Control orders and the *Prevention of Terrorism Act 2005*

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Authors: Alexander Horne and Gavin Berman (statistics)

This note refers to the control order regime that was in operation until 25 January 2012. Information about the Coalition Government approach to control orders can be found in the Standard Note Counter-Terrorism Review.

Control orders were introduced by the *Prevention of Terrorism Act 2005* following a successful challenge[1] to the human rights compatibility of the provisions for detaining foreign terrorist suspects previously contained in Part 4 of the *Anti-terrorism, Crime and Security Act 2001*. Additional information about the background to the introduction of the 2005 Act is contained in the Library Research Paper on the Bill.[2] The legislation proved highly controversial and it was amended and significantly shortened during its passage through Parliament as the Government sought to enact it before the dissolution of Parliament prior to the 2005 General Election. The Bill received Royal Assent as the *Prevention of Terrorism Act 2005* on 11th March 2005 and came into force immediately. The Government's *Explanatory Notes* on the Act are available online.[3]

The 2005 Act is aimed at preventing terrorism-related activity by individuals, irrespective of their nationality or terrorist cause, through the use of two kinds of control orders: "derogating" and "non-derogating". These terms refer to the Government's view of the compatibility of the orders with the right to liberty and security set out in Article 5 of the European Convention on Human Rights (ECHR). There has been a substantial amount of litigation about the control order regime. On 31 October 2007, the House of Lords, in a series of judgements, concluded that some of the conditions imposed on certain suspected terrorists breached human rights legislation, however the court upheld the use of the control order regime. A further hearing by the House of Lords on whether the current use of "closed material" complied with Article 6 of the ECHR took place in March 2009. The Court concluded (following an earlier judgement of the European Court of Human Rights) that a 'controlee' must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. It also stated that where open material provided to the controlee consisted purely of general assertions (and the case against the controlee was based solely or to a decisive degree on closed materials) the requirements of a fair trial would not be satisfied.

This note is intended to provide a brief summary of the key provisions of the Act and the use that the Home Secretary has made of the powers under the Act since it came into force. The main provisions of the Act (sections 1-9) require annual renewal and there have been four

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[1] *A and others v Secretary of State for the Home Department* [2004] UKHL 56
[2] 05/14 at http://www.parliament.uk/commons/lib/research/rp2005/rp05-014.pdf
[3] http://www.opsi.gov.uk/acts/en2005/2005en02.htm

successful motions to renew since 2005. The last debate in the Commons on the *Draft Prevention of Terrorism Act 2005 (Continuance in force of Sections 1 to 9) Order 2009* took place on 1 March 2010, where the provisions were renewed for a further year. A further renewal debate is due to take place on 2 March 2011.

In their 2010 Election Manifesto, the Liberal Democrats pledged to scrap control orders. In a policy review paper, entitled *A Resilient Nation*, published in January 2010, the Conservatives stated that they would "review the Control Order system with a view to reducing reliance on it and, consistent with security, replacing it".

In February 2010, the Labour Government published its own assessment of the use of control orders. Contained in a Memorandum to the Home Affairs Select Committee, entitled Post-Legislative Assessment of the Prevention of Terrorism Act 2005 (Cm 7797) it indicated that the Home Office spent approximately £10.8 million on control orders between April 2006 and August 2009. It also noted that at the time of the Home Secretary's quarterly Written Ministerial Statement on control orders (for the period ending 10 December 2009) there were only twelve orders in force and only 45 individuals had ever been subject to a control order. More up to date statistics on the operation of the regime can be found at Section J.

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A. Control orders

1. Derogating and non-derogating control orders

The Bill that became the *Prevention of Terrorism Act 2005* was introduced in the House of Commons on 22 February 2005 following a successful challenge to the human rights compatibility of the provisions for detaining foreign terrorist suspects previously contained in Part 4 of the *Anti-terrorism, Crime and Security Act 2001* in the case of *A and others v Secretary of State for the Home Department* [2004] UKHL 56.[4]

The 2005 Act is aimed at preventing terrorism-related activity by individuals, irrespective of their nationality or terrorist cause, through the use of two kinds of control orders: "derogating" and "non-derogating". These terms refer to the Government's view of the compatibility of the orders with the right to liberty and security set out in Article 5 of the European Convention on Human Rights (ECHR).

Control orders contain "obligations" considered necessary for purposes connected with preventing or restricting the person's involvement in terrorism-related activity. Section 1(4) gives a long illustrative list, ranging from restricting possession of specified substances to curfews and restrictions on the person's place of residence. The Act distinguishes between "derogating control orders", which only a court may make,[5] and "non-derogating control orders", which the Secretary of State may make, subject to approval by the High Court. The essential difference between the two types of order is that a derogating order can contain obligations incompatible with a person's liberty under article 5 of ECHR and must be renewed every six months, rather than annually, if it is to continue in force. A designated derogation order, derogating from Article 5 of the ECHR, would need to be made before the Home Secretary could apply to the court for a derogating control order. The designated derogation order would be made and laid before Parliament. There is judicial involvement in both kinds of control order.

During the debate on Commons' consideration of Lords amendments to the *Prevention of Terrorism Bill* on 9 March 2005 Charles Clarke, who was then Home Secretary, set out what procedures involved in making both derogating and non-derogating control orders:

a. The procedure for making derogating control orders

> In summary, the security services and the police will put together the case for an order and identify the measures they think necessary to prevent the individual in question from continuing to carry out terrorist-related activities. The Home Secretary or other Secretary of State will then look at the case and as part of that process—I want to emphasise this point—ask whether the police, in consultation with the prosecuting authorities, have considered whether there is a realistic prospect of prosecuting the individual for terrorist or other offences.

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4 See http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf

5 Except in urgent cases, see below

> If the Home Secretary or other Secretary of State thinks that the test for making a derogation order is made, an application will be made, *ex parte*, to the High Court for the court to make the order. If the court thinks that there is material which, if not disproved, is sufficient to justify the order being made, it will make the order and refer it immediately for a full *inter partes* hearing as quickly as possible. At each stage, the court will be able to look at all the material relevant to the case and to examine witnesses. At the full hearing, the defence will have the open material in a Secretary of State's case. The person who is to be subject to the order will be represented at the full hearing by the legal representative of his choice in open sessions and by a special advocate in closed sessions. The special advocate will have access to all the closed material.
>
> The court's judgment will be in two halves—open and closed—and the subject of the order will see the court's open judgment.[6]

b. The procedure for making non-derogating control orders

> I remain of the view that these orders are different in nature from derogating orders, but I accept that some measure of judicial involvement in the process is necessary and desirable.
>
> My amendments, which I laid before the House this morning, therefore provide that the Secretary of State must apply to the High Court for permission to make a non-derogating order, save where urgent action is required. I shall explain a little more about what I mean by "urgent action" in a moment. The normal process for making non-derogating control orders will therefore work in the following way. The Security Service and the police will put a case together, as I have already described. If the Secretary of State thinks that the test is met, an application to the High Court for leave to make the order will be made. If the court agrees that the Secretary of State has a case, it will give the Secretary of State permission to make the order, and the order will be made. The Secretary of State will then refer the order to the court, which will arrange for a full hearing to take place as soon as possible thereafter. If the court refuses leave, the order will not be made.
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> At the full hearing, the court will consider all the material before it, examine witnesses, and so on. It will be able to hear the case in both open and closed sessions. As with derogating control orders, the subject will have access to the open material, and his or her interests will be represented by the counsel of his or her choice in open session, and by a special advocate in closed session under the special advocate procedure.[7]

A Home Office press notice published on the day the Bill received Royal Assent explained what was envisaged:

> Non-derogating control orders allow the Home Secretary to impose a range of conditions including a ban on internet or mobile phone use, restrictions on movement and travel, restrictions on associations with named individuals and the use of tagging for the purposes of monitoring curfews. […]
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> The Act also makes provision for the Home Secretary to apply to a court for the court to make a derogating control order which could require someone to remain in a particular place at all times, if the threat to the UK changes. A designated derogation

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6 HC Deb 9 March 2005 c 1575-6

7 c1579

order, derogating from Article 5 of the ECHR, would need to be made before the Home Secretary could apply to the court for a derogating control order. The designated derogation order would be made and laid before Parliament. It would come into force immediately, but would need to be confirmed by both Houses, following a debate, within 40 days.[8]

The Home Office website originally described the arrangements for making control orders as follows:

> **The facts about Control Orders**
>
> 1. Control orders enable the authorities to impose conditions upon individuals ranging from prohibitions on access to specific items or services (such as the Internet), and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews. A control order does not mean 'house arrest'.
>
> 2. Specific conditions imposed under a control order are tailored to each case to ensure effective disruption and prevention of terrorist activity.
>
> 3. The Home Secretary must normally apply to the courts to impose a control order based on an assessment of the intelligence information. If the court allows the order to be made, the case will be automatically referred to the court for a judicial review of the decision.
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> 4. In emergency cases the Home Secretary may impose a provisional order which must then be reviewed by the court within 7 days.
>
> 5. A court may consider the case in open or closed session – depending on the nature and sensitivity of the information under consideration. Special Advocates will be used to represent the interests of the controlled individuals in closed sessions.
>
> 6. Control orders will be time limited and may be imposed for a period of up to 12 months at a time. A fresh application for renewal has to be made thereafter.
>
> 7. A control order and its conditions can be challenged.
>
> 8. Breach of any of the obligations of the control order without reasonable excuse is a criminal offence punishable with a prison sentence of up to five years and/or an unlimited fine.
>
> 9. Individuals who are subject to control order provisions have the option of applying for an anonymity order.
>
> 10. To date the Government has not sought to make a control order requiring derogation from Article 5 of the European Convention on Human Rights.[9]

B. The Home Secretary's use of the powers to make control orders

No derogating control orders have been made since the 2005 Act was implemented. As at 10 December 2009, non-derogating orders had been made in respect of 45 individuals. Of these 7 have absconded.

