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Security Detention – UK Practice

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1 Introduction: The UK and Terrorism

The UK has a long history of terrorism law and practice both at home, particularly in Northern Ireland,¹ and abroad in its former colonial empire.² Its domestic anti-terrorism law is wide-ranging and highly sophisticated³ and its anti-terrorism practices and policies continue to attract great interest,⁴ as do the leading judicial decisions.⁵ This article seeks to assess the application of a number of anti-terrorism strategies involving detention of individuals. Part 2 briefly introduces the legal and human rights context. Parts 3 consider the provisions of the Anti-Terrorism, Crime and Security Act (2001) on indefinite detention. Part 4 examines the judicial responses to those provisions. Part 5 examines the Prevention of Terrorism Act 2005, and in particular details the regime of control orders it introduced. The regime of control orders can only be properly understood as a response to the judicial rejection of the regime of indefinite detention. Parts 6-8 examine the judicial challenges to control orders to date. These have concerned procedure (Part 6), substance (Part 7) and relating to the possibility of prosecution (Part 8). Part 9 contains some concluding comments on the future for Control Orders. It considers suggestions that have been made for improving the control orders regime and how the regime may be impacted by developments in other anti-terrorist strategies. The Control Order regime is important internationally because it represents the current UK strategy for dealing with individuals who have been returned from other jurisdictions, for example, from the United States.⁶

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¹ See P Wilkinson (ed) Terrorism: British Perspectives (Aldershot, Dartmouth, 1993).

² See C Walker, Blackstone's Guide to the anti-Terrorism Legislation (Oxford, OUP, 2002); C Townshend, Britain's Civil Wars: Counterinsurgency in the Twentieth Century (London, Faber, 1986).

³ Some aspects of domestic law have been required by legal obligations under European and international law. See H Duffy, The 'War on Terror' and the Framework of International Law (Cambridge, 2005); F Gregory, 'The EU's Response to 9/11: A Case Study of Institutional Roles and Policy Processes with Special Reference to Issues of Accountability and Human Rights' 17 Terrorism and Political Violence (2005) 105-23.

⁴ See C Walker, 'Policy Options and Priorities: British Perspective' in M van Leeuwen (ed) Confronting Terrorism: European Experiences, Threat Perceptions and Policies (The Hague, Kluwer, 2003) 11; A Vercher, Terrorism in Europe (Oxford, OUP, 1992).

⁵ 'the decision in the A case [considered below] is a landmark decision that will be used as a point of reference by courts all over the world for decades to come, even when the age of terrorism has passed', M Arden, 'Human Rights in The Age of Terrorism' 121 LQR (2005) 604-27 at 621.

⁶ See I. Cobain and V. Dodd, 'Britain to US: we don't want Guantánamo nine back' The Guardian, 3 October 2006; S. O'Neill, M. Evans and T. Reid, 'Release of inmates from

2 The Legislative and Human Rights Context

2.1 Human Rights Act 1998

The Human Rights Act 1998 (HRA), most of which entered into force in October 2000, was a major constitutional development.⁷ The HRA ‘incorporates’⁸ the European Convention on Human Rights (ECHR) into UK law. All legislation can now be tested for its compatibility with the ECHR. The HRA represents an ingenious construction that impacts on legislative, executive and judicial powers and involves all institutional actors in rights review.⁹ Under s. 3 HRA all legislation must ‘so far as it is possible to do so’ be read and given effect in a way that is compatible with the ECHR¹⁰ If it is not possible, the higher courts can issue a ‘declaration of incompatibility’ under s 4 HRA. In all cases so far these have been followed by remedial legislation. Under s 6 HRA it is unlawful for a public authority to act in a way which is incompatible with a Convention rights.¹¹

2.2 Controlling the Terror Threat: Anti-Terrorist Legislation in the UK

Major terrorist atrocities almost always see new legislative provisions in response to public demand. After 9/11 the Anti-Terrorism, Crime and Security Act (2001) (ATCSA)¹² was passed with great speed.¹³ It contained an array of new offences and new

Guantanamo leaves Britain facing a security headache’ *The Times*, 8 August 2007 (if five Guantanamo Bay inmates were returned to Britain they would be placed under surveillance and could have terrorist control orders imposed on them if they are thought to be a threat to national security. Consideration would also be given to their deportation).

⁷ See D McGoldrick, ‘The HRA in Theory and Practice’ 50 *ICLQ* (2001) 901-53.

⁸ It is not a technical ‘incorporation’ as the ECHR is not per se part of UK law.

⁹ See D Feldman, ‘The Human Rights Act 1998 and Constitutional Processes’ *Legal Studies* [1999] 165-206; P Craig, ‘The Courts, the Human Rights Act and Judicial Review’ 117 *LQR* (2001) 589-603; D Nicol, ‘Are Convention Rights a No-Go Area For Parliament’ [2002] *Public Law* 438-48.

¹⁰ See A Kavanagh, ‘The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998’ 26(1) *OJLS* (2006) 179-206; TRS Allen, ‘Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority’ 63(3) *Cambridge Law Journal* (2004) 685-711; R Ekins, ‘Constitutional Law, Judicial Supremacy and the Rule of Law’ 119 *LQR* (2003) 127-152.

