widely criticised for preventing those who might have a valid claim to asylum in the United Kingdom from arriving there in order to make that claim. In the absence of valid documentation "a refugee's claim to asylum" it was said, would "for all practical purposes, be determined by an employee of an airline or shipping company at the port of embarkation."<sup>35</sup> Apart from its specific effect, on refugees, the second line of criticism aimed at the 1987 Act was that it constituted the privatisation of immigration control, which would now be carried out not by agents of the state – with associated lines

---

<sup>28</sup> Ibid, reg 21(5)(a).

<sup>29</sup> Ibid, reg 21(5)(b).

<sup>30</sup> Ibid, reg 21(5)(c).

<sup>31</sup> Immigration Rule 320(6)

<sup>32</sup> Immigration (European Economic Area) Regulations 2006, reg 19(3); Immigration Rules, rule 36.

<sup>33</sup> There also exists – in relation, it would seem, to all three groups under discussion – at least a theoretical possibility of employing the prerogative powers to prevent the exit of a person from the United Kingdom via the writ of *ne exeat regno*.

<sup>34</sup> These supplemented related rules under the Immigration Act 1971 which required carriers to pay the costs associated with the detention, accommodation and maintenance of passengers refused entry on arrival in the United Kingdom.

<sup>35</sup> Anne Ruff, The Immigration (Carriers' Liability) Act 1987, [1989] *Public Law* 222, 222.

of accountability for breaches of the relevant legal frameworks – but by those whose co-operation was secured under threat of financial sanction. The UK appeared, said the Refugee Council, to be seeking to “distance itself, both geographically and legally, from immigration control.”<sup>36</sup> The relevant rules, taking the same basic form, are now contained in the Immigration and Asylum Act 1999, which provides that if a person who requires leave to enter the United Kingdom is brought to it by ship or aircraft, and fails to produce either an immigration document (usually a passport)<sup>37</sup> “which is in force and which satisfactorily establishes his identity and his nationality or citizenship” or a visa (if one is required),<sup>38</sup> then the owner of the ship or aircraft may be charged, by the Secretary of State, a sum of £2000.<sup>39</sup> There is a defence where the individual can be shown to “have produced the required document or documents to the owner or his employee or agent when embarking on the ship or aircraft for the voyage or flight to the United Kingdom”,<sup>40</sup> unless the falsity of the document, or the fact that it does not relate to the person in question, is “reasonably apparent”.<sup>41</sup> These rules mean that those without (or incapable of proving) the right to enter the United Kingdom – including those excluded for security reasons – will not in normal circumstances be brought to the country, making it highly unlikely that they will succeed in arriving in Britain in the first place.<sup>42</sup> To buttress that scheme, the 1999 Act also imposed penalties on those who transported to the United Kingdom ‘clandestine entrants’, even if they did so unknowingly.<sup>43</sup>

### c. Authority to carry

The various powers described above are nevertheless considered to leave a gap in the regime by which the right to travel is limited on the grounds of security:

The visa regime is only applicable to those who require a visa to travel to the UK, and despite the existence of an order excluding or deporting a person from the UK, the existence of an UN [*sic*] or EU travel ban or a refusal of leave to enter in advance of travel, an individual who does not require a

---

<sup>36</sup> See Anne Ruff, ‘The Immigration (Carriers’ Liability) Act 1987’, [1989] *Public Law* 222 and Frances Nicholson, ‘Implementation of the Immigration (Carriers’ Liability) Act 1987: privatising immigration functions at the expense of international obligations?’ (1987) *International and Comparative Law Quarterly* 586, as well as the comments of Simon Brown LJ in *R v Uxbridge Magistrates’ Court, ex p Adimi* [2001] QB 667, 674B-C.

<sup>37</sup> Immigration and Asylum Act 1999, s.40(9).

<sup>38</sup> *Ibid*, s.40(1).

<sup>39</sup> *Ibid*, s.40(2).

<sup>40</sup> *Ibid*, s.40(4).

<sup>41</sup> *Ibid*, s.4(5). On this question, see *Ryanair Limited v Secretary of State for the Home Department* [2016] EWFC B5.

<sup>42</sup> For an interesting consideration of the legitimacy of the coercion lying behind carrier sanctions, see Tendayi Bloom and Verena Risse, ‘Examining hidden coercion at state borders: why carrier sanctions cannot be justified’, (2014) 7 *Ethics & Global Politics* 65.

<sup>43</sup> In *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, the Court of Appeal decided that the relevant provisions were incompatible with Article 6 of, and Article 1 of Protocol 1 to, the ECHR. The incompatibility was remedied by the Nationality, Immigration and Asylum Act 2002. The operation of the amended scheme was considered by the Court of Appeal in *Bolle Transport BV v Secretary of State for the Home Department* [2016] EWCA Civ 783.

visa for the UK may still be able to travel. Carriers will not always be aware of an exclusion or deportation order, travel ban or other restriction on a person's travel and so would not be in a position to deny boarding.<sup>44</sup>

A second problem, identified at various points in the preparatory material, is that immigration controls exercised within the UK, do not themselves prevent those who pose a threat to the plane itself from boarding that plane in the first place.<sup>45</sup> For these reasons there exist, alongside the mechanisms described above, rules about the authority of these carriers to transport individuals to the United Kingdom, found in successive 'authority to carry schemes'. These schemes have important implications for the right to travel, and offer interesting lessons about the mechanisms by which the security of the United Kingdom is protected, now and – perhaps – in the future.<sup>46</sup> They nevertheless are implemented in a manner which is – as a matter of both substance and procedure – vulnerable to criticism on rule of law grounds. It is to those schemes we now turn.