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8 *Prevention of Terrorism Bill Receives Royal Assent*, 14 March 2005, Home Office press release 049/2005

9 The Home Office has subsequently updated this list. See: Home Office: The facts about Control Orders

Section 14 of the 2005 Act requires the Home Secretary to report to Parliament every three months on the exercise of his powers to make control orders. The Home Secretary's reports to Parliament made under this provision have generally taken the form of Written Statements,[10] although the report issued in September 2005 during the summer recess appeared as a Written Answer to a Parliamentary Question.[11] Detailed statistics on the number of orders made and renewed can be found at section J of this paper.

C. Standard of proof

There was some confusion in the discussion of the proposals for control orders during the passage of the 2005 Act because references were made to the "burden of proof" when what was meant was the "standard of proof". The *Guardian* picked the point up and explained:

> To clarify, burden of proof is the obligation, which normally rests with the prosecution, in this case the government, to provide evidence that can convince a court or jury of the truth of an allegation. Standard of proof concerns the requirement in criminal cases of being "beyond reasonable doubt", and that in civil cases, which rests on a "balance of probabilities", and the lesser standard proposed for some parts of the bill of "reasonable suspicion".[12]

The Government had accepted that the standard of proof for derogating control orders should be the balance of probabilities, because the subjects of those orders will be deprived of their liberty, but insisted that for non-derogating control orders, the standard should be reasonable suspicion.[13] In its report on the 2006 order continuing the 2005 Act the Joint Committee on Human Rights made the following comments about the standard of proof:

> 55. We regard the standard of proof for the making of control orders to be an extremely important feature of the Act.
>
> 56. In the case of non-derogating control orders, which under the Act are made by the Secretary of State, the standard which is set not only affects the ease with which, under the Act, the Secretary of State can make such a control order in the first place, but, crucially, it affects the adequacy and effectiveness of subsequent judicial control as a safeguard against arbitrary or unjustified interference with the Convention rights affected. The standard of proof defines the questions to be answered not only by the Secretary of State but also by the court charged with hearing challenges to non-derogating control orders which have been made by the Secretary of State.
>
> 57. The standard of proof to which the Secretary of State must be satisfied when deciding whether or not to make a control order against an individual is set very low in the Act: he need only have "reasonable grounds for suspecting" that the individual is or has been involved in terrorism-related activity. He need not be "satisfied" or have a "belief": mere suspicion will suffice. Nor need there be proof, even on a civil standard: reasonable grounds will suffice.

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10 HC Deb 16 June 2005 c23-4WS; HC Deb 10 October 2005 c9WS; HC Deb 12 December 2005 c131WS; HC Deb 13 March 2006 c88WS; HC Deb 12 June 2006 c48WS; HC Deb 11 September 2006 c122WS; HC Deb 11 December 2006 c40-42WS

11 HC Deb 12 September 2005 c2557W

12 "Blair claws back ground as terror bill revolt wanes" *Guardian* 10 March 2005

13 HC Debates 9 March 2005 c 1588

58. The Act provides for the standard to be higher in relation to a derogating control order, that is, an order imposing an obligation (or obligations) which amounts to a deprivation of liberty and is therefore incompatible with Article 5 ECHR. The Act provides for such derogating control orders to be made by the court, on application by the Secretary of State. In such cases, the court must be "satisfied, on the balance of probabilities" that the person concerned is or has been involved in terrorism-related activity.

59. "Reasonable suspicion" is an extremely low threshold, lower even than the "balance of probabilities" standard in civil proceedings, which is in turn lower than the "beyond reasonable doubt" standard which applies in the determination of a criminal charge.

60. During the passage of the Act, our predecessor Committee asked the Secretary of State whether there is any reason in principle for not requiring the standard of proof for control orders to be at least the civil standard of balance of probabilities. He said that he did not think that there is a reason in principle but that there are "quite serious practical arguments" about which particular possible standard should apply.

61. We welcome the Secretary of State's acceptance that there is no reason in principle for not requiring the standard of proof for control orders to be at least the civil standard of balance of probabilities. In our view there are strong reasons in principle for requiring the standard of proof to be at least that high in relation to non-derogating control orders, and higher still in relation to derogating control orders.

62. Under both types of control order the matter of which the Secretary of State or the court must have a reasonable suspicion or be satisfied on the balance of probabilities is the person's involvement in "terrorism-related activity". This is an allegation of the utmost gravity. It is a well established legal principle that the gravity of the allegation is an important factor in determining the appropriate standard of proof in relation to that matter in legal proceedings.

63. As far as non-derogating control orders are concerned, reasonable suspicion is in our view too low a threshold to justify the potentially drastic interference with Convention rights which such orders contemplate. It is the same standard as applied under Part 4 ATCSA 2001, of which the Special Immigration Appeals Commission said "it is not a demanding standard for the Secretary of State to meet". Moreover, as we explain further below, the Act provides for only a supervisory judicial role in relation to such orders, applying the principles applicable in relation to judicial review. A merely supervisory jurisdiction over a decision based on "reasonable grounds for suspicion" is a very weak form of judicial control over measures with a potentially drastic impact on Convention rights, particularly in combination with the use of closed procedures in which the controlled person never sees the material or is even told the substance of the allegations which may form the basis of the Secretary of State's suspicion. In our view such a low standard of proof, in such a context, carries a high risk of being insufficient in practice to ensure the proportionality of interferences with Convention rights authorised by the Act.

64. As far as derogating control orders are concerned, by definition these impose controls which amount to a deprivation of liberty. This is the most serious control which can be placed on an individual, and it can usually only be imposed following conviction of a criminal charge. Deprivation of liberty on a balance of probabilities is anathema both to the common law's traditional protection for the liberty of the individual and to the guarantees in modern human rights instruments which reflect those ancient guarantees. In our view the appropriate standard for such measures is the beyond reasonable doubt standard.

65. In his evidence to our predecessor Committee the Home Secretary did not elaborate on the "practical arguments" which drove him to select reasonable suspicion and balance of probabilities as the relevant standards of proof in relation to the two types of order. We have considered the argument put forward in the Home Office

notes on control orders issued on 28 February 2005 addressing some of the issues raised in the Second Reading debate on the Bill. There it is said that "this is not an area where either the secretary of state, or the court, will be dealing with proof of issues of fact. It is essentially an exercise in risk assessment and evaluation of intelligence material in the national security context." However, the threshold question for the exercise of the power to make control orders is whether the individual is or has been involved in terrorism-related activity. In our view that is pre-eminently a factual question and it is entirely appropriate that there should be a debate about what should be the standard of proof in relation to that question.

66. We are not aware of any other practical arguments capable of outweighing the above reasons in principle for setting a higher standard of proof in both cases. **We therefore consider that the standard of proof in relation to both types of control order is set at too low a level in the Act. In our view, the standard of proof in relation to non-derogating control orders should be the balance of probabilities, and in relation to derogating control orders, which by definition amount to a deprivation of liberty, the standard of proof should be the criminal standard of beyond reasonable doubt. We draw this matter to the attention of each House.**[14]

The standard of proof necessary to impose a control order was also considered by the Constitutional Affairs Committee (as it then was), in its report on *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates.*[15] The Committee was critical of the standard suggested by the Government, referring to submissions which had been made to it by a number of Special Advocates, who had represented the interests of persons who had previously been detained at Belmarsh. The Committee indicated that:

102. We raised concerns with the Lord Chancellor that the use of judicial review as an appeal mechanism did not offer sufficient procedural safeguards, since it is rare in such proceedings for oral evidence to be presented. This is despite the fact that the appeals would tend to focus on evidential matters which would require cross examination of witnesses. The Lord Chancellor provided some guarantees that this would not be a problem, stating that:

> […] the courts have got great discretion to determine how the case is actually conducted. I cannot envisage it arising, if the judge in a particular Control Order case thought somebody needed to be cross-examined, that that would not happen.

This assurance was of some benefit, given the undemanding test required by the judicial review procedure, whereby the Home Secretary merely had to demonstrate that he has reasonable grounds for his relevant belief or suspicion. SIAC has commented that "it is not a demanding standard for the Secretary of State to meet".