¹¹ S 6 details the scope of ‘public authority’. It includes the courts but not the parliament.

¹² See A Tomkins, ‘Legislating Against Terror: The Anti-Terrorism, Crime and Security Act’ [2002] *Public Law* 205.

¹³ See PA Thomas, ‘September 11th and Good Governance’ 53 *NILQ* (2002) 366; ‘JL Hiebert, ‘Parliamentary Review of Terrorism Measures’ 68 *MLR* (2005) 676-80.

powers.¹⁴ The most controversial new measures in the ATCSA were those in Part 4, titled ‘Immigration and Asylum’, permitting indefinite detention for foreign nationals suspected of being international terrorists.¹⁵ These provisions required the UK to derogate from Article 5 ECHR and Article 9 ICCPR.¹⁶

3 The ATCSA Part 4 Regime for Indefinite Detention

Section 21 of ATCSA provided that the Home Secretary could certify an individual if he reasonably believed that that person’s presence in the UK was a threat to national security and that he suspected that the person was a terrorist. Once certified a range of immigration decisions (which can only be taken against non-nationals), including an order for removal, could be taken even though the person could not be removed for legal or practical reasons. Interestingly, the principal legal reason would normally be that it was contrary to the ECHR to remove an individual who presented substantial evidence that he or she would face a real risk of treatment incompatible with the ECHR.¹⁷ In the anti-terrorist context this would normally be ill-treatment or the death penalty but in principle it could extend to other rights.¹⁸ Seventeen persons were detained under Part 4 regime.¹⁹ Only one person won an appeal against certification. In March 2004 the Special Immigration Appeals Commission (SIAC) ruled that the assessments placed before it for detaining a Libyan man as a ‘suspected international terrorist were not reliable’ and that reasonable suspicion had not been established. The Court of Appeal upheld SIAC’s decision.²⁰ There was particular controversy in 2006 when it, ‘emerged that lawyers

¹⁴ Eg there were provisions on the disclosure of information, policing of nuclear and aviation facilities, retention of communications data, EU third pillar provisions. On the latter see D Bonner, ‘Managing Terrorism While Respecting Human Rights? European Aspects of the ATCSA 2001’ 8 *European Public Law* (2002) 497.

¹⁵ Eg on a sunset provision and on reviews. For the detailed provisions see H Fenwick, ‘The ATCSA 2001: The “Response” of Great Britain’s Legal Order to September 11, 2001: Conflicts With Fundamental Rights’, in P Eden and T O’Donnell, September 11, 2001: A Turning Point in International and Domestic Law? (Transnational, Ardsley, NY, 2005) (eds) 533-613 at 544-604.

¹⁶ See generally C Mikaelson, ‘Derogating From International Human Rights Obligations in the “War Against Terrorism” - A British-Australian Perspective’ 17 *Terrorism and Political Violence* (2005) 131-55.

¹⁷ It could also have been that they satisfied the criteria for being granted asylum.

¹⁸ The House of Lords has held that a person may rely not only on Articles 2 and 3 ECHR but also 5, 6, 8 and possibly 9 to resist a decision to remove them to a state where anticipated ill treatment would or might result in the completely denial or nullification/ of those Convention rights, see *R (Razgar) v. Secretary of State for the Home Department* (No. 2) [2004] UKHL 27, [2004] 2 AC 368 and in *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

¹⁹ For details of their national origin and the allegations against them see ‘Who are the terror detainees?’ <<http://news.bbc.co.uk>> 11 March 2005.

²⁰ See *Secretary of State for the Home Department v M* [2004] EWCA Civ 324, [2004] 2 All E.R. 863. See also *A & Others v State for the Home Department* [2004] EWCA Civ

discovered that material presented by the intelligence services in his case contradicted evidence given in another appeal. The discrepancy led to severe criticism of the Home Office by SIAC judges'.²¹

According to Amnesty International most of the ATCSA detainees were held in the High Security Unit (HSU) in Belmarsh prison. The HSU was described as a prison within the prison. The cells were small with restricted natural light. Detainees were kept in their wing and could communicate only with detainees in the same wing, except during religious worship. During their initial detention in the HSU, the ATCSA detainees were locked in their cells 22 hours a day and in the two hours out of their cell they were subjected to 'small-group isolation'. AI considered that many of these aspects of the HSU regime violated international human rights standards: the lack of adequate association time and activities in communal areas; the lack of educational, sport, and other meaningful activities and facilities; and the lack of access to open air, natural daylight and exercise in a larger space. In March 2002 the ATCSA detainees were decategorized from Category A 'high risk' to Category A 'standard risk' and transferred to House Block 4 in Belmarsh. When Amnesty International delegates visited the detainees in June 2002, the detainees said they were still being locked up 22 hours a day; that they were denied adequate health care; and that they were only allowed 'closed' visits with their families (when a glass screen separates the detainee from family). Amnesty International concluded that those held at Belmarsh were suffering conditions that amounted to cruel, inhuman and degrading treatment, and that the conditions had led to a serious deterioration of their physical and mental health.²²