### **3. ATC, the right to travel and the rule of law**

Two ATC schemes have so far been implemented – the 2012 and 2015 schemes – the first under the problematic authority of the Nationality, Immigration and Asylum Act 2002,<sup>47</sup> and the second under Counter-Terrorism and Security Act 2015.<sup>48</sup> Each scheme requires carriers to request authority to transport persons to (and, later, from) the United Kingdom, penalising them for failures to request such authority or for transporting a person where such authority has been refused, though the two schemes differ slightly in scope – first as regards the carriers to which they apply. The 2012 scheme specified that it applied only to air passenger carriers “operating to the UK”, and only to those which had been issued with a form known as IS72, issued under Schedule 2 to the Immigration Act 1971,<sup>49</sup> which “acts as the written notice requiring submission of passenger data to e-Borders”,<sup>50</sup> this being a system for gathering data on those travelling to Britain prior to their arrival in order to facilitate (security) checks and (if necessary) to prevent travellers from leaving their point of departure. The 2015 scheme applies to “to all carriers operating to and from the UK that have been required by the Secretary of State or an

---

<sup>44</sup> Home Office, Authority to Carry Scheme 2015, [3].

<sup>45</sup> See, e.g., Home Office, Aviation Security: Consultation on a Statutory Authority to Carry Scheme (September 2011), 8 and 10.

<sup>46</sup> For consideration of these and related issues in the American context, see Anya Bernstein, ‘The hidden costs of terrorist watch lists’ (2013) 61 *Buffalo Law Review* 461 and Martin Rudner, ‘Intelligence-Led Air Transport Security: Pre-Screening for Watch-Lists, No-Fly Lists to Forestall Terrorist Threats’ (2015) 28 *International Journal of Intelligence & Counterintelligence* 38.

<sup>47</sup> Nationality, Immigration and Asylum Act 2002, s.124.

<sup>48</sup> Counter-Terrorism and Security Act 2015, ss.22-24.

<sup>49</sup> Paras 27 and 27B

<sup>50</sup> Home Office, Authority to Carry Scheme 2012, [10].



immigration officer under paragraph 27 and 27B of Schedule 2 to the Immigration Act 1971 or by a police officer under section 32 of the Immigration, Asylum and Nationality Act 2006, to submit information comprising passenger or crew information.”<sup>51</sup> The new duties associated with the ATC schemes therefore, in both cases, build not only on prior immigration duties – those discussed above, now found in the 1999 Act – but also, and more directly, on a duty to provide information under the 1971 Act<sup>52</sup> (and regulations made under it)<sup>53</sup> which applies quite separately from, but overlaps with, the requirements of the ATC scheme. Two differences in the scope of the 2012 and 2015 schemes are evident: the first is that a new power in the 2015 Act to apply ATC schemes to flights leaving the United Kingdom has been acted upon. The second is the reference to the 2006 Act: the provision cited permits a police officer to require the owner or agent of a ship or aircraft to provide “passenger or service information” where he or she thinks it necessary for “police purposes”,<sup>54</sup> defined to include “the prevention, detection, investigation or prosecution of criminal offences” and “safeguarding national security”.<sup>55</sup> In practice, however, it seems that a requirement to provide information under the 2006 Act will usually be supplementary to – rather than instead of – one under the 1971 Act, and so the effective scope of the scheme is not, on this basis, significantly greater in its current form than in its previous incarnation. In recognition of the overlap between the various requirements to provide information, a penalty cannot be imposed under the relevant ATC regulations where a penalty has been imposed under the regulations made under the new provision in Schedule 2 to the 1971 Act or under the relevant provisions of the 2006 Act.<sup>56</sup> There are, then, multiple layers to the state’s regulation of carriers’ behaviour: sanctions for carrying those with inadequate documentation or permissions; sanctions for failing to supply passenger information; and, in turn, sanctions for transporting those in respect of whom authority to carry is required by the terms of the scheme in force at a given moment. What would have been difficult to do in a single bound – place duties for enforcement of national security norms upon private transport carriers – has instead been achieved by layering duties one on top of the other,

---

<sup>51</sup> Home Office, Authority to Carry Scheme 2015, [10].

<sup>52</sup> Immigration Act 1971, Schedule 2, para 27, as amended by the Immigration, Asylum and Nationality Act 2006 and the Counter-Terrorism and Security Act 2015. The 2015 Act also inserted into Schedule 2 the 1971 Act a new paragraph 2BB permitting regulations to be made imposing penalties for failure to provide the various information which might be required from carriers, with regulations made under that provision (The Passenger, Crew and Service Information (Civil Penalties) Regulations 2015/961) coming into force on the same day as the 2015 scheme.

<sup>53</sup> The Immigration and Police (Passenger, Crew and Service Information) Order 2008/5, as modified by the Immigration and Police (Passenger, Crew and Service Information) (Amendment) Order 2015/859.

<sup>54</sup> Immigration, Asylum and Nationality Act 2006, s.32(1)-(4).

<sup>55</sup> Immigration, Asylum and Nationality Act 2006, s.32(5)(b), and Immigration and Asylum Act 1999, s.21(3). The provision of such information – Advanced Passenger Information (‘API’) – can also be required under Schedule 7, para 17 of the Immigration Act 2000 (as amended by the Anti-terrorism, Crime and Security Act 2001), not further discussed in the present piece.

<sup>56</sup> Nor where proceedings have been instituted under these provisions. The Authority to Carry Scheme (Civil Penalties) Regulations 2015, reg 3(5)(b) and (6).

such that the additional requirements of the ATC scheme can plausibly be characterised a relatively minor additional burden.