103. The nine Special Advocates who sent us a joint submission also highlighted the limitation of the judicial review procedure, indicating that:

> When the matter [appeal] is first considered by the court (within 7 days of the original decision to impose the order) the test is quite different: the court will not be asked to consider whether an individual "is or has been involved in terrorism-related activity", instead it will have to ask itself whether the matters relied on by the Home Secretary are "*capable of constituting*

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[14] Joint Committee on Human Rights Twelfth Report Session 2005-06 *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* HL 122/HC 915

[15] Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, Seventh Report Session 2004-5, HC 323-I

> *reasonable grounds*" for the making or a derogating [now non-derogating] control order. That test appears to be even less demanding than that which applied under Part 4 of ATCSA since it requires the court to decide whether there are reasonable grounds (as opposed to whether the matters relied upon are *capable* of constituting reasonable grounds…)

104. Legally, it is possible that the courts could follow the approach laid down in the case of *R v Secretary of State for the Home Department, ex parte Daly* and consider whether in cases engaging rights under the European Convention on Human Rights, the interference was really proportionate to the legitimate aim being pursued. A statutory amendment to the appeal standard would offer a better mechanism to ensure greater fairness. It is also unclear whether these provisions in the *Prevention of Terrorism Act 2005* will withstand any challenges brought pursuant to the European Convention on Human Rights.

105. We are concerned that under the *Prevention of Terrorism Act 2005*, the appeal mechanism used under the *Anti-terrorism, Crime and Security Act 2001*, has been transposed into potential challenges to control orders. Under the new provisions, Parliament has accepted that the Home Secretary need only demonstrate a 'reasonable suspicion' that someone is engaged in prescribed activity. The judicial review then only considers whether the Home Secretary's decision was reasonable and does not adequately test whether there was sufficient evidence to justify that suspicion. This test is one step further removed from whether there was objectively a 'reasonable suspicion'. The Home Secretary merely has to show to a judge that he had 'reasonable grounds to suspect' not that such a belief was reasonable to any objective standard. We believe that this system could be made fairer through a variation of the current test, whereby the Home Secretary would have to prove that the material objectively justified his 'reasonable suspicion'.

D. Court decisions in relation to control orders

Section 3 of the *Prevention of Terrorism Act 2005* provides for supervision by the courts of non-derogating control orders. In non-urgent cases it will be the court that gives permission for the order to be made, following an application by the Secretary of State, while in urgent cases the court will be confirming an order that the Secretary of State has already made. In both cases, if permission for or confirmation of the order is given, the court will also make arrangements for a directions hearing in relation to the order to be held within seven days.

Under section 3 the only ground on which the court may quash a control order or quash an obligation imposed by a control order is that the decision to make the order, the order itself or a particular obligation imposed by the order, is "obviously flawed".[16] Section 3(11) of the Act emphasises that in determining what constitutes a flawed decision the court must apply the principles applicable on an application for judicial review.

In his second report on the Act, the Government's independent reviewer, Lord Carlile of Berriew, noted the considerable impact of court decisions in relation to control orders in 2006.[17]

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[16] *Prevention of Terrorism Act 2005* s.3(2)-(3)

[17] Second report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005 19th February 2007, para.50

On 31 October 2007, the House of Lords handed down judgments in the cases of *Secretary of State for the Home Department v. JJ and others* (FC) [2007] UKHL 45; *Secretary of State for the Home Department v. MB (FC)* [2007] UKHL 46; and, *Secretary of State for the Home Department Respondent v. E and another* [2007] UKHL 47. The judgments considered a number of issues including:

- Whether a non-derogating control order amounted to a criminal charge for the purposes of article 6 of the ECHR;
- Whether the cumulative impact of the obligations under the control orders amounted to a deprivation of liberty within the meaning of article 5(1) of the ECHR;
- Whether the procedures provided for by s 3 of the 2005 Act (and Rules of Court) were compatible with article 6 of the ECHR (the right to a fair trial) in circumstances where they result in the controlled person in essence being unaware of the case made against him.

The Lords ruled that the non-derogating control orders did not amount to a criminal charge for the purposes of article 6 of the Convention. Lord Bingham indicated that:

> it cannot be doubted that the consequences of a control order can be, in the words of one respected commentator, 'devastating for individuals and their families' […] but the tendency of the domestic courts […] has been to distinguish between measures which are preventative in purpose and those which have a more punitive, retributive or deterrent object. The same distinction is drawn in the Strasbourg authorities […] I would on balance accept the Secretary of State's submission that non-derogating control order proceedings do not involve the determination of a criminal charge. Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligation imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.[18]

As to the second issue, the court reiterated that the prohibition on depriving a person of his liberty under article 5 has an autonomous meaning (that is a meaning throughout the Council of Europe for the purposes of the Convention) whatever it might be thought to mean in any member state. A series of decisions by the European Court of Human Rights in Strasbourg established that 24-hour house arrest has been regarded as tantamount to imprisonment, depriving the subject of his or her liberty.[19]

However deprivation of liberty does not amount to a mere deprivation of the freedom to live life as one pleases, but means to be deprived of one's physical liberty.[20] The court considered the Strasbourg jurisprudence, Baroness Hale observing that:

> We must look at the 'concrete situation' of the individual concerned and take account of 'a whole range of criteria such as the type, duration , effects and manner of the

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[18] [2007] UKHL 46, paras 23-24

[19] See for example *Mancini v Italy* (App no 44955/98, 12 December 2001) and *NC v Italy* (App no 24952/94, 11 January 2001)

[20] *Engel v The Netherlands No 1* (1976) 1 EHRR 647, para 58

> implementation of the measure in question' […] The 'difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity and not one of nature or substance.'

The majority concluded that the most severe orders, which subjected controlees to 18-hour home curfews, did amount to a breach of human rights. Lord Bingham stated that:

> The effect of the 18 hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little contact with the outside world, with means insufficient to permit the provision of significant facilities for self-entertainment and with the knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size […] but they were […] located in an unfamiliar area where they had no family, no friends or contacts, and which was no doubt chosen for that reason. [21]

The House of Lords considered that a 12 hour curfew imposed was acceptable. Lord Bingham observed that:

> The obligations imposed on E do, however, differ from those imposed on JJ and others in respects accepted by the courts below as material. The curfew to which he is subject is of twelve hours' duration, from 7.0p.m. to 7.0a.m., not eighteen hours. The residence specified in the order is his own home, where he had lived for some years, in a part of London with which he is familiar. By a variation of the order his residence is defined to include his garden, to which he thus has access at any time. He lives at home with his wife and family, and Home Office permission is not required in advance to receive visitors under the age of ten. Five members of his wider family live in the area, and have been approved as visitors. He is subject to no geographical restrictions during non-curfew hours, is free to attend the mosque of his choice and is not prohibited from associating with named individuals.[22]

In respect of the final issue, as to whether the procedures provided for by s 3 of the 2005 Act (and Rules of Court) were compatible with article 6 of the ECHR in circumstances where they result in the controlee in essence being unaware of the case made against him, the court concluded it was not confident that Strasbourg would hold that every control order hearing in which the special advocate procedure was used would be sufficient to comply with article 6 of the Convention. Nonetheless, with strenuous effort it considered that it should usually be possible to accord the controlled person a substantial measure of procedural justice. The court indicated that the best judge of whether the proceedings afforded a sufficient measure of procedural protection was the judge who conducted the hearing. Baroness Hale said:

> "The fuller the explanation given, the fuller the instructions that special advocates will be able to take from the client before they see the closed material. Both judge and special advocate will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases […] All must be alive to the possibility that material could be redacted or gisted in such a way

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[21] [2007] UKHL 45, para 24
[22] [2007] UKHL 47, para 7

> as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge."

If, despite all efforts, it was not possible to afford sufficient protection, Convention rights required that the judge be in a position to quash the order. However, that would not be so in every case.[23]

In the relevant cases, the court determined that it was not appropriate to make a declaration of incompatibility. Rather, it remitted the cases, with the ruling that Sch 1, para 4(3)(d) of the Act had to be read and be given effect "except where to do so would be incompatible with the right of the controlled person to a fair trial".

The Financial Times reported the comments of Shami Chakrabati, director of Liberty, the human rights organisation:

> 'The authorities have rightly lost their most draconian 18-hour curfews without trial,' she said. But Ms Chakrabati also admitted that Liberty was 'disappointed' that the concept that anyone could be subject to indefinite community punishment without the charges, evidence and proof required by a criminal trial had survived.[24]

The BBC reported the immediate reaction of the then Home Secretary:

> Home Secretary Jacqui Smith said she welcomed the broad thrust of the rulings.
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> She said that control orders were not the "first choice" to deal with terrorism suspects - but there were cases where it was appropriate.
>
> "I'm very pleased that the Law Lords have upheld the regime," she told the BBC. "My top priority is national security and protection of the British people."
>
> Ms Smith said she was disappointed that 18-hour curfews had been ruled out, but added no order would have to be "weakened" because of the rulings.[25]

JUSTICE, a human rights NGO which had intervened in the cases, said:

> The rulings are a victory for fairness over secrecy, and liberty over suspicion. Nobody can receive a fair hearing without knowing the evidence against him. If we allow the fight against terrorism to trample upon basic principles of justice then we destroy the very values we fight for.[26]

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[23] A further, important decision on the disclosure of evidence was made in the case of *Bullivant* [2007] EWHC 2938 (Admin) in which Mr Justice Collins clarified the special advocate procedure and the method by which the court would consider whether there had been a breach of Art. 6 of the ECHR (however see pp 15, 16 below)

[24] *Financial Times* "UK control orders survive challenge", 1 November 2007

[25] BBC Online, Lords want control order rethink, 31 October 2007 (last accessed 23 February 2010)