There was also some evidence that the conditions of detention were causing psychiatric problems.²³ One was detained in a secure mental hospital; another was released on conditional bail because of the deterioration of his mental health while in custody. Another was released on bail, on strict conditions, in April 2004. The Home Secretary revoked his certification of another in September 2004, and he was released without conditions. The remainder were detained in high security jails. The European Committee on the Prevention of Torture twice visited persons detained under Part IV of ATCSA and made adverse comments the regime.²⁴ Amnesty International condemned it as a 'shadow criminal justice system'.²⁵ Other human rights organisations were heavily critical. In a powerfully reasoned report a Committee of Privy Councillors (the Newton Committee) 'strongly recommended' that the detention power be terminated 'as a matter

1123 on a number of generic issues dealt with by SIAC. One person was granted bail, see *G v Secretary of State for the Home Department* [2004] EWCA Civ 265.

²¹ See S O'Neill, 'Immigration Powers Used To Hold Al-Qaeda Kingpin in Jail' *The Times*, 20 October 2006.

²² The information in this paragraph is reproduced from Amnesty International, 'UK - Human Rights: A Broken Promise' <<http://web.amnesty.org/library/Index/ENGEUR450042006?open&of=ENG-GBR>> (23 February 2006), p.21.

²³ *Id.*, 21-23.

²⁴ See CPT/Inf (2003) 18, 9; CPT/Inf (2006) CPT/Inf (2006) 26, 27 28 and 29.

²⁵ AI Report, Broken Promises, n 23 above, p.15.

of urgency'.²⁶ As noted, seventeen people were subjected to the Part IV regime. Legally, they could have left at any time (hence it was referred to as a three wall prison) if they were willing to return to a place where they were willing to face a real risk of serious ill-treatment. Although two individuals did just this, it was not realistic to expect detainees to do this. By the time of the decision of the House of Lords in the *A (Belmarsh Detainees) Case* those detained had already been held for three and a half years and faced the prospect of indefinite detention.

4 The Judiciary and Indefinite Detention

The detention system in ATCSA was challenged in *A (FC) and Others v Secretary of state for the Home Department*.²⁷ While 'Belmarsh [was] not the British Guantanamo Bay'²⁸ there had been strong judicial criticism of the regime at the US base.

4.1 The Special Immigration Appeals Commission

It is important to understand how the issue of indefinite detention came before the respective courts. In 1997, the UK authorities established the Special Immigration Appeals Commission (SIAC).²⁹ SIAC is an immigration tribunal, empowered to hear appeals by foreign nationals against being issued with deportation orders on grounds that they pose a threat to the 'national security' of the UK, and that their presence in the UK is not conducive to the public good. SIAC can conduct 'closed' hearings in which the deportee and counsel are excluded, and at which the Home Secretary is allowed to present secret intelligence information. This is to ensure the protection of 'national security'. Under immigration powers, the UK authorities are entitled to detain people pending deportation.³⁰

In *Secretary of State for the Home Department v Rehman*³¹ the applicant, a Pakistani national, had applied for indefinite leave to remain in the UK. This was refused.

²⁶ Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report*, House of Commons, HC 100 (2003), paras. 185–204.

²⁷ [2004] UKHL 56, [2005] 2 A.C. 68.

²⁸ Baroness Hale, *id.*, para 223. See also PA Thomas, 'Emergency and Anti-Terrorist Powers: 9/11: USA and UK' (2003) 26 *Fordham International Law Journal* 1193-1233; W Scheuerman, 'Emergency Powers and the Rule of Law After 9/11' 14 *The Journal of Political Philosophy* (2006) 61–84.

²⁹ This was done in response to the adverse judgment of the European Court of Human Rights in the case of *Chahal v United Kingdom*, finding that the safeguards advanced by the United Kingdom as affording proper due process standards were inadequate. Neither judicial review by the High Court nor the adviser system satisfied art. 5(4) ECHR which mandates that the legality of detention must be determined by a 'court'.

³⁰ See S O'Neill, 'Immigration Powers Used To Hold Al-Qaeda Kingpin in Jail' *The Times*, 20 October 2006.

³¹ [2001] UKHL 47, [2003] 1 AC 153.

On the basis that the Secretary of State was satisfied, on the basis of the information he had received from confidential sources, that R was involved with an Islamic terrorist organization. He was satisfied that in the light of R's association with the organization it was undesirable to permit him to remain and that his continued presence in this country represents a danger to national security. R challenged the decision before SIAC, which allowed his appeal on the basis that that Secretary of State had not established that R was, is, and was likely to be a threat to national security. The CA allowed the Secretary of state's appeal and this was upheld by the House of Lords. The key focus was on the interpretation of 'national security' and 'in the interests of national security'. The HL accepted that the United Kingdom's national security could be threatened by action targeted at an altogether different jurisdiction, even if no British subjects were directly involved. The determination of the issue of whether something was "in the interests" of national security WAS not a question of law, but rather a "matter of judgment and policy".³²