#### **a. The legal basis and scope of ATC schemes**

Both the 2002 and 2015 Acts seek to distinguish the grant and refusal of such authority in relation to a particular person from the question of whether that person has, in law, the right to enter the country, and it is here that the rule of law implications of the ATC schemes become evident. The 2002 Act provides that “[t]he grant or refusal of authority under an authority-to-carry scheme shall not be taken to determine whether a person is entitled or permitted to enter the United Kingdom”;<sup>57</sup> the 2015 Act makes a similar but distinct point (and in more forceful language), providing that “[t]he grant or refusal of authority under an authority-to-carry scheme does not determine whether a person is entitled or permitted to enter the United Kingdom.”<sup>58</sup> These claims (notably, the latter makes no mention of rights to leave the United Kingdom) are correct – in neither case are the legal rights of abode, to enter, remain in, or exit the United Kingdom directly and strictly affected by either that statute or the related ATC scheme. Nevertheless, there is a certain unreality about these statutory protestations, which mirrors the point made above about the instrumentalisation of the prerogative power to issue passports for the promotion of national security ends. When one is deprived of one’s passport, one retains the right to enter and leave the country: passports facilitate the exercise of that right but do not confer it. Here, as discussed further below, some of those in respect of whom authority to carry will be refused to carriers are people who have no right to enter or to leave the United Kingdom (or, alternatively, whose prima facie right to enter or exit has been temporarily and contingently suppressed by some over-riding legal mechanism). In respect of people in either of those categories, the ATC scheme can be understood as an additional enforcement mechanism for an underlying rule; one which is superior to the mechanisms which otherwise exist (such as refusing a person leave to enter the United Kingdom once they have already arrived in it, for example) and will in many cases be the primary enforcement mechanism because those who would otherwise enforce the relevant rules are not in a position to do so. Nevertheless, in some cases, at least, authority to carry will be, under the scheme, refused in respect of persons who have, as a matter of law, the right either to enter or to leave the country. The authority to carry scheme therefore prevents them from exercising a right which it simultaneously and explicitly purports to leave intact. These statutory clarifications of the strict legal position potentially mislead, a person’s right to enter and exit being rendered largely – perhaps entirely – illusory if authority to bring that person into or out of the country is refused to any and all those who have the physical capacity to do so. And where

---

<sup>57</sup> Nationality, Immigration and Asylum Act 2002, s.124(8).

<sup>58</sup> Counter-Terrorism and Security Act 2015, s.22(7).

those who are refused a passport (or whose passport is withdrawn) can in theory nevertheless enter and exit the country using alternative documentation (subject to what is said below about that possibility), those in respect of whom authority to carry is refused have no such option. In this way, the ATC schemes (and the statutes which stand behind them) not only creates an additional barrier to the exercise of rights, but risks muddying the water as to the content of those rights in the first place, in a manner which is inimical to the rule of law values of certainty and legality. This tension between the legal and the practical effects of the ATC scheme – which promotes national security only by restricting rights which, as a matter of law, are left untouched by it – is a central feature of the legal framework under consideration, and is evidenced most acutely by the evolution of the ATC schemes’ legal basis and scope over time.

The 2012 ATC scheme did not stand on a clear and exhaustive statutory footing, being regulated by (but not created by or under) the Nationality, Immigration and Asylum Act 2002,<sup>59</sup> which defined an ‘authority to carry scheme’ as “a scheme operated by the Secretary of State which requires carriers to seek authority to bring passengers to the United Kingdom”<sup>60</sup> and provided that regulations might be made imposing penalties upon those carriers which carried a person to the United Kingdom where permission to carry that person had not been sought or had been refused.<sup>61</sup> The only features of an ATC scheme prescribed by the statute was that it specify the class of carrier to which it applied (which might be “defined by reference to a method of transport or otherwise”)<sup>62</sup> and the class of passengers to which it applied (which might be “defined by reference to nationality, the possession of specified documents or otherwise”).<sup>63</sup> Though the regulations made under the statute were to be made via the affirmative resolution procedure,<sup>64</sup> there was no direct provision for Parliament to approve the substance of the scheme itself, which was to be laid before Parliament where regulations under the Act were being made and identified within those regulations.<sup>65</sup> No scheme was in fact created in the decade following the enactment of these provisions. Eventually, however, the Security and Travel Bans Authority to Carry Scheme 2012 was produced; in line with the statutory regime described, penalties for failure to request authority were given effect by regulations.<sup>66</sup> This method of proceeding raises important and still unresolved rule of law issues. The statutory framework reflects a belief that the imposition of a monetary penalty requires clear legal authority and that the authority in question must ultimately derive from an

---

<sup>59</sup> Nationality, Immigration and Asylum Act 2002, s.124.

<sup>60</sup> Ibid, s.124(2).

<sup>61</sup> Ibid, s.124(1).

<sup>62</sup> Ibid, s.124(3)(a).

<sup>63</sup> Ibid, s.124(3)(b).

<sup>64</sup> Ibid, s.124(9).

<sup>65</sup> Ibid, s.124(5)(b).

<sup>66</sup> The Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012, SI 2012/1894.

explicit statutory provision. What seems implicit in it, conversely, is the idea that the ATC scheme itself need not so derive; that, given that the “grant or refusal of authority under an authority-to-carry scheme shall not be taken to determine whether a person is entitled or permitted to enter the United Kingdom”, there was no need for the ATC scheme to have the same statutory grounding as did the penalties for breaching it. The basic common law position is that every interference with an established public law or private law right – that is, an act which implicitly or explicitly modifies the distribution of legal rights and obligations – must have some legal basis.<sup>67</sup> Where no legal authority is required to do some act, it is because that act does not in fact alter such obligations;<sup>68</sup> it does not alter the normative position of persons (as does the making of a contract, for which the central government appears to find its authority in the third source powers deriving from the corporate status of the Crown), nor does it represent an interference with an established right possessed by a person. In their disclaimers, quoted above, the 2002 and 2015 Acts protest that they do not affect the legal rights of individuals; if this is true, it must follow that they do not require a clear legal basis. My argument here is that this logic is wrong, that its wrongness is in fact admitted by the use to which the 2002 Act was eventually put, and that said wrongness carries over into the 2015 scheme, to which these rules of law issues do not, for reasons explained below, apply with the same force.

The 2012 scheme applied to all third-country nationals, EEA nationals (and accompanying family members whether EEA or third-country nationals) who were “subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security” and, finally, those listed by either the United Nations or the EU as being subject to travel restrictions because of an association with either Al-Qaeda or the Taliban.<sup>69</sup> Other EEA nationals, and all British nationals, were excluded from its scope.<sup>70</sup> Why? Because, it is submitted, notwithstanding the protestations of the 2002 Act, such persons have – as described in part 1 of this article – a right to enter the United Kingdom, to prevent them from doing so would effectively negate that right, and the non-statutory nature of the 2012 ATC scheme meant that it was incapable of doing so. That is: individuals who are possessed of UK nationality, we have seen above, enjoy a right of abode and so “shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance” except as required to prove identity and nationality. This statutory right may of course be

---

<sup>67</sup> See, more famously, *Entick v Carrington* (1765) 29 St Tr 1029.