[26] JUSTICE, Press release 31 October 2007

In a separate briefing, JUSTICE analysed the effect of the rulings, claiming that:

> The nature of the closed hearings will be significantly changed and the role of the special advocates will shift accordingly.
>
> At the moment, control order proceedings begin with the Home Secretary indicating which evidence she is prepared to disclose to the defendant and which evidence she wishes to keep secret or 'closed'. There is then a closed hearing in which the government and the special advocate appointed to represent the defendant argue over whether the closed evidence can safely be disclosed to the defendant. In some cases, judges can order the Home Secretary to disclose evidence to the defendant, but not if the judge agrees with the Home Secretary that its disclosure would harm the public interest in maintaining national security […]
>
> Under the new disclosure rule, the judge will have the power to order the Home Secretary to disclose all evidence that the judge deems necessary for the defendant to receive in order to receive a fair trial. This means that the role of the special advocate will change towards maximising disclosure to the defendant, not merely on the basis that it is *safe* to do so but that it *necessary* to do so in order for the defendant to receive a fair trial […] In some cases, where the judge decides that certain evidence must be disclosed to a defendant, the government may decide that it is better to withdraw the control order than to proceed with the hearing. Note that the government cannot be forced to disclose evidence even where it has been ordered to by the court. If it does not comply with a diclosure order, however, it cannot rely upon the evidence as part of its case against the defendant (see para 4(4) of the Schedule to the 2005 Act and the comments of Baroness Hale in *MB* and *AF*, para 72).[27]

The effect of the House of Lords judgment on the issue of Article 6 of the ECHR was not entirely clear-cut, despite the comment from JUSTICE. There was subsequently substantial further litigation on the issue. The question was again considered by the High Court and then the Court of Appeal in the case of *Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148, (17 October 2008). In that case, the Court of Appeal sought to interpret the judgment of the House of Lords from October 2007 (in the cases of MB and AF) relating to Article 6.

The Home Office summarised its view on the judgment as follows:

> In summary, the majority found that there is no principle that a hearing will be unfair in the absence of open disclosure of an irreducible minimum allegation or evidence. The majority also found that in assessing whether a hearing had been unfair the court must look at all the circumstances of the case including the steps taken to disclose material in open, the effectiveness of the special advocates and the difference that disclosure may have made. [28]

The Joint Committee on Human Rights has also commented on the issue stating that:

> We interpreted the majority in the House of Lords in MB to have held that the concept of fairness imports a core irreducible minimum of procedural protection. In our view,

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[27] JUSTICE, *Control order briefing*, October 2007, available at www.justice.org.uk

[28] Home Office Statement, 15 December 2008

> the decision in MB requires the Secretary of State to provide the gist of any closed material on which she intends to rely and on which fairness demands the controlled person has an opportunity to comment.[29]

The Court of Appeal granted permission for an appeal to the House of Lords on the Article 6 grounds, the case was heard from the 2 March 2009.

1. The House of Lords Judgment in June 2009

A little over a week before the commencement of the appeal in the House of Lords, the Grand Chamber of the European Court of Human Rights handed down its judgment in *A and others v United Kingdom* (Application No 3455/05). This case addressed, amongst other things, the extent to which the admission of closed material was compatible with the fair trial requirements of Article 5(4) of the ECHR. The case was brought by a number of terrorist suspects who had been unlawfully detained at Belmarsh (pursuant to the provisions of the *Anti-Terrorism, Crime and Security Act 2001* that had been declared incompatible with the human rights legislation). This case was relied upon heavily by the House of Lords, and accordingly, the conclusions of the Grand Chamber (in its unanimous judgment) are set out below:

> "215. The Court recalls that although the judges sitting as SIAC were able to consider both the "open" and "closed" material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.
>
> 216. The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a 'public emergency threatening the life of the nation'. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also, in this connection, Fox, Campbell and Hartley, cited above, (1990) 13 EHRR 157, para 39).
>
> 217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a sine qua non (see paragraph 204 above). Moreover, in the

[29] Joint Committee on Human Rights, Fifth Report Session 2008-9, *Counter–Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009*, HC 282, paras 23-28

circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (Garcia Alva v Germany (2001) 37 EHRR 335, para 39, and see also Chahal (1996) 23 EHRR 413, paras 130 - 131).

218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied."

Lord Phillips, who gave the leading judgment in the House of Lords, indicated that:

59. […] I am satisfied that the essence of the Grand Chamber's decision lies in paragraph 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.

> Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.[30]

The judgement of the House of Lords was unanimous, however, a number of the Law Lords made observations that they had felt constrained by the judgement of the European Court of Human Rights. Lord Hoffman spoke frankly, saying that:

> 70. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Phillips of Worth Matravers and I agree that the judgment of the European Court of Human Rights ("ECtHR) in *A v United Kingdom* (Application No 3455/05) requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the ECtHR. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.

Rather than quashing the orders, the Law Lords remitted the appeals back to the High Court "for further consideration" in accordance court's decision.

2. Reaction to the judgment

The Home Secretary, Alan Johnson, was reported to have been disappointed by the judgment. He was quoted by the Guardian as having said:

> Protecting the public is my top priority and this judgment makes that task harder. Nevertheless, the government will continue to take all steps we can to manage the threat presented by terrorism. All control orders will remain in force for the time being and we will continue to seek to uphold them in the courts. In the meantime, we will consider this judgment, and our options, carefully.[31]

Chris Huhne, the Liberal Democrats spokesman on Home Affairs indicated that:

> Today's unanimous ruling clearly states that control orders are a fundamental infringement of human rights and an affront to British justice. It is unacceptable to deny a person freedom without even telling them what they are suspected of. We do not need to sacrifice the freedoms we have fought so hard for. We must not become what we are fighting. This discredited regime should be scrapped immediately. The government should focus instead on making it easier to prosecute terrorists by making intercept evidence available in court.

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30 Secretary of State for the Home Department v AF and others [2009] UKHL 28

31 *The Guardian ,*"Terror control orders breach human rights, law lords rule" 10 June 2009

The Shadow Home Secretary, Chris Grayling, criticised the fact that the Government had not taken the opportunity to review the regime in the past, stating:

> This is further evidence of the government's failure to create a proper regime to control dangerous terror suspects in the UK. They have set up a system which just isn't working properly and is in urgent need of review.[32]

Lord Pannick QC, a cross-bench peer who represented the lead appellant said:

> Since the Home Secretary can no longer impose control orders without telling the controlees the substance of the case they have to meet, the right decision – legally and politically – would be to abandon the discredited control order regime and concentrate on prosecuting in the criminal courts those against whom there is evidence of wrongdoing.[33]

E. Commentary on the early operation of the control order regime

[NB some of the following background information will have been superseded by the judgment of the House of Lords in the case of *Secretary of State for the Home Department v AF and others* [2009] UKHL 28, discussed above. The section has been retained for historical interest, and as it lists other concerns about the control order system and possible methods to reform it].

In its report on *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, published in February 2006[34] the Joint Committee on Human Rights said it had significant concerns about whether, in the absence of sufficient safeguards, the regime of control orders was compatible with the rule of law and with well-established principles concerning the separation of powers between the executive and the judiciary. The committee went on to say:

> We also doubt whether the control orders regime contained in the provisions being continued in force is compatible with Articles 5(4) and 6(1) ECHR. On this ground alone we seriously question the renewal of the Act without Parliament's first debating and deciding whether the special exigencies of the current security situation justify the extraordinary exceptions to traditional English principles of due process and what in our view amounts to a de facto derogation from Articles 5(4) and 6(1) ECHR. We are not in a position to express a view at this stage on whether such exceptions and derogations are justified. We draw this matter to the attention of each House. [35]

Section 14 of the *Prevention of Terrorism Act 2005* requires the Home Secretary to appoint a person to review the operation of the Act. Lord Carlile of Berriew, who had already been

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32 *Ibid*

33 *The Times,* "Terror law in turmoil as lords back suspects' fight against house arrest", 11 June 2009

34 Joint Committee on Human Rights Twelfth Report Session 2005-06 *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* HL 122/HC 915

35 *Ibid*. para.78

appointed as the Government's independent reviewer of other anti-terrorist legislation, was appointed to review the Act on 18 March 2005. His first report on the *Prevention of Terrorism Act 2005* was published on 2 February 2006.[36] His second report was published on 19 February 2007.[37] In his second report Lord Carlile made a number of comments about the use of control orders to date and the cases of the individuals who disappeared or absconded:

> 20. Since the beginning of 2006 there have been a total of 19 controlees. In the cases of two, their control orders were renewed in March 2006. Another was renewed in September 2006. Those three persons remain subject to orders. Two control orders were revoked in September 2006 and new ones issued.
>
> 21. Six orders were quashed by the High Court and this was upheld by the Court of Appeal in August 20067. All of those controlees were the subject of new orders. However, one absconded immediately prior to the Court of Appeal's judgment and the new order could not be served.
>
> 22. By the 16th January 2007 18 control orders were in existence. Three examples of those orders, with conditions, are contained in *Annex 1* to this report. […]
>
> 23. There have been three incidents during the past year involving the disappearance of persons who were or were about to be controlees. The viability of enforcement should always be considered when a control order is under consideration: it would not be appropriate for them to be regarded simply as a prophylactic.
>
> 24. In one case the person concerned was an inpatient in a locked ward in a psychiatric hospital. He disappeared via a ground floor window. I am not in a position to comment on any responsibility of the hospital, which was aware of his status. Given (i) the expense in manpower and money of round the clock physical surveillance, and (ii) the apparent medical condition, diagnosis and needs of the person concerned at the time, leaving him in the hands of the hospital was reasonable given the light conditions of the order (which primarily required him to report daily to the police). However, this and other cases do commend constant reconsideration of the surveillance and observation needs of each controlee, given the risk that each might present to national security if uncontrolled.
>
> 25. Another disappeared immediately prior to the decision of the Court of Appeal to uphold the quashing of his control order by the High Court, and before a new order could be served. When such circumstances may arise, in future there should be provision for this eventuality – in the sense that there should be the minimum delay between the quashing of the old and the service of the new order if that is the appropriate course in the case. The police were ready to serve the new order as soon as they were allowed to under the terms of the judgment.
>
> 26. The third absconded in early January 2007. Soon after being served with a control order, he was believed to have entered a mosque. At this point he had not breached his control order. There was no operational reason to enter the mosque and it would therefore have been inappropriate for police officers to do so. Unfortunately he disappeared, breaching his control obligations. Whilst in this case it would have been inappropriate for the police to enter the mosque, it raises questions about how generally to approach sensitive issues such as presence in a mosque, church or other place of worship. The straightforward approach would be to make it clear that if controlees are in breach of anything other than minor aspects of conditions, the police

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[36] First report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005 2nd February 2006

[37] Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005 19 February 2007

will pursue them wherever they are situated after allowing them a short time to emerge voluntarily.

27. Although I am not aware of any evidence of inappropriate behaviour by anyone connected with the mosque in that case, it is worth saying the following for the future. Anyone knowingly giving shelter from legal obligations has a clear civic duty to facilitate compliance with the law. If they do not do so, they will have little cause for complaint if police enter their premises. In so entering the police must show full respect for the nature of the premises concerned, and do the minimum reasonably necessary to fulfil their duty. Every effort should be made to involve community leaders and avoid giving offence.

Lord Carlile made the following comments about his role as reviewer, the Home Secretary's exercise of his powers and the obligations imposed by control orders. He also suggested a number of possible changes in the current arrangements:

33. As part of my function as independent reviewer, my task is to replicate exactly the position of the Home Secretary at the initiation of a control order. I call for and am given access to the same files as were placed before the Secretary of State when he was asked to determine whether a control order should be made. These files include detailed summaries of evidence and intelligence material, as well as the draft Order and obligations. The summaries describe not only the activities alleged against the individual and the sources of information, but also the context of those activities in a wider and very complex terrorism picture. I do this in every case.

34. Much of the information is derived from intelligence. The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which a concerted and strategic response to terrorism (and especially suicide bombings) is needed. The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk – not least, by any means, those who offer unsolicited information out of disapproval of conduct and events at which they may have been and might continue to be present.

35. That is not to say that there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the Law should be amended to a limited extent to achieve that.

36. I would have reached the same decision as the Secretary of State in each case in which a control order has been made, so far as the actual making of the order is concerned. In some cases the extent of obligations under the order was more cautious and extensive than absolutely necessary, as the court proceedings cited in footnote 6 above demonstrate, though those proceedings are subject to current appeal at the time of writing. Like his predecessor, the present Home Secretary asks questions and certainly does not act as a mere cipher when the papers are placed before him. The process is rigorous and structured in an appropriate way, so that the decisions are definitely those of the Home Secretary himself, not his officials. In accordance with my obligations under section 14(5)(b) I report that the Secretary of State has acted appropriately in relation to his powers under section 3(1)(b) of the Act, in relation to the use of the power to make urgent non-derogating orders, in that he has made none thus far.

> 37. In some cases control orders against UK citizens have been founded on solid intelligence of their intention to join insurgents in Iraq or Afghanistan, with resulting risks to British and other allied troops. Whilst such uses of the legislation are appropriate in the cases I have seen, they are at the lowest end of the potential range of use for control orders. The greatest care must be taken to ensure that the orders are used only in those cases where there is a clear intention to put the stated desire into effect, as opposed to extravagant expressions of support or wishes.
>
> 38. The quality of preparation of cases for the Secretary of State by officials and the control authorities concerned is extremely high, as one is entitled to expect when a Secretary of State has to make a decision diminishing the normal rights and expectations of the individual.

Lord Carlile went on to comment on proportionality and time limits:

> 42. The key to the obligations is proportionality. In each case they must be proportional to the risk to national security presented by the controlee. The minimum obligations consistent with public safety are the only acceptable basis for control orders.
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> […]
>
> [T]here has to be an end of the order at some point, in every case. Some of the controlees have already been the subject of their orders for a considerable time. Their orders cannot be continued indefinitely – that was never intended and would not be permitted by the courts. As a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now whether on a case-by-case basis or by legislation (if appropriate) would be short-sighted.[38]

Lord Carlile emphasised that individuals suspected of terrorist offences should be prosecuted wherever possible and that control orders should only be used as a last resort:

> 58. I believe that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction. I encourage such investigation to continue. Information about international contacts, financial support for insurgents in Iraq or Afghanistan, and the use of guarded language to refer to potential terrorism targets might be progressed to evidence of significant terrorism crime. As I indicate above, it is a given that it would be far better for prosecutions to occur, of course provided they pass the usual threshold standards (evidential and public interest, respectively) for prosecution applied in all cases by the CPS. It has already been argued in the High Court that the failure to bring a prosecution at the time of the control order being made, and possibly at later stages, could amount to an abuse of the judicial process: whilst this point remains imaginative and undetermined, it cannot be written off.
>
> 59. I remain of the view that, as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society. There are problems in the administration of the orders, not least the issue of constant surveillance. However, the disappearance of a small minority does not necessarily undermine the benefits of the orders in relation to the majority. It is plainly doubtful that any well-organised terrorism cell would wish to rely in a significant way on someone who is being sought by police internationally, so the absconders probably present little risk provided that they are sought diligently.

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[38] *Ibid*. para.43

In an article in the *Guardian* on 21 February 2007 the then Liberal Democrats home affairs spokesman Nick Clegg criticised the provisions of the 2005 Act relating to control orders and said the Liberal Democrats would be voting against the motion to approve the order being debated in the House of Commons on Thursday 22 February 2007 which would enable the provisions of the 2005 Act to remain in force for a further twelve months:

> Control orders are unique in that they give a politician, rather than a judge, the power to curtail someone's freedom without even giving the individual the reasons why. They have also proved messy to implement in practice, as the ability of three suspects to escape their control orders showed. Even the home secretary, John Reid, admits they are "full of holes". And yet, the government seems to have abandoned all plans to review or replace them. This is, in large part, because the government appears to believe that our court system is not equipped to deal with the complexities of the contemporary terrorist threat.
>
> It is true that the nature of modern terrorism poses huge challenges to our criminal justice system. But our response should be to reform, streamline and strengthen our system to bring terror suspects before court, rather than circumvent due process altogether. A battery of curfews and tags, imposed in a legal limbo at the behest of politicians, is no surrogate for the aggressive use of the full force of the law. Would-be terrorists are criminals, and should be treated as such.
>
> I and my Liberal Democrat colleagues will be voting against the extension of control orders tomorrow because we believe more can and should be done to pursue prosecutions against terror suspects. Control orders should be repealed and replaced by a package of new measures to strengthen our ability to prosecute terror suspects in court.
>
> Instead of holding suspects for extended periods without charge, we need to consider ways in which charges could be brought more rapidly in the first place. We should make it easier, for instance, for prosecutors to bring charges against terror suspects where evidence has not yet been fully produced but there is a good prospect that it will. We should also re-examine the circumstances in which the police can question suspects after charge.
>
> A way to introduce phone-tap evidence in court must be found, with protections for the security services so agents and surveillance methods are not compromised. And we should use plea-bargaining more actively to encourage so-called supergrasses to give evidence against more serious criminals. The government has already passed plea-bargaining legislation to tackle organised crime: why not use it to thwart terror plots too?
>
> If there remain a handful of individuals who cannot be charged, for whom control-order-like powers are still required, they must be granted by a judge, be time-limited, and be subject to a higher standard of proof and to regular and thorough assessments of the possibility of prosecution. Anything less is a betrayal not only of our traditional British system of justice, but also of our duty to pursue prosecutions against those criminals who plot to carry out terrorist atrocities.[39]

On 18 February 2008, Lord Carlile published his Third Report on the Operation of the 2005 Act.[40] One issue which he picked up on again was the ending or "endgame" for control orders. Lord Carlile observed that "there has to be an end of the order at some point, in every case". He went on to indicate that:

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[39] "This is a fork in the road" Guardian 21 February 2007

[40] Available at http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary

> 49. Last year, I advised that, as a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now, whether on a case by case basis or by legislation (if appropriate) would be short-sighted.
>
> 50. It is now my view that it is only in rare cases that control orders can be justified for more than two years. After that time, at least the immediate utility of even a dedicated terrorist will seriously have been disrupted. The terrorist will know that the authorities will retain an interest in his or her activities and contacts, and will be likely to scrutinise them in the future. For those organising terrorism, a person who has been subject to a control order for up to two years is an unattractive operator, who may be assumed to have the eyes and ears of the State upon him/her. […]
>
> 51. I advise that there should be a recognised and possibly statutory presumption against a control order being extended beyond two years, save in genuinely exceptional circumstances. However, if a former controlee brings him/herself within the legislation thereafter, I do not suggest that they could not be made the subject of a fresh control order, on the basis of new material and a change in circumstances.