The ATCSA gave SIAC new powers. These included provision for the grant of bail (s.24), appeal against certification by a certified suspected international terrorist (s.25), periodic reviews of certification (s.26), periodic reviews of the operation of sections 21 to 23 (s.28). Section 29 provided for the expiry (subject to periodic renewal) of sections 21 to 23 and for the final expiry of those sections, unless renewed, on 10 November 2006. By section 21(8), legal challenges to certification were reserved to SIAC. Habeas corpus was thus excluded. Section 30 gave SIAC exclusive jurisdiction on 'derogation matters', which covered the derogation from Article 5(1) ECHR made by the UK. SIAC was designated as the appropriate tribunal to hear a challenge under the HRA to the compatibility of the use of derogation power with an applicant's Convention right. SIAC was constituted as a superior court (s.35) and appeals from its decisions under the ATCSA lay to the Court of Appeal and House of Lords.

With respect to certification the only remedy was cancellation of the certificate if either the SIAC considered that there were no reasonable grounds for the belief or suspicion required under s.21 (a) or (b) or 'for some other reason' (s.25 (2)). SIAC could appoint an independent lawyer – a Special Advocate - to represent an applicant's interests when considerations of national security meant that the applicant and his lawyers had to be excluded from the proceedings while the sensitive evidence was put.³³ The Special Advocate represents the interests of, but is not responsible for, an appellant. This significantly modifies the ordinary lawyer/client relationship. The Special Advocate is precluded from communicating highly pertinent information, namely the closed case, to the appellant and as a result, the scope of the Special Advocate to receive meaningful instructions is limited. Thus, the ability of the appellant, or his solicitor, to make informed decisions as how best to proceed is constrained. At any closed session, neither the appellant nor his lawyers are permitted to be present and the Special Advocate takes over entirely as his representative. They have no power to call witnesses.³⁴

³² Lord Hoffman, *id* para 50.

³³ For a critique see Constitutional Affairs Committee, HC, *The Operation of the SIAC and the Use of Special Advocates*, Seventh Report of Session 2004-05, HC 323-1.

³⁴ The Special Advocate system was also imported into the PTA 2005. See below Part 00.

4.2 Re A (FC) and others (FC) v. Secretary of State for the Home Department (Belmarsh Detainees Case)

The nine appellants had been certified by the Home Secretary under s. 21 and detained under section 23 of ATSCA.³⁵ They shared certain common characteristics that were central to their appeals. All were foreign (non-UK) nationals. None had been the subject of any criminal charge.³⁶ In none of their cases was a criminal trial in prospect. The UK had derogated from Article 5(1) (f) ECHR.³⁷ The applicants challenged the lawfulness of their detention as inconsistent with the ECHR. They argued that the United Kingdom was not legally entitled to derogate from its ECHR obligations; that, if it was, its derogation was nonetheless inconsistent with the ECHR and so ineffectual to justify the detention; and that the statutory provisions under which they had been detained were incompatible with their Convention rights.

SIAC considered a body of closed material, that is, secret material of a sensitive nature not shown to the parties. The Court of Appeal (CA) was not asked to read this material. Nor was the House of Lords. Before SIAC and the CA the applicants lost on the issue of whether there was a public emergency. Before the SIAC they were successful in their argument that the provisions of s.23 were discriminatory and so in breach of article 14 of the Convention. The CA rejected this view.³⁸ Lord Woolf CJ referred to a tension between article 15 and article 14 ECHR.³⁹ He held that it would be ‘surprising’ if article 14 prevented the Secretary of State from restricting his power to detain to a smaller rather than a larger group. He held that there was objective and reasonable justification for the differential treatment of the appellants.⁴⁰ Brooke LJ similarly found good objective reasons for the Secretary of State's differentiation, although he also relied on rules of public international law.⁴¹ Chadwick LJ found that since the Secretary of State had reached his judgment on what the exigencies of the situation required, his decision had to

³⁵ Two of the eight December detainees exercised their right to leave the United Kingdom: one went to Morocco on 22 December 2001, the other (a French as well as an Algerian citizen) went to France on 13 March 2002. One of the December detainees was transferred to Broadmoor Hospital on grounds of mental illness in July 2002. Another was released on bail, on strict conditions, in April 2004. The Home Secretary revoked his certification of another in September 2004, and he was released without conditions.

³⁶ Although one of the detainees has previously been tried and acquitted of a terrorist offence.

³⁷ See *A (Belmarsh Detainees) Case*, para 11.

³⁸ *A, X and Y, and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2004] QB 335.

³⁹ *Id* para 45.

⁴⁰ *Id* para 56.