<sup>68</sup> One of the difficulties of this position, which the common law has not yet managed to resolve, is that many things which do not alter or interfere with legal rights or obligations nevertheless harm the interests of individuals: see, e.g., Adam Perry, ‘The Crown’s Administrative Powers’, (2015) 131 *Law Quarterly Review* 652.

<sup>69</sup> Home Office, *Authority to Carry Scheme 2012*, [12]. The schemes in question are not the subject of consideration here, though have been subjected to very severe criticism, primarily upon due process grounds. See, for example, Christopher Michaelsen, ‘The Security Council’s Al Qaeda and Taliban Sanctions Regime: “Essential Tool” or Increasing Liability for the UN’s Counterterrorism Efforts?’ (2010) 33 *Studies in Conflict and Terrorism* 448.

<sup>70</sup> *Ibid*, [13] and [14].

limited by later incompatible statute, just as it is limited procedurally by the statute which confers it. But the 2012 ATC scheme was not statutory: it was an administrative act, albeit one acknowledged and partly regulated by statute. As such, the use of the scheme in a manner incompatible with the right of abode (and other rights to enter the UK) would – it would seem – have been unlawful, if not in the mere application of the scheme, then certainly in the case of refusal of authority to carry a person with the right to enter the UK. The same applies to EEA nationals and their family members.<sup>71</sup> The use to which the 2012 scheme was put in this way betrays the emptiness of the 2002 Act’s protestation that it does not determine the right to enter the UK.

Now, however, the legal basis of ATC schemes is more concrete and so such a scheme is capable – as the 2012 scheme was not – of direct interference with the right to travel. The Counter-Terrorism and Security Act 2015 provides that the Secretary of State “may make one or more schemes requiring a person (a ‘carrier’) to seek authority from the Secretary of State to carry persons on aircraft, ships or trains” which are arriving to or leaving from the United Kingdom,<sup>72</sup> and that such a scheme comes into force “in accordance with regulations made by the Secretary of State by statutory instrument.”<sup>73</sup> Two points of contrast are obvious. The first is that noted above: the scope of possible ATCs has been expanded so that it now encompasses not only those entering the United Kingdom, but also those leaving, and so implicates not only the right of entry but also that of exit. The second is that this constitutes clear statutory authority of a sort whose absence in the 2002 legislation was regrettable. The 2015 Act mandates certain features of a scheme made under it: it must specify the classes of carrier to which it applies, the classes of person in respect of whom authority to carry must be sought, and the classes of person in respect of which it may be refused.<sup>74</sup> Only the third of these is limited by the statute, which provides that a scheme may specify a class of persons in respect of whom authority may be refused “only if it is necessary in the public interest”.<sup>75</sup> No requirement of necessity is imposed, however, on the refusal of authority, nor is a requirement of proportionality imposed on either the inclusion of categories of person within the scheme or on the refusal of authority to carry in respect of particular persons. A new scheme – the Authority to Carry Scheme 2015 – was brought into force by regulations made under the new provision in the 2015 Act, the Scheme which they brought into force (at the end of March 2015) having been laid before Parliament at the beginning of that month, so that Parliament – as

---

<sup>71</sup> Though the point was never determined by a court, related provisions within the Immigration (Carriers’ Liability) Act 1989 were held by the High Court not to represent a restriction on individuals’ freedom to travel under EU law in *R v Secretary of State for the Home Department, ex parte Hoverspeed* [1999] INLR 591. This suggests that the mere application of the 2012 scheme would not have represented an interference with the relevant rights.

<sup>72</sup> Counter-Terrorism and Security Act 2015, s.22.

<sup>73</sup> *Ibid*, s.23(1).

<sup>74</sup> *Ibid*, s.22(2).

<sup>75</sup> *Ibid*, s.22(3).

required by the statute<sup>76</sup> – had the opportunity to scrutinise the scheme before giving its (affirmative) consent to the regulations.<sup>77</sup> Penalties for breach of the scheme were set out in separate regulations.<sup>78</sup> The 2015 scheme requires carriers to whom it applies to do the following in respect of those passengers and crew to whom it applies: seek authority to carry a person, provide specified information by a specified time before travel, provide and receive information in a specified manner and form, and not carry a person they have been refused authority to carry.<sup>79</sup> A breach of any of these requirements – without reasonable excuse<sup>80</sup> – can expose the carrier to the possibility of civil punishment of up to £50,000.<sup>81</sup> The 2015 scheme is broader than the 2012 scheme also in this respect: it applies to “all passengers and crew travelling, or expected to travel, to or from the UK on a class of carrier to which this scheme applies” except where the carrier is supplying the information voluntarily, in which case it applies only to those passengers in respect of whom information is supplied by the carrier.<sup>82</sup> In practice, this means that the details of almost all passengers – including UK and EEA nationals – must be given to the Home Office, and authority to carry those persons sought from it in respect of all of them. The current variant of the scheme therefore operates within a framework which, unlike its predecessor, is capable of being lawfully used to negate the existence of prima facie rights of entry, and which creates greater opportunity for both legal and political accountability. Nevertheless, it continues to be the case that the detail of the scheme is not found within a piece of primary or secondary legislation. There is still no explicit derogation from or limitation of the rights of abode and entry: the statutory framework denies that the scheme it creates has (these) legal effects even though it distinguishes from its predecessor in being capable of producing such effects. This denial is, though, less plausible here than it was when offered in the 2002 Act. The issue of legality has therefore been in part resolved, though it must be doubted that the statutory authority is sufficiently explicit to override (as it in practice does) what is undoubtedly a constitutional right. The issue of clarity – of the contradiction between the strict legal effect of the ATC scheme and its practical significance – remains, however, live.