Lord Carlile also summarised the scrutiny given by the courts to the control order regime, between paragraphs 58-63 of his report.

He suggested that while the quality of the letters concerning possible prosecution of controlees has improved:

> [I] should like to see further detail given to the Home Secretary in every case as to why additional investigation, or different forms of evidence gathering, might not enable a criminal investigation. As last year, I believe that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction. I encourage such investigation to continue […][41]

He concluded (amongst other things) that:

> I remain of the view that, as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportionate safety valve for the proper protection of civil society.[42]

During the course of the renewal debate in 2008, Dominic Grieve QC, for the Conservatives, commented that:

> What troubles me—and it may trouble the House—is what practical steps the Government are going to take over the next 12 months before we come back for the next renewal to see whether we can, in fact, get rid of control orders for good. That is the challenge that the Minister has to answer. It is a challenge that I have also had to consider as Opposition spokesman deciding whether to support the renewals or to seek to oppose them. On balance, and with a considerable degree of reluctance, our conclusion is that we should allow renewal to take place this year. […] If the Minister and the Government are prepared to rise to the occasion, I like to think that we could use the Counter-Terrorism Bill and the opportunity for debate surrounding it to have some sensible discussions that could lead to the Government having sufficient confidence to decide that this order will not require renewal at all next year. It is only

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41 *Ibid,* para 74
42 *Ibid*, para 76

> on those grounds that we have decided not to vote against the renewal motion this afternoon. I have to tell the Minister, however, that the longer this process goes on and the longer control orders remain in place on individuals, the more difficult the renewal process will become. If we come back next year and find that seven individuals will have been subject to control orders for more than three years, the Government's position will start to become even more difficult. [43]

The most recent reports from Lord Carlile are considered at Section G of this paper.

F. Duration of the Act and recent counter-terrorist legislation

The nine sections of the 2005 Act which deal with control orders were set to expire after 12 months, but could be renewed by up to a year at a time. The first Commons debate on renewal of these provisions took place on 15 February 2006[44] and subsequent debates have been referred to above.

The 2005 Act has no 'sunset clause', and cannot be amended in the annual debates on renewal, but in 2006 the Government offered a timetable which could have provided a legislative vehicle for amending the Act. The Home Secretary said:

> I announced in my statement on 22 February my clear intention to introduce further counter-terrorist legislation as soon as parliamentary time allows. I can tell the House that the Government will ensure that the new legislation that I announced some weeks ago is timetabled in such a way that hon. Members will have had the opportunity to consider the first report of the independent reviewer before they seek to table amendments. The effect of that, of course, is that the operation of the Bill before us now and the reviewer's independent review will be available to Members of both Houses in considering amendments to that legislation.
>
> To achieve that, I suggest a timetable along the following lines for the House to consider. I suggest that, in March 2005, we get Royal Assent for this Bill; that, immediately thereafter, we appoint the independent reviewer; and that, in the late autumn of 2005, we publish the draft counter-terrorism Bill and begin its pre-legislative scrutiny, which I promised to the House.
>
> In early 2006, the first report of the independent reviewer would be presented to the Home Secretary, who would lay the report before Parliament, as previously pledged. The report would include both the reviewer's report on the operation of the current Bill and the implications of the new offences for this Bill. In spring 2006, the new counter-terrorism Bill would be introduced in the Commons, informed by the analysis that I have just described. In March 2006, a year from today, there would be the first renewal of the prevention of terrorism Act order. Until July 2006, the counter-terrorism Bill would proceed through Parliament and, we hope, receive Royal Assent in July 2006. [45]

Since the 2005 Act came into law, two further Terrorism Acts have been passed. Neither, however, makes substantial changes to the control order regime.

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43 HC Deb, 21 February 2008, col 569 -570
44 HC Deb 15 February 2006 c1499-1523
45 HC Deb 10 March 2005 c 1860

After the bombings in London in July 2005 the Government introduced new provisions, now set out in the *Terrorism Act 2006.* It also said it had decided to "decouple" these new provisions from the other measures it had been considering for possible inclusion in a new counter-terrorism Bill following the enactment of the 2005 Act. The Government said it would consider these latter measures separately in the spring of 2006. In his statement of 2 February 2006 on the renewal of the *Prevention of Terrorism Act 2005,* following the publication of Lord Carlile's report on the operation of the Act in 2005, the Home Secretary said the Government had decided to postpone consideration of any separate legislation for the following reasons:

> On receiving Lord Carlile's report, I was left to consider the merits of introducing a Bill that would have little content, but would enable hon. Members to table amendments to the Prevention of Terrorism Act. In doing so, I noted the following points.
>
> First, Lord Carlile's report emphasises that there has not yet been a complete cycle of control orders, in that legal challenges brought by those who have been the subject of control orders have not yet been completed and therefore tested in the courts. I think that final conclusions on the operation of the whole control order regime would therefore be premature.
>
> Secondly, there are three very important pieces of work that are being done this year, which I want to be able to take into account before presenting legislation on counter-terrorism. The first is Lord Carlile's review of the legislative definition of terrorism, which was promised during the passage of the Terrorism Bill and has been a significant part of the debate in both Houses of Parliament. The second is his report on the operation of the current Terrorism Bill, once passed, and in particular the measure to lengthen the period of detention without charge to 28 days, which has been the subject of great debate in both Houses. The third is the work that the Government are undertaking to find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence. That has been raised in many parts of the House. Each of those pieces of work has been of considerable importance to Members in all parts of this House during our debates, and in my view will demand attention before we decide the details of how to proceed on terrorism legislation.
>
> I am conscious that our terrorism legislation is now split between several different Acts of Parliament, and that the principal Act, the Terrorism Act 2000, has been subject to multiple amendments. That, as Lord Carlile among others has noted, is confusing, and I am keen to ascertain whether a way could be found of consolidating all our counter-terrorism legislation in a single, permanent Act. When I expressed that hope on Third Reading of the Terrorism Bill on 10 November 2005, the Opposition parties were good enough to say that they might be prepared to co-operate in such an endeavour.
>
> For all those reasons, I have decided not to introduce further legislation on terrorism now, but to plan for the development of a draft Bill that takes into account all the work that I have laid out, to be published in the first half of 2007 for pre-legislative scrutiny. Depending on the outcome of that scrutiny, we will seek to introduce the legislation later that year.
>
> It is a matter of genuine regret to me that—despite very positive discussions between the parties at the beginning of last year, following the House of Lords judgment on Belmarsh, and during the summer of last year after 7 July—any consensus reached has never held during the passage of subsequent legislation. It is unarguable that it

> would be better by far if the next counter-terrorism Bill had the support of all parts of the House. The timetable that I have set out offers us that opportunity and for my part, I am determined to take it, working with the whole House.[46]

In a speech at the Royal United Services Institute (RUSI) on 14 February 2007 the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, said the Government was discussing in Cabinet what further legislation might be required following the Home Secretary's capability review.[47]

Some more minor amendments to the control order regime were set out in the *Counter-Terrorism Act 2008.* These changes to the Control Order regime were suggested by the Government in its paper *Possible measures for inclusion in a future counter terrorism bill*.[48]

In particular, additional powers were taken to allow the police to enter premises and search premises (by force if necessary). The proposals were considered by Lord Carlile QC, who observed that:

> I support the conclusion of paragraph 57 of the first consultation paper that a self-standing system of powers of entry, search and seizure should be attached to the system for the enforcement of control orders. The enforcement of the system is difficult, and the existing powers are not entirely adequate where there is not suspicion of a breach of the control order conditions, but there is a suspicion of other terrorism activities.
>
> There are three significant gaps in the ability of the police to enter and search the property of an individual subject to a control order for the purposes of monitoring compliance and enforcing the order.[49]

The Explanatory Notes to the Act set out the changes in some detail[50] but in effect, they allow for powers of entry and search (s 78); amend the definition of involvement in terrorism-related activity (s 79) and allow the Secretary of State to make an application for an anonymity order to protect the identity of the controlled person at the stage when permission is being sought from the court to make the control order rather than when the control order is actually made (s81).

The Joint Committee on Human Rights argued that the "amendments to the control order regime […] are largely in the nature of relatively minor "tidying up" amendments in the light of the first few years of the regime's operation".[51] When the measures were introduced, the Committee stated that they:

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46 HC Debates 2 February 2006 c478-479

47 "Human rights and terrorism" speech by Lord Falconer of Thoroton to the Royal United Services Institute 14 February 2007 http://www.dca.gov.uk/speeches/2007/sp070214.htm

48 Home Office, Possible Measures for Inclusion in a Future Counter Terrorism Bill, 25 July 2007 (at 23 February 2010); Home Office, Options for pre-charge detention in terrorist cases, 25 July 2007 (at 23 February 2010)

49 Lord Carlile QC, Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill, December 2007, Cm7262, p14-15, (on 23 February 2010)

50 http://www.opsi.gov.uk/acts/acts2008/en/08en28-d.htm

51 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill*, HC 199, 7 February 2008, p17

> Do not address at all the most controversial aspects of the control orders regime which have been the subject of intense parliamentary debate, frequent adverse comment by us; and now, important judgments of the House of Lords […]. In our view […] the Bill provides an opportunity for Parliament to rectify some of the most significant defects in the control order regime which have been identified in the course of the many legal challenges to that regime and to particular orders under it.[52]

G. More recent developments

Lord Carlile's Fourth Report on the operation of the 2005 Act was published on 3 February 2009. Key statistics are provided at Paragraph 14 of the Report, whilst Paragraph 52 contains a helpful digest of the principal judicial decisions on control order cases, and their implications.