⁴¹ *Id*, paras 112-32.

stand. He stated that ‘The decision to confine the measures to be taken to the detention of those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality’.⁴²

4.3 The Decision of the House of Lords

In *A (FC) and others (FC) v Secretary of State for the Home Department*⁴³ (hereinafter *A (Belmarsh Detainees) Case*) the appeal was exceptionally heard by a nine-member panel.⁴⁴ The judgment has been described as ‘one of the most constitutionally significant ever decided by the House of Lords’.⁴⁵ All nine made some reference to 9/11. The Senior Law Lord, Lord Bingham, delivered the leading judgment.⁴⁶ A notable feature of his opinion was its strong internationalist focus. Along with UK decisions of UK courts and the Privy Council, he cited extensively from decisions of the European Commission and European Court of Human Rights, and from Canadian and US Supreme Courts. That has been a normal feature of post HRA 1998 jurisprudence. Rather more striking is the range of other European and international materials cited by Lord Bingham: Opinion 1/2002 of the Council of Europe Commissioner for Human Rights,⁴⁷ the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,⁴⁸ the parliamentary Joint Committee on Human Rights,⁴⁹ the International Covenant on Civil and Political Rights (1966), the General Comments of the United Nations (UN) Human Rights Committee, the European Commission against Racism and Intolerance, UN Commission on Human Rights, Resolutions of the Security Council of the United Nations, International Convention on the Elimination of All Forms of Racial Discrimination 1966, General Recommendations of the Committee on the Elimination of All Forms of Racial Discrimination, the International Law Association’s Paris Minimum Standards of Human Rights Norms in a State of Emergency.⁵⁰ Dickson has observed that, ‘For a Law Lord to rely to such an extent ‘soft law’ standards is rare indeed and it will certainly add to the status of these standards internationally’.⁵¹

⁴² *Id* paras 152-3.

⁴³ [2004] UKHL 56, [2005] 2 A.C. 68. See M Elliott, ‘UK: Detention Without Trial and the “War on Terror”’ 4 *International Journal of Constitutional Law* (2006) 553-66; R O’Keefe, ‘Decisions of British Courts During 2004’ 75 *BYIL* (2004) 518-35.

⁴⁴ This evidences its constitutional importance.

⁴⁵ M Loughlin, ‘Introduction to *A v Secretary of State for the Home Department*’ 68(4) *MLR* (2005) 654.

⁴⁶ Lord Nicholls, Lord Scott, Lord Rodger, Lord Carswell and Baroness Hale all made approving references to Lord Bingham’s speech.

⁴⁷ Council of Europe Doc Comm DH (2002) 7, 28 August 2002, Mr Alvaro Gil-Robles.

⁴⁸ 7 *HRQ* (1985) 3.

⁴⁹ It is joint in the sense that it is composed of members of the House of Commons and the House of Lords.

⁵⁰ 79 *AJIL* (1985) 1072, 1074.

⁵¹ B Dickson, ‘Law Versus Terrorism: Can Law Win?’ [2005] *EHRLR* 11-28 at 23. M Arden, ‘Human Rights in The Age of Terrorism’ 121 *LQR* (2005) 604-27, describes the judgment as remarkable for the use it makes of such materials, at 616. There was

Lord Bingham began by stressing that, ‘The duty of the House, and the only duty of the House in its judicial capacity, is to decide whether the appellants’ legal challenge is soundly based.’⁵² His account of the background to the case refers to the events of 9/11 and the facts that, ‘Before and after 11 September Usama bin Laden, the moving spirit of Al-Qaeda, made threats specifically directed against the United Kingdom and its people’.⁵³ As noted above, an important aspect of the case was that the problem the UK found itself in was because of its efforts to comply with the rulings of the European Court of Human Rights and in particular the Chahal case.⁵⁴ The practical effect of that jurisprudence was that, ‘a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country and is not charged with any crime, may not under article 5(1)(f) of the [ECHR] and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security’.⁵⁵ It was this jurisprudence that had necessitated that the UK’s derogation to Article 5 to cover the detention powers in Part 4 of ATCSA.

4.4 Proportionality

Lord Bingham accepted the proportionality challenge to the Derogation Order and to s.23 ATCSA. Central to this view was the argument that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem.⁵⁶ It allowed non-UK suspected terrorists to leave the country with

similarly extensive use of international materials in *Re A Foreign Torture Evidence*, considered in Part 9 below.

⁵² *A (Belmarsh Detainees) Case*, Lord Bingham, para 3.

⁵³ *Id.*, para 6.

⁵⁴ *Chahal v United Kingdom* (1996) 23 EHRR 413. Essentially the test is whether there are substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state.

⁵⁵ *A (Belmarsh Detainees) Case*, Lord Bingham, para 9. The UK has supported a challenge to *Chahal* in *Ramzy v Netherlands*, A/25224/05, currently before the European Court of Human Rights. The UK submission is reproduced in the JCHR Report, n 373 below, Ax. 2. It relies on the minority judgment of judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev And Levits in *Chahal* that ‘a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination’, para 1. See also the intervention by Justice and Liberty, <http://www.icj.org/IMG/pdf/Ramzy_intervention_Justice.pdf>

⁵⁶ Lord Bingham, para 43. See also Lord Hope (serious error to regard the case as about the right to control immigration. Rather it was an issue about the aliens’ right to liberty, para 103) and (indefinite detention without trial of foreign nationals cannot be said to be strictly required to meet the exigencies of the situation, if the indefinite detention without trial of those who present a threat to the life of the nation because they are suspected of involvement in international terrorism is not thought to be required in the case of British

impunity and left British suspected terrorists at large, while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, might harbour no hostile intentions towards the United Kingdom.⁵⁷ He robustly rejected the approach of SIAC and the CA:

I do not consider SIAC's conclusion as one to which it could properly come. In dismissing the appellants' appeal, Lord Woolf CJ broadly considered that it was sensible and appropriate for the Secretary of State to use immigration legislation, that deference was owed to his decisions (para 40) and that SIAC's conclusions depended on the evidence before it (para 43). Brooke LJ reached a similar conclusion (para 91), regarding SIAC's findings as unappealable findings of fact. Chadwick LJ also regarded SIAC's finding as one of fact (para 150). I cannot accept this analysis as correct. The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom*... Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred in law and the Court of Appeal erred in failing to correct its error.⁵⁸

Lord Scott was unable to accept that the Secretary of State had established that section 23 was 'strictly required' by the public emergency. He should, at the least, have shown that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice.⁵⁹ For Baroness Hale, if it was not necessary to lock up the nationals it could not be necessary to lock up the foreigners. It was not strictly required by the exigencies of the situation.⁶⁰ Finally, a number of the Lordships also made the point that it was hard to see that the detainees were so very dangerous given that the Government was happy to let them go to any country that would take them.⁶¹ This pointed to proportionality of the measures.

4.5 Discrimination

nationals, para 129) and (s 23 of Act not rationally connected to the legislative objective, para 133).

⁵⁷ *A (Belmarsh Detainees) Case*, para 43.

⁵⁸ *Id* para 44 (emphasis added).

⁵⁹ Lord Scott, para 155.

⁶⁰ Baroness Hale, para 231.

⁶¹ See Lord Bingham, para 33, Lord Nicholls para 85, Lord Hope, para 133, Lord Scott, para 140, Baroness Hale, para 230 and Lord Carswell, para 240.

The appellants also attacked s. 23 as discriminatory on the basis of nationality. The Home Secretary had argued that the threat to the life of the nation, ‘came predominantly, but not exclusively from foreign nationals and that foreign nationals were using the UK as a base for international terrorist activities’.⁶² Although there was a threat from British nationals, extending the ATCSA detention powers to them would be disproportionate:

While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify.⁶³

SIAC had concluded that s 23 was discriminatory because the threat did not stem solely from foreign nationals. The CA disagreed but the HL reversed this. The critical issue, as often in discrimination analysis, was in determining of the appropriate comparator. The Attorney General submitted that the position of the appellants should be compared with that of non-UK nationals who represented a threat to the security of the UK but who could be removed to their own or to safe third countries. The relevant difference between them and the appellants was that the appellants could not be removed. A difference of treatment of the two groups was accordingly justified and it was reasonable and necessary to detain them. The CA had accepted this on the basis that, ‘the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed’.⁶⁴ However, Lord Bingham rejected this approach because it meant accepting, ‘the correctness of the Secretary of State’s choice of immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved’.⁶⁵ In his view the proper comparators were suspected international terrorists who were UK nationals. The appellants shared with this group the most relevant characteristics (a) of being suspected international terrorists and (b) of being irremovable.⁶⁶ Although he accepted that the Attorney General’s comparison might be reasonable and justified in an immigration context, it could not be so ‘in a security context, since the threat presented by suspected international terrorists did not depend on their nationality or immigration status’.⁶⁷ Baroness Hale also followed this approach. She was particularly scathing about the Attorney Generals’ efforts to justify the measures:

No one has the right to be an international terrorist. But substitute ‘black’, ‘disabled’, ‘female’, ‘gay’, or any other similar adjective for ‘foreign’ before ‘suspected international terrorist’ and ask whether it would be justifiable to take power to lock up that group but not the ‘white’, ‘able-bodied’, ‘male’ or ‘straight’ suspected international terrorists. The answer is clear.⁶⁸

⁶² Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (February 2004, Cm 6147), para 24.

⁶³ Id para 36.

⁶⁴ A, X and Y (Belmarsh Detainees) Case, CA, per Lord Woolf, para 56.

⁶⁵ Id para 53.

⁶⁶ Id paras 51-2. Similarly Lord Hope, para 138.

⁶⁷ Id para 54. See also Lord Rodger, para 166.

⁶⁸ A (Belmarsh Detainees) Case, Baroness Hale, para 238.

The Attorney General also made a more far-reaching submission that, ‘international law sanctions the differential treatment, including detention, of aliens in times of war or public emergency’.⁶⁹ After considering a range of European and international materials, Lord Bingham asserted that there was no European or other authority for the Attorney General’s view. Moreover, there were a number of international treaties and materials that were, ‘inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency.’⁷⁰ A decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another, could not be justified. It was a violation of article 14 ECHR. It was also a violation of article 26 of the ICCPR and so inconsistent with the United Kingdom’s ‘other obligations under international law’ within the meaning of article 15 ECHR. A range of international instruments and US authorities were considered but none were considered to support the Attorney General’s view.⁷¹

Lord Nicholls similarly thought that the government had misconceived the human rights of non-nationals in this situation.⁷² For Lord Scott a difference based on the right to residence was, ‘irrelevant to the issue as to what measures are required in order to combat the threat of terrorism that their presence in this country may be thought by the Secretary of State to present’.⁷³ If the measures were really necessary they would logically have been applicable to nationals and non-nationals. The measures were as irrational as if they had been confined to Muslims only or to men only.⁷⁴ It was irrational and discriminatory to restrict the application of the measures to suspected terrorists who had no right of residence in this country. Some suspected terrorists might well be home-grown.⁷⁵ Of course, the truth of this last comment became evident in July 2005 when there was a series of suicide attacks in London by UK nationals.