#### **b. Refusal of authority to carry**

The details of those to whom the scheme applied having been provided, then authority to carry, the 2012 scheme said, “will be refused” in respect of those falling into a variety of categories:<sup>83</sup> EEA

---

<sup>76</sup> *Ibid*, s.23(4)(a).

<sup>77</sup> The Counter-Terrorism and Security Act 2015 (Authority to Carry Scheme) Regulations 2015, SI 2015/997.

<sup>78</sup> The Authority to Carry Scheme (Civil Penalties) Regulations 2015, SI 2015/957.

<sup>79</sup> Home Office, Authority to Carry Scheme 2015, [6].

<sup>80</sup> The Authority to Carry Scheme (Civil Penalties) Regulations 2015, reg 3(5)(a).

<sup>81</sup> *Ibid*, reg 3(1),(2) and (7).

<sup>82</sup> Home Office, Authority to Carry Scheme 2015, [13].

<sup>83</sup> *Ibid*, [15] (emphasis added).

nationals subject to an exclusion or deportation order on public security grounds; third-country nationals excluded on national security grounds, subject to a deportation order on national security grounds, or “who have been or would be refused a visa because of national security”; and those “listed by the United Nations or European Union as being subject to travel restrictions due to their association with Al Qaeda or the Taliban”.<sup>84</sup> It seems that, in respect of all others, authority would be granted – no discretion remained to be exercised. The overall effect of the categories to whom the 2012 scheme applied and those in respect of whom authority would be refused was to tie the scheme very closely to considerations of national security, and in a way which mirrored the manifestation of national security concerns in immigration law. The automatic nature of the refusal cements that view: the 2012 scheme provided, in its substance, a new mechanism of enforcement for that portion of immigration law aimed at protecting the United Kingdom’s national security. The question is treated more subtly by the 2015 scheme which, rather than fettering the discretion of the decision-maker (as the 2012 scheme purported to do), identifies categories of person in respect of whom authority to carry “may be refused”, the categories differing as between carriage to and from the United Kingdom.<sup>85</sup> In the former case, those newly encompassed include persons subject to a TEO under the 2015 Act, individuals who are “assessed by the Secretary of State to pose a direct threat to the security of an aircraft, ship or train or persons or property on board”,<sup>86</sup> and individuals who are “using an invalid travel document that is, or appears to be, a passport or other document which has been lost, stolen or cancelled, has expired, was not issued by the government or authority by which it purports to have been issued or has undergone an unauthorised alteration.”<sup>87</sup> The first of these categories maintains the link, noted above, between refusal of authority and national security. The third, however, widens it out to render it a more general immigration provision. Even those categories, however, which carry over from the 2012 to the 2015 scheme have been widened: where the 2012 version spoke of “EEA nationals and accompanying/joining third country national family members of EEA nationals who are the subject of an exclusion or deportation order under the Immigration (European Economic Area) Regulations 2006 because they pose a threat to public security” this last qualifier has been removed in the 2015 version.<sup>88</sup> Similarly, the 2012 version applies to persons who have been or are in the process of being excluded from the UK “under rule 320(6) of the immigration rules on grounds of national security”; the equivalent provisions in the 2015 scheme excludes the reference to national security which, due to the phrasing of the relevant

---

<sup>84</sup> Ibid, [15]. The Immigration Act 2016 amends section 8B of the Immigration Act 1971 (originally inserted by the Immigration and Asylum Act 1999). The section provides *inter alia* that a person identified in UN Security Council resolution or instrument of the Council of the EU requires or recommends that a person not be admitted to the UK, that person is an ‘excluded person’ and must be refused leave to enter or remain. The 2016 amendment makes that general rule subject to the requirements of the ECHR and the Refugee Convention.

<sup>85</sup> Ibid, [14] and [15] (emphasis added).

<sup>86</sup> Previously dealt with under the Aviation Security Act 1982.

<sup>87</sup> Ibid, [14].

<sup>88</sup> Ibid, [14]. Cf, Home Office, Authority to Carry Scheme 2012, [15].

immigration rule, means that authority to carry is liable to be refused in respect of all those whose exclusion is “conducive to the public good”, even on non-national security grounds.<sup>89</sup> The apparent introduction of a discretion to refuse authority is therefore accompanied by a significant broadening of the categories of person in respect of whom it might be exercised, which has the effect of weakening the link between the scheme and the ends of national security. The new iteration is liable to operate as a more general scheme for the enforcement of immigration norms, albeit broader and more punitive than the underlying scheme of carrier sanctions which has immigration as its direct and explicit end.

The new power to refuse authority to carry from the United Kingdom may, the 2015 scheme provides, be exercised in respect of persons in a number of categories:<sup>90</sup> those subject to UN or EU travel restrictions, persons under the age of 18 “whom the Secretary of State has reasonable grounds to believe are intending to leave the UK for the purposes of involvement in terrorism-related activity”, those whose travel documents are being retained under the 2015 Act, those subject to post-custodial licence conditions following conviction for a terrorism-related offence which prohibit travel from the United Kingdom, those subject to TPIM travel measures preventing travel outside the United Kingdom, and, finally:

Individuals in respect of whom the Secretary of State has cancelled a passport issued to the person or has not issued a passport on the basis that the person to whom the passport was issued or who applied for the passport has or may have been, or will or may become, involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities.<sup>91</sup>

Several points can be made about these categories. The first is that they cleave more closely to the national security purpose, relating in several cases to objective categories, those falling within which are already prohibited from leaving the country by their possession of whichever status brings them within the scheme. The effect is that the extra layer of bureaucracy is, in relation to those falling within those categories, exactly co-extensive with that below it – or indeed capable of substituting for it – such as to be reasonably conceptualised as a mere enforcement mechanism in relation to those against whom enforcement might otherwise be difficult or impossible. This highlights an important distinction between those entering and those exiting the United Kingdom: when authority to carry is refused in relation to the latter, the effect is to prevent them leaving the jurisdiction. This is particularly important if

---

<sup>89</sup> Ibid, [14]. Cf, Home Office, Authority to Carry Scheme 2012, [15].

<sup>90</sup> Ibid, [15].