Lord Carlile noted, *inter alia*, that:

> 4. The enactment of PTA2005 occurred before the London suicide bombings of the 7th July 2005 and the events of the 21st July 2005. Since those events the Terrorism Act 2006 has been passed4, and the Counter-Terrorism Act 2008. Both introduced some new terrorism-related offences and significant changes to other material provisions. Of particular note in the 2006 Act were section 1 (encouragement of terrorism), section 2 (dissemination of terrorist publications), section 5 (preparation of terrorist acts), and section 6 (training for terrorism). Those provisions have contributed to the charging of more individuals with terrorism-related criminal conduct. This trend is welcome – it is in the public interest for the conventional charge and trial process to be used whenever possible, rather than control orders. […]
>
> 31. in my view it is said all too easily that the authorities have a panoply of effective means of enforcement of control orders, including electronic and physical surveillance.
>
> 32. All forms of surveillance involve considerable human resources. This is especially so of watching and following. A complete package of measures requires a secure place of observation. Observation of individuals generally requires several officers, observing, logging and recording images.
>
> 33. The importance of ensuring that control orders are enforced means that so-called 'light touch' control orders are not a realistic proposition save in exceptional cases. My discussions with Ministers and officials leave me with the conclusion that the limitations of so-called 'light touch' control orders are well understood.
>
> 34. The continuing relatively low number of control orders, set alongside the vastly greater number of known terrorism suspects, confirms that the Home Secretary remains rightly reluctant to expand their use.
>
> 35. It has been suggested in some quarters of the media that control orders would have to be made against any former Guantanamo Bay detainees returned to or accepted into the UK. In this context it should be said that control orders are not a routine form of control of people who are perceived to be potentially troublesome, and

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[52] *Ibid*

> it is over-simplistic to assume that they would be appropriate, acceptable, practicable or even lawful against a group of people simply because they had been detained elsewhere, under a foreign (and unusual) jurisdiction. […]
>
> 37. I remain of the view that control orders remain a largely effective necessity for a small number of cases, in the absence of a viable alternative for those few instances.[...]
>
> 47. I remain of the view that there are cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. The Committee of Privy Councillors chaired by Sir John Chilcot in their report published on the 6th February 2008[7] set out 9 tests to be passed before any such evidence will be admitted in a court. Debate about this issue has not lost momentum. The use of intercept evidence in a criminal court possibly has the potential for reducing the number of control orders, though this is far from certain.
>
> 48. I would have reached the same decision as the Secretary of State in each case in which a control order has been made during 2008, so far as the actual making of the order is concerned. Measuring the proportionality of the obligations is a difficult task, and inevitably the Courts will sometimes have to resolve conflict between a naturally cautious security establishment and the public policy imperative of as little State control as possible of unconvicted persons.

Lord Carlile reiterated a point he made in his Third Report, stating that:

> 58. My view is that it is only in a few cases that control orders can be justified for more than two years. After that time, at least the immediate utility of even a dedicated terrorist will seriously have been disrupted. The terrorist will know that the authorities will retain an interest in his or her activities and contacts, and will be likely to scrutinise them in the future. For those organising terrorism, a person who has been subject to a control order for up to two years is an unattractive operator, who may be assumed to have the eyes and ears of the State upon him/her. Nevertheless, the material I have seen justifies the conclusion there are a few controlees who, despite the restrictions placed upon them, manage to maintain some contact with terrorist associates and/ or groups, and a determination to become operational in the future.
>
> 59. The government has rejected my view expressed last year that there should be a recognised and possibly statutory presumption against a control order being extended beyond two years, save in genuinely exceptional circumstances. Nevertheless I believe that it is fully recognised that extended periods under control orders are likely to be reviewed with especial care by the courts.

On 27 February 2009, the Joint Committee on Human Rights published a report entitled *Counter–Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009*. The Committee concluded, *inter alia*, that:

> 11. Our consistent concerns about the adequacy of the due process safeguards in the control orders regime, and in particular the lack of a meaningful opportunity to challenge the closed material, have recently been vindicated by the European Court of Human Rights. On 19 February 2009 the Grand Chamber unanimously held that there had been a violation of the right in Article 5(4) ECHR to have the lawfulness of detention decided by a court in the cases of four of those who were detained under

> Part IV of the *Anti-Terrorism, Crime and Security Act 2001* which preceded the control orders regime.[53]
>
> 12. The Court held that the evidence on which the state relied to support the principal allegations made against the four individuals was largely to be found in the closed material and was therefore not disclosed to the individuals or their lawyers. It said that special advocates could not perform their function, of safeguarding the detainee's interests during closed hearings, in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. There was a violation of the right to a judicial determination of the legality of detention because the four detainees were not in a position effectively to challenge the allegations against them [...]
>
> 33. We continue to have very serious concerns about the human rights compatibility of both the control orders regime itself and its operation in practice. We remain concerned that it will continue to result in breaches of both the right to liberty and the right to a fair hearing. Moreover, with every annual renewal, we grow more concerned about the length of time for which a number of individuals have been the subject of control orders. Subjecting individuals to indefinite preventive measures is not acceptable and, as Lord Carlile predicts, will at some point inevitably lead to a violation of their human rights.

This prediction (at para 11) has in fact been proved correct (see para D(1) of this paper, above). The Committee also made reference to a report published by the International Commission of Jurist (ICJ) in February 2009 entitled *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights.*

The Committee noted that the ICJ Panel had expressed concern that, over the longer term, control orders could give rise to a "parallel legal system" and undermine the rule of law. The Committee also stated that it agreed with the observation of the ICJ's Eminent Jurists Panel that "if secret intelligence cannot be transformed into evidence over time, or if the State fails to obtain new evidence, the preventive measures should cease." It accordingly repeated an earlier recommendation that "there ought to be a maximum limit on the duration of a control order, and that Parliament ought to debate what that limit should be."

The Commons debate on the *Draft Prevention of Terrorism Act 2005 (Continuance in force of Sections 1 to 9) Order 2009* took place on 3 March 2009 and the provisions were extended for a further year.[54]

Lord Carlile's Fifth Report[55] on the operation of the 2005 Act was published on 1 February 2010. Lord Carlile again reiterated his opinion that "the control orders system remains necessary, but only for a small number of cases where robust information is available to the effect that the suspected individual presents a considerable risk to national security, and conventional prosecution is not realistic."

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53 *A and others v UK,* Application No. 3455/05 [GC], judgment of 19 February 2009, at paras 193-224.

54 HC Deb 3 March 2009, c 734

55 Lord Carlile, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, February 2010,

He went on to note that a number of relatively minor changes should be made to the control order regime. These included recommendations that "control orders are no longer appropriate ... where the main objective is to prevent travel abroad" and that "a power of personal search of controlees by a constable should be added to the legislation as soon as possible."

Lord Carlile gave lengthy consideration to the merits of control orders and possible alternatives and concluded (at para 85) that "it is my view and advice that abandoning the control orders system entirely would have a damaging effect on national security. There is no better means of dealing with the serious and continuing risk posed by some individuals."

On 2 February 2010, the Home Affair Select Committee published its report, *The Home Office's Response to Terrorist Attacks*.[56]

The Committee stated that:

In 2006 we supported the introduction of control orders. We believed at the time that they could be used to disrupt terrorist conspiracies and that there would be circumstances in which it would not be possible to charge individuals but where close monitoring of a suspect would be necessary. However, control orders no longer provide an effective response to the continuing threat and it appears from recent legal cases that the legality of the control order regime is in serious doubt. It is our considered view that it is fundamentally wrong to deprive individuals of their liberty without revealing why. The security services should take recent court rulings as an opportunity to rely on other forms of monitoring and surveillance.[57]

In February 2010, the Government published its own assessment of the use of control orders. Contained in a Memorandum to the Home Affairs Select Committee, entitled *Post-Legislative Assessment of the Prevention of Terrorism Act 2005 (Cm 7797)* it indicated that the Home Office spent approximately £10.8 million on control orders between April 2006 and August 2009 and that at the time of the Home Secretary's last quarterly Written Ministerial Statement on control orders, for the period ending 10 December 2009, there were only twelve orders in force and only 45 individuals had ever been subject to a control order.