Lord Nicholls stressed that the courts were ‘acutely conscious’ that the government alone was able to evaluate and decide what counter-terrorism steps were needed and what steps would suffice to protect the security of this country and its inhabitants. He accepted that courts were not equipped to make such decisions, and nor had they been charged that responsibility. However, Parliament had charged the courts with a particular responsibility to check that legislation and ministerial decisions did not overlook the human rights of persons adversely affected. The courts would accord to Parliament and ministers, the ‘primary decision-makers’, an appropriate degree of latitude. As the latitude would vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon

⁶⁹ *Id* Lord Bingham, para 55.

⁷⁰ *Id* para 63.

⁷¹ See also D Wilsher, ‘The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives’ 53 *ICLQ* (2004) 897-934.

⁷² *A (Belmarsh Detainees) Case*, HL, para 84.

⁷³ Lord Scott, para 157.

⁷⁴ Lord Scott, para 158.

⁷⁵ *Id*.

that right. The courts would only intervene when it was apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor. For Lord Nicholls that was the situation in this case⁷⁶ Although this was a national security case where Parliament would normally have substantial latitude to make decisions that was undermined because security considerations had not prompted a similar negation of the right to personal liberty in the case of nationals who posed a similar security risk. The government had described such a 'draconian' power as 'difficult to justify'.⁷⁷ But, in practical terms, it was equally draconian for a non-national who, in practice, could not leave the country for fear of torture abroad.⁷⁸

Lord Hoffman's opinion attracted the greatest publicity because of its language and tenor. It was also firmly grounded in English law and domestic considerations rather than in the international and European sources that underlay Lord Bingham's opinion.⁷⁹ Lord Hoffman did not accept the case that there was a threat to the life of the nation for the purposes of Article 15 ECHR. Indeed, he was of the view that:

The real threat to the life of the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.⁸⁰

However, it is worth remembering that Lord Hoffman's view on the existence of a public emergency was not shared by any other member of the House. It has also been criticized extra-judicially by Arden LJ on the basis that the Law Lords had not seen the closed material in the case.⁸¹ It is somewhat ironic that the leading opinion of Lord Bingham and a number of the other opinions actually cited Lord Hoffman's opinion in *Secretary of State for the Home Department v Rehman*⁸² in support of the argument that that a decision on the very existence of an emergency were very much at the political end of the spectrum and required legitimation through the democratic process.

For completeness it is necessary to briefly note Lord Walker's dissent. He didn't consider the measures to be discriminatory, as there were sound, rational grounds for

⁷⁶ A (Belmarsh Detainees) Case, Lord Nicholls, paras 79-81

⁷⁷ Citing Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (February 2004, Cm 6147), para 36. The discussion paper was a direct response of the report of the Newton Committee, n 26 above.

⁷⁸ A (Belmarsh Detainees) Case, Lord Nicholls, para 83.

⁷⁹ For an excellent analysis see T Poole, 'Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case' 32(4) *Journal of Law and Society* (2005) 534-61.

⁸⁰ Lord Hoffman, para 97. See also S Jenkins, 'Judges Cut Through the Hysteria of Rulers Made Tyrants By Fear' *The Sunday Times* 22 July 2006 (only threat to British Constitution came from members of the government).

⁸¹ M Arden, 'Human Rights In The Age of Terrorism' 121 *LQR* (2005) 604-27 at 616.

⁸² [2001] UKHL 47, [2003] 1 AC 153, para 62.

different treatment, or to be disproportionate, given the safeguards against oppression and the possibilities for judicial and parliamentary review.⁸³

4.6 Concluding Comments on the A (Belmarsh Detainees) Case

The House of Lords decision in the A (Belmarsh Detainees) Case was greeted with acclaim by human rights lawyers and with shock by the government.⁸⁴ It is particularly significant in terms of how it saw the relative institutional competence of the executive and the judiciary. It asserts a relatively strong role for the judiciary in the protection of the rule of law in general and of fundamental human rights in particular. The decision can be read to support the argument of those who claim that parliamentary sovereignty in the UK is gradually being replaced by a system of constitutional supremacy under which fundamental rights are not subject to executive or even Parliamentary removal.⁸⁵ However, it can be read more narrowly as simply following parliaments own directions in the HRA and applying it to the narrow technical legal issue of discrimination – an area where courts traditionally feel they have proper expertise.⁸⁶ Fundamental to the HL's decision was its conception that what was at issue was not an 'immigration' matter but a 'security' one. Conceived in security terms, the governments position was illogical and irrational because British nationals could present an equal security threat but were not subject to detention. In rule of law terms the Act violated the rule that laws should apply equally to all save to the extent that objective differences justify differentiation.⁸⁷ In emergency situation states have commonly resorted to measures against aliens and subsequently sought to extent them to citizens.⁸⁸ The House of Lords stood up for a small number of politically (and largely legally) powerless individuals. As Dickson has rightly observed that, 'The House of Lords, much to its credit, has ensured that the rule of law prevails even when very few people, including non-British nationals, have their fundamental rights breached'.⁸⁹