<sup>91</sup> Ibid.



– as is often the case – there are no immigration checks within the United Kingdom, these being carried out at the destination rather than point of departure: only the ATC scheme prevents those who have no right to leave from doing so. In relation to those entering, however, there is a conceptual (and geographical) gap between the inability to enter the United Kingdom and the inability to board a plane which will transport you there, making the layers of enforcement distinct in their scope. The categories in relation to whom authority to carry out of the country will be refused, however, include several of whom this objective status (and the consequent co-extension of the layers of regulation) is not the case. By including these categories, the scheme comes to apply to people who, as a matter of law, enjoy the right to leave the country. This is true of both categories related to passports: those whose documents are being retained under the 2015 Act and those whose passports have been withdrawn on public interest grounds (and, given that one of the grounds for retaining a passport is that the withdrawal of the passport is under consideration, a person in the first category may soon find him or herself in the second).<sup>92</sup> The ATC scheme is therefore being used to fill a ‘gap’ left by the strict legal position created by the grant, refusal and withdrawal of passports. It was noted above that the exercise of the right of abode is subject to the possibility of identity and nationality checks, the primary method of demonstrating both of which is the possession of a passport. Though it was suggested above that the withdrawal of a passport effectively negates that right, there remains – in law – the possibility that a person might nevertheless be able to enter or leave the United Kingdom with a birth certificate or similar. This feature of the ATC scheme seeks to extinguish that possibility – however remote it may be – ensuring that the persons in question will not be taken outside the United Kingdom regardless of the legality of their doing so. In this sense also, the legal basis of the 2012 scheme was insufficient: it would not, it is submitted, have been possible to implement such a rule without a statutory basis for the sort provided by the 2015 Act. A gap, of course, remains even here – there is nothing, it seems, to prevent a person whose passport has been withdrawn on public interest grounds, and in respect of whom authority to carry has for that reason been refused, from exiting the United Kingdom by his or her own efforts (potentially even clearing immigration by use of a form of identification other than a passport). It is fair to conclude, however, that the endeavour is rendered, as a result of the ATC scheme, even more difficult than the loss of a passport already makes it. And all without the strict legal right of the individual to exit the UK being curtailed in any way. The ATC scheme, then, plays a variety of roles, both in facilitating the enforcement of distinct rules – relating directly to national security but also, indirectly, to immigration – and creating new rules about who can and cannot travel, which seek to fill some of the gaps left by other national security regimes. In both these cases, however, the on the ground

---

<sup>92</sup> Counter-Terrorism and Security Act 2015, Schedule 1, para 5(1)(a).

enforcement of the rule is not the work of a state actor, but of a private company required – on pain of financial penalty – to do and not do certain things.

#### **4. ATC and the ‘privatisation’ of national security**

Fiona de Londras has provided a categorisation of the forms of private characterisation which exist within the field of counter-terrorism: that category within which ATC schemes – as now constituted – would fall is what de Londras calls ‘statutory privatisation’,<sup>93</sup> which describes situations where “legislative obligations are placed on non-state actors to engage in relatively specific activities that feed into broader state-run counter-terrorist strategies and policies”.<sup>94</sup> This phenomenon, of which the placing of banks under statutory obligations to freeze the assets of certain persons is given as an example,<sup>95</sup> is judged “relatively unproblematic from a constitutionalist perspective” because the statutes which create the obligations “will be subject to the same constitutionalist limitations on legitimate statutory authority as is all legislation” and so will be required to comply with human rights guarantees, with the overall statutory framework including “some mechanism of accountability (whether judicial, administrative or parliamentary)”.<sup>96</sup> The analysis offered here of the ATC scheme mostly supports these claims. Though the fact that the ATC was only belatedly given a statutory footing was reflected in the more limited scope of the 2012 incarnation, that the earlier version could be implemented without statutory authority neatly illustrates the difficulty of relying upon the mechanisms of constitutionalism in the context of a common law constitution in which legal authority is required only for acts which alter or conflict with the legal rights of persons. And though de Londras is correct that the framework at issue here allows for a variety of forms of accountability – in, for example, Parliamentary approval of the 2002 and 2015 Acts and the various regulations made under them, as well as (in effect) of the 2015 scheme itself – the possibility of accountability for the operation of the scheme is nevertheless put at risk by the privatisation of the security function: only, we shall see, the contingent operation of the scheme avoids a situation in which privatisation works to undermine the rule of law.

##### **a. Legal accountability for the operation of ATC schemes**

The fact that the duties of enforcement are effectively imposed – by coercive means – upon private parties means that the underlying decision by a state actor is separated from its practical consequences.

---

<sup>93</sup> Fiona de Londras, ‘Privatised Counter-Terrorist Surveillance: Constitutionalism Undermined’ in George Williams, Fergal F Davis & Nicola McGarrity (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism*, Routledge (2013), 61.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, 62.

<sup>96</sup> *Ibid.*

This threatens to preclude a remedy against the carrier itself for its operation of the scheme. In the consultation document prior to the implementation of the 2012 scheme, it was accepted that “there is theoretically potential for cases of mistaken identity,”<sup>97</sup> and stated that processes – not detailed in the consultation document or the schemes themselves – would be put in place to permit passengers who believed themselves to have been denied boarding for that reason, and to ensure that mistakes were not repeated on subsequent occasions.<sup>98</sup> What, then, of judicial accountability for the operation of the scheme? An action in contract against the carrier will not succeed because the conditions of carriage will inevitably permit the carrier to refuse carriage where required to do so by a relevant authority,<sup>99</sup> and – not least for financial reasons – no carrier will choose to act in deliberate contravention of such a requirement. Nevertheless, the various legal statuses which place one in one of the categories of person in respect of whom authority to carry might be refused can mostly be directly challenged – one can, for example, challenge the imposition of a Temporary Exclusion Order,<sup>100</sup> or a TPIM.<sup>101</sup> If that succeeds, then the issue of authority to carry is resolved automatically. Though it may be possible in theory to seek review of the decision to refuse authority rather than the underlying (or logically prior) decision from which it follows, it is not clear what are the (common law) grounds on which one might challenge refusal of authority to carry. The 2015 Act provides sufficient authority for the new scheme, while the relatively limited discretion which the 2015 scheme provides to the Home Office is highly unlikely to be exercised in such a way that a court would – particularly in this sensitive area of policy – hold it irrational in the relevant public law sense. Nevertheless, even that might be challenged on Human Rights Act grounds, as section 6 of the Human Rights Act makes it unlawful for a public authority to act incompatibly with one’s Convention rights.<sup>102</sup> Here, the public authority in question is the Home Office: the relationship between carrier and traveller is a horizontal one, on which the HRA does not bite.<sup>103</sup> Those attempting to enter the United Kingdom are not, as a general proposition, within its jurisdiction for the purposes of Article 1 of the ECHR,<sup>104</sup> such that the UK is obliged to secure to them the rights in the Convention.<sup>105</sup>