On the effectiveness of the orders, the Home Office recognised the earlier difficulties it had faced with absconders, but stated that "in some cases control orders have successfully prevented involvement in terrorism-related activity. In others – the majority – they have restricted and disrupted that activity without entirely eliminating it."[58]

H. Intercept Evidence

As mentioned above, In June 2007, the Government established a Privy Council Review on the issue of intercept evidence lead by Sir John Chilcot. The Committee reported in February

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[56] Home Affairs Select Committee, *The Home Office's Response to Terrorist Attacks*, Sixth Report of Session 2009–10, HC 117-I, 2 February 2010

[57] *Ibid,* para 48

[58] Home Office, Post-Legislative Assessment of the Prevention of Terrorism Act 2005 (Cm 7797) , February 2010, para 55

2008, concluding that intercept evidence should be used in criminal trials subject to a number of important conditions. Following publication of the report, the Prime Minister indicated that "extensive work" was required to ensure that the complex set of conditions could be met.

Detailed material, explaining the background to this debate is available in the Library Research Paper 08/20 Counter-Terrorism Bill on pages 44-48.

In February 2009, then Home Secretary, Jacqui Smith, made a progress report to the House on this issue.[59]

Since this statement, the Government has made further statements, doubting the possibility of bringing forward a viable system of admitting intercept evidence. Full details can be found in the Library Standard Note The Use of Intercept Evidence in Terrorism Cases

I. Some further reading

- Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and the use of Special Advocates*, HC 323-I, 3 April 2005;
- Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009, HC 282, 27 February 2009
- Joint Committee on Human Rights, *Counter–Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HC 356, 20 February 2008;
- Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HC 365 4 March 2007;
- K.D Ewing and Joo-Cheong Tham, *The continuing futility of the Human Rights Act,* Public Law (2008) Winter pp 668-693;
- Horne, A, *Counter-Terrorism*, *Some Legal Conundrums in the United Kingdom,* World Defence Systems, Issue 2 of 2008, Sovereign Publications pp 43-49;
- Horne, A *Control Orders – Where Do We Go From Here?,* World Defence Systems, Issue 2 of 2009, Sovereign Publications, pp 172-176
- Horne, A. *The Courts and Counter-Terrorism: Asserting the Rule of Law?* in *Cases that Changed Our Lives* (Lexis Nexis, 2010)
- Starmer, K. *Setting the record straight: human rights in an era of international terrorism*, European Human Rights Law Review E.H.R.L.R. (2007) No.2 pp 123-132;
- Walker, C. *Keeping control of terrorists without losing control of constitutionalism* (2007) 59 Stanford Law Review pp 1395-1463

[59] HC Deb 12 February 2009, cc87-8WS

- Walker, C. *The threat of terrorism and the fate of control orders*, Public Law, January 2010, pp 4-18

- The Guardian, News Articles on Control Orders

- Judgement of the House of Lords, Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) [2009] UKHL 28

J. Statistics

The *Prevention of Terrorism Act 2005* came into force on 11 March 2005 and was repealed by the *Terrorism Prevention and Investigation Measures Act 2011*.

The available statistics relating to control orders were reported to Parliament in quarterly written statements, with the first issued in June 2005.[60] There were 27 such statements with the final one released on 19 December 2011.[61] The figures provided here are taken from each of the individual written statements.

The appended table shows the number of control orders made in each reporting period and, where provided, the number that were issued to British and foreign nationals. The table shows the number of orders revoked by the Home Secretary or quashed by the courts and whether new orders were made in their place. Control orders will expire after a year unless they are renewed and this information is also included below.

The final figures show that, as at 14 December 2011, 9 control orders were in force, all of which were in respect of British citizens. These orders will remain in effect for a 42 day transitional period concluding on 25 January 2012 unless revoked before then.

In Lord Carlile's sixth annual report on the issue of control orders, published in February 2011,[62] it was reported that, as at 10 December 2010, there were 48 individuals ever subject to a control order. The report breaks down what happened to the 40 individuals who had been, but are no longer, subject to a control order:

> 10 were served with notices of intention to deport and either held in custody or granted bail. 6 of these have now been deported.
>
> 12 individuals have had their control orders revoked (because the assessment of the necessity of the control order changed).
>
> 4 individuals have not had their orders renewed as the assessment of the necessity of the control orders changed.
>
> 3 individuals had their orders revoked and not replaced as the Government concluded that the disclosure requirements required as a result of the decision of the House of

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60 In October 2006 the Home Secretary asked Lord Carlile to consider whether any improvements could be made to the quarterly report. The format of the September to December 2006 report, and all subsequent reports, was revised in the light of this review to include additional information.

61 http://www.parliament.uk/documents/commons-vote-office/7-HomeOffice-ControlOrderPowers.pdf

62 http://www.official-documents.gov.uk/document/other/9780108510106/9780108510106.pdf

Lords in AF & Others could not be met because of potential damage to the public interest.

1 individual absconded (in August 2006) after the Court of Appeal confirmed the quashing of his order – a new order had been made to serve on the individual but he absconded before it could be served. The new order was therefore never in operation.

2 individuals had their control orders quashed by the High Court. One of these was an individual who had absconded, but subsequently handed himself in to the police.

3 individuals had their control orders revoked on direction of the Court.

5 individuals' control orders expired, following their absconding from their control orders. These 5 individuals had absconded in, respectively, September 2006, January 2007, May 2007, May 2007 and June 2007. Control orders last for 12 months. Their control orders expired in, respectively, April 2007, December 2007, February 2008, February 2008 and August 2007.

There have therefore been seven control order absconds since the Prevention of Terrorism Act 2005 came into force on in March 2005, although in one case the order was made but had never been served. Details of absconds are provided in the quarterly reports.

Further information, not provided in the quarterly report to Parliament, may be released in response to Parliamentary Questions. For example, a previous answer provided details of the length of time that individuals had been the subject of control orders.

Length of time individual subject to one or more control orders, of those subject to control order as at 10 December 2008	
Under 6 months	1
6 to 12 months	7
Between 12 months and two years	2
Between two and three years	3
Over three years	2
Total subject to control order as at 10 December 2008	**15**

Source: HC Deb 12/2/09 c2206W

Control order statistics

	Orders made and served			Revoked by Home Secretary		Quashed by court				Modifications		In force at end of period		
	Total	GB national	Foreign national	Not remade	Remade	Not remade	Remade	Renewed	Expired	Made	Refused	Total	GB citizen	Met area residents
3 months from														
11-Mar-05	11	0	11							3	0	11	n/a	n/a
11-Jun-05	1	1	0	9						0	3	3	n/a	n/a
11-Sep-05	5	n/a	n/a							0	2	8	n/a	n/a
11-Dec-05	3	2	1					2		0	0	11	3	n/a
11-Mar-06	3	2	1							0	1	14	5	n/a
11-Jun-06 [1]	9	2	7	n/a	n/a	n/a	n/a	1	n/a	2	7	15	6	n/a
11-Sep-06 [2]	1	1	0		2					15	4	16	7	8
11-Dec-06	2	2	0		2					1	13	18	9	8
11-Mar-07	0	0	0				1		1	16	14	17	8	7
11-Jun-07	2	2	0	1				5	4	25	23	14	8	4
11-Sep-07	0	n/a	n/a							47	15	14	8	4
11-Dec-07	2	n/a	n/a	1		1		3	3	35	12	11	4	3
11-Mar-08 [3]	6	n/a	n/a	2				1		70	31	15	3	2
11-Jun-08	1	n/a	n/a					6		120	61	16	4	3
11-Sep-08	0	n/a	n/a			1				96	23	15	4	3
11-Dec-08 [4]	2	n/a	n/a					2		62	2	17	6	5
11-Mar-09 [5]	5	n/a	n/a	1		1		6		108	24	20	10	6
11-Jun-09	0	n/a	n/a	5				5		125	49	15	9	7
11-Sep-09 [6]	3	n/a	n/a	6						77	29	12	9	7
11-Dec-09	1	n/a	n/a	2						44	13	11	10	6
11-Mar-10	2	n/a	n/a	1				3		43	10	12	9	4
11-Jun-10 [7]	0	n/a	n/a	3				2		56	14	9	9	4
11-Sep-10 [8]	1	n/a	n/a					1	2	34	12	8	8	3
11-Dec-10 [9]	2	n/a	n/a					2		53	21	10	10	3
11-Mar-11 [10]	2	n/a	n/a		1			2		60	25	12	12	3
11-Jun-11 [11]	0	n/a	n/a	1				2		76	22	11	11	1
11-Sep-11 [12]	0	n/a	n/a	2				2		76	19	9	9	n/a

Notes:

1 - Complete information for the number of orders revoked, quashed or expired was not provided in the quarterly report to Parliament for this reporting period.

2 - In addition 3 further control orders made but not served against one foreign and two British nationals

3 - In addition an order was made but not served

4 - In addition three orders were made but not served

5 - Two control orders made but not served in the previous quarter have also been revoked and one control order made but not served in a previous quarter has expired.

6 - One control order previously made but not served has been revoked in this quarter.

7 - One control order was made but not served

8 - One control order made but not served in a previous quarter has expired.

9 - One control order was made and revoked without ever being served. A further control order was made in respect of the same individual but was not served during the reporting period.

10 - One control order which was made, with the permission of the court, during a previous quarter was served during this quarter.

11- One control order made but not served in a previous quarter has expired.

12 - Up to 14 December 2011 as the Prevention of Terrorism Act 2005 was repealed and Terrorism Prevention and Investigation Measures Act 2011 commenced on 15 December 2011.

Source: All information is taken from the relevant quarterly WMS - Report to Parliament on control order powers