---

<sup>97</sup> Home Office, Aviation Security: Consultation on a Statutory Authority to Carry Scheme (September 2011), 9

<sup>98</sup> Ibid. The possibility of error – and the difficulty of discerning it – is multiplied by the fact that the reasons for the refusal of authority will not be given to the carrier. During debates on the matter in the House of Commons, it was noted that to make airlines (often state-owned or run) or other carriers aware that a particular person was being prevented from travelling to the United Kingdom for national security reasons would potentially put those individuals at risk of ill-treatment from the authorities of the country they hoped to leave. HC Deb 12 June 2002, vol 386 col 933 (Jeremy Corbyn).

<sup>99</sup> See, e.g., those of British Airways: “We may decide to refuse to carry you or your baggage if one or more of the following has happened or we reasonably believe may happen” including “If carrying you would break government laws, regulations, or orders” (7a22), or “If you have refused or failed to give us information which a government authority has asked us to provide about you, including passenger information requested in advance of your flight” (7a23).

<sup>100</sup> Counter Terrorism and Security Act 2015, s.11.

<sup>101</sup> Terrorist Prevention and Investigation Measures Act 2011, s.16.

<sup>102</sup> Notably, the Joint Committee on Human Rights did not, in its report on the Counter-Terrorism and Security Bill, consider the human rights implications of the authority to carry question..

<sup>103</sup> Human Rights Act, s.6. On the meaning of ‘public authority’, see *YL v Birmingham City Council* [2007] UKHL 27, [2008] AC 95.

<sup>104</sup> *Khan v UK* (Application No. 11987/11), [24].

Where, though, a person is travelling to the UK to be reunited with family living there, Article 8 may be engaged as against the United Kingdom<sup>106</sup> (the right of freedom of movement in Article 2 of the Fourth Protocol to the Convention not being incorporated into domestic law).<sup>107</sup> Only some persons will therefore be able to challenge the direct refusal to carry and the jurisprudence of the Strasbourg court suggests that an assessment of the proportionality of the interference will take into account travellers' consensual submission to the special security processes imposed on travel, to which ATC schemes are evidently analogous.<sup>108</sup> In relation to those whose Article 8 rights are not thereby interfered with, there will be no way of challenging the necessity or proportionality of the refusal of the authority to carry; only a challenge to the underlying legal status is available, and such status will in many cases, and for the very same reason, not constitute an interference with ECHR rights.

The mere requirement to seek authority to carry a particular individual does not constitute an interference with one's rights under the ECHR. The refusal of authority to carry will, however, almost certainly be such an interference, though only in the circumstances identified. In that limited category of cases in which the refusal of authority constitutes an interference with one's Article 8 rights, therefore, the question becomes that of the conditions for a justified interference. As long as the discretion inherent in the 2015 scheme is exercised in pursuit of national security ends, or those other ends recognised in paragraph 2 of Article 8, there is unlikely to be any issue with the legitimacy of the aim or the proportionality of the interference. And though the hybrid status of the scheme – which is not itself law, but which is authorised, limited and implemented (now) by statute – raises questions as to whether the relevant interference is 'in accordance with the law', it seems that there are sufficient safeguards against its arbitrary use for this status to count against it.<sup>109</sup> There is also, finally, the EU law angle: though it was noted above that the courts have in the past rejected the claim that the need to show one's passport is an interference with the right to freedom of movement under EU law, the situation where authority to carry is refused is of course very different, but nevertheless possible to justify by reference to the provisions in the 2006 regulations for the making of an exclusion order, and the underlying

---

<sup>105</sup> European Convention on Human Rights, Article 1.

<sup>106</sup> There is support in the Court's case-law for the proposition that the Contracting State's obligations under Article 8 may, in certain circumstances, require family members to be reunified with their relatives living in that Contracting State. However, that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in the Contracting State and is being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the Contracting State. *Khan v UK* (Application No. 11987/11), [27].

<sup>107</sup> The UK has signed but not ratified Protocol 4, on the basis that Articles 2 and 3 thereof "could be taken, respectively, to confer rights in relation to passports and a right of abode on categories of British nationals who do not currently have that right": Department for Constitutional Affairs, Report on the UK Government's Inter-Departmental Review of the UK's Position under various International Human Rights Instruments, July 2004, cited in Joint Committee on Human Rights, Review of International Human Rights Instruments (2004-05, HL 99, HC 264), [37]. Nor are the rights in it incorporated into domestic law: Human Rights Act 1998, s.1.

<sup>108</sup> See, e.g., *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45, [64].

<sup>109</sup> See, e.g., *Weber v Saravia* (2008) 46 EHRR SE5.

provisions of the Citizens Rights Directive.<sup>110</sup> As such, the scheme as it now stands is both lawful and, which is not the same, subject to adequate legal oversight, such that suitable remedies would appear to be available for its wrongful operation. In the next section, however, I argue that this state of affairs is a contingent one, and the same model of indirect, compelled privatisation of security along this model may in other circumstances lead to security processes evading the relevant mechanisms of legal scrutiny.

### **b. Privatisation and the public-private link**

The UK's ATC schemes constitute a privatisation of security of a sort which we can expect to become more common in future. They do not rely upon the state's own vast and sophisticated enforcement apparatus but instead are supported by and augment that apparatus, being essentially parasitic upon it, in that the categories of person in respect of whom authority to carry may be refused are created (mostly) by legislation and populated by the executive and the courts, but are operated 'on the ground' by what will be in all (or almost all) cases private entities. This enforcement role is not one for which these entities have volunteered. Instead, they have been co-opted into it by a legislative scheme which subjects these entities to significant monetary penalties should they breach the terms of the ATC scheme, leaving them no choice but to comply. Though the ATC scheme which exists is subject to adequate legal oversight, that state of affairs is a function of the contingent operation of the scheme, which closely and directly reflects, in its front-line private enforcement, the underlying framework and categories of public power. This is apparent in two key features of the scheme. The first is that the categories employed in the ATC scheme are in the main categories already known to public law, which can be challenged at the level at which they take effect. The unavailability of a direct means to challenge a refusal to carry is to that extent negated: the individual refused authority to carry can subvert the refusal through direct appeal to or challenge of the public authority which, if successful, will result in a reversal of the private actor's position. There is, however, nothing in the relevant legislation which compels that arrangement: the 2015 Act specifies only that if a category of persons is to be specified as being one in respect of whom authority to carry may be refused, that may happen only if to do so is "necessary in the public interest".<sup>111</sup> If the categories employed were autonomous, not simply mirroring the extant public law categories described above – if, for example, they were to be defined by nationality – then the possibility of challenge to inclusion within that category would disappear and the possibility of legal accountability for the operation of the scheme would be attenuated. That is, it would continue to be possible to challenge the specific refusal of ATC on Human Rights Act grounds (in those circumstances in which

---

<sup>110</sup> See, e.g., Immigration (European Economic Area) Regulations 2006, SI 2006/1003, regs 19 and 21; Citizens Rights Directive 2004/38/EC OJ L 158/77, articles 27 and 28.

<sup>111</sup> *Ibid.*, s.22(3).

Article 8 rights are implicated). Given, however, that refusal (unlike the creation of categories of person in relation to whom authority to carry might be sought, which might therefore be challenged on that basis) is not subject, under the 2015 Act, to a requirement of necessity, the scope for common law review thereof would be very limited indeed. Following directly from this, the second key feature of the scheme is its automatic nature and – the consequence of that – the absence of any scope for the exercise of discretion by the private actors co-opted into the national security framework. The private actor, that is, need not make any judgement as to whether a person is a threat to security. Decisions continue to be made by a public actor and merely implemented by a private law actor. In this way, again, the fact that the privatisation of security has in the case of ATC schemes remained wedded to the underlying public law structures ensures that the privatisation is not accompanied by negative consequences for the rule of law. This too could conceivably cease to be the case – the question of authority to carry could, that is, be made conditional upon the exercise of discretion or judgment of the carrier and its agents – and, if so, the scope for legal accountability would be weakened, the exercise of discretion by private actors not being fettered in the manner in which that afforded to public actors by definition is.

These observations underline that the form of the privatisation of security is not in and of itself sufficient to guarantee that there exist adequate means of securing, through law, redress for the operation of a privatised system of security regime. Instead, the availability of such redress will be determined ultimately by the substance of the regime by which privatisation takes place and, in particular, by the question of whether the private layer of such a scheme is a mere reflection of an underlying public law framework, or is autonomous and free-standing. ATC schemes are, for now, the former, but might easily have been the latter. In that sense, they simultaneously capture the privatisation of security in a relatively benign form, and yet demonstrate the pitfalls which might await privatisation regimes in which there do not exist such close ties to the underlying public power, whether in the field of transport or – as is perhaps more likely – outside of it. Though it would not be practical to seek to protect national security without co-opting transport (or, say energy, or finance) companies, the exact legal method by which this is done reveals itself vital if key constitutional values are to be upheld.

## **5. Conclusion**

The provision, in the Counter-Terrorism and Security Act 2015, provides for the first time a solid statutory base for ATC schemes, which (now) effectively prevent individuals travelling to and from the United Kingdom – sometimes, where they would otherwise have no right to do so, in other cases where they may enjoy a right but its exercise is effectively prohibited to them. The 2015 Act, though it

represents a significant advance on its 2012 predecessor from the perspective of basic rule of law requirements, nevertheless possesses certain features which must concern us, including its increased breadth, and the consistent walking of a tightrope between purporting not to affect legal rights (which may be true as a matter of strict legal reality, but it is deeply misleading in terms of the value of those rights) and the seeming acceptance that it has sufficient legal effect – and in relation to individuals who enjoy, as a matter of domestic and EU law, the right to enter the UK – that it was no longer viable for the scheme’s legal basis to be so weak. More generally, ATC schemes indicate one of the key ways in which the national security constitution seems likely to evolve in the near future, co-opting private actors into exercising powers which would more normally be exercised by the state itself and its officials, via the threat of penalties of non-compliance. This feature of the scheme has several important consequences, most obviously in separating the exercise of state power from the harm suffered by the individual, and so adding a new layer of action which must be accounted for in attempts to ensure legal accountability for the use of that power. Though the ATC schemes as they stand very strongly reflect the fundamentally public status of limitations upon the right to travel – and so are a relatively benign form of privatisation – they capture simultaneously the possibility of partially separating the private enforcement of some policy from its underlying public power. To the extent that such separation takes place, with the private enforcement based upon autonomous and free-standing categories and frameworks, the sort of legal accountability which exists for the operation of ATC schemes is likely to be frustrated.<sup>112</sup>

---

<sup>112</sup> The 2011 consultation on the first ATC scheme included, at 9, an estimate that authority to carry would only be refused in respect of 2-3 persons a year. An answer given in Parliament (HC Deb 12 July 2016, WA 39971) indicates, however, that the numbers in fact ranged from 56 to 107 each month, giving a total of over 1000 since the 2015 scheme had entered into operation. What proportion of this discrepancy can be explained by reference to the expanded scope of the 2015 scheme is not, however, clear.