⁸³ See Lord Walker, paras 191-218

⁸⁴ See Arden, n 5 above; T Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation model of Constitutionalism' 68 MLR [2005] 655-68; J Steyn, '2000-2005: Laying The Foundations of Human Rights Law in The United Kingdom' [2005] EHRLR 349-62 at 351-2.

⁸⁵ See the discussion in *International Transport Roth GMBH and Others v Secretary of State for the Home Department* [2002] UKHRR 479.

⁸⁶ For a leading example see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557 (housing legislation regulating surviving tenancies discriminatory on grounds of sexual orientation). See also S Fredman, 'From Deference to Democracy: The Role of Equality Under the Human Rights Act 1998' 122 Law Quarterly Review (2006) 53-81.

⁸⁷ See Lord Bingham, 'The Rule of Law' 66 Cambridge Law Journal (2007) 67-85.

⁸⁸ See D Cole, *Enemy Aliens* (New York, New Press, 2003); id, 'Enemy Aliens' 54 Stanford Law Review (2001-02) 953-1004.

⁸⁹ B Dickson, 'Law Versus Terrorism: Can Law Win?' [2005] EHRLR 11-28 at 24.

Legally, under the structure of the HRA, the government did not have to accept the declaration of incompatibility.⁹⁰ However, it was in a difficult legal and political position.⁹¹ In January 2005 the government announced that it accepted the declaration of incompatibility and that new legislation would replace indefinite detention in prison.⁹² The new provisions were contained the Prevention of Terrorism Act 2005.

5 The Prevention of Terrorism Act 2005

After the measures in Part 4 ATCSA were held incompatible with the ECHR in *Re A (Belmarsh Detainees)* the executive proposed a new system of control orders.⁹³ The proposals applied to British nationals and non-nationals and were very controversial.⁹⁴ The government accepted that they represented a, ‘very substantial increase in the executive powers of the State in relation to British citizens’.⁹⁵ There was a substantial rebellion by backbench Labour MP’s in the House of Commons and strong opposition in the House of Lords.⁹⁶ The parliamentary process had to be dealt with very quickly because the previous powers to detain the individuals were due to expire on 14 March 2005. In the event the Prevention of Terrorism Act 2005 (PTA) took just 18 days between introduction and Royal Assent. The first control orders, to deal with the ten suspects previously interned in Belmarsh, were issued by the Home Secretary immediately.

The Joint Parliamentary Committee on Human Rights produced, at great speed, a critical report on the Bill⁹⁷ The Bill sought to authorise the Secretary of State to make ‘control orders’ that would allow a suspected terrorist to be placed under house arrest, and thereby derogate from the right to liberty under Article 5 of the ECHR, without prior judicial authorisation. The Bill would also authorise a wide range of restrictions on suspects’ movements, association, expression, and travel, again without prior judicial involvement. The JCHR conducted a rigorous rights-review of the proposed measures within days of the Bill’s introduction. It questioned why house arrest was being contemplated, particularly in light of the Home Secretary’s admission that ‘there is currently no need’ to derogate from Article 5 of the ECHR. The JCHR also expressed doubt about the legitimacy of denying liberty without prior judicial involvement.⁹⁸ The reason given for refusing prior judicial authorisation was that the government had ‘prime

⁹⁰ See P Naughton, ‘Clarke Stands Firm Over Terror Detainees After Ruling’, *The Times*, December 16, 2004.

⁹¹ D Bonner, ‘Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights’ 12(1) *European Public Law* (2006) 45-71 at 59.

⁹² See Home Secretary, H.C. Debates, Vol. 430, col. 306-309 (26 January 2005).

⁹³ The essential idea of these had been proposed by the Newton Committee, n 26 above, which described them as restrictions, para 251.

⁹⁴ See Bonner, n 91 above.

⁹⁵ H.C. Debates, Vol. 430, col. 309 (26 January 2005).

⁹⁶ See M Bright and G Hinsliff, ‘Chaos: How War On Terror Became A Political Dogfight’ *The Observer*, 13 March 2005

⁹⁷ Ninth Report of JCHR, Session 2004-05, *Prevention of Terrorism Bill: Preliminary Report*, HL 61/ HC 389.

⁹⁸ *Id.*, paras 5, 13, 15-17.

responsibility to protect the nation's security' and that to abdicate this responsibility to the judiciary would be inappropriate.⁹⁹ The JCHR characterised this explanation as an 'eccentric interpretation of the constitutional doctrine of the separation of powers', and reminded the government that the 'judiciary's responsibility for the liberty of the individual' had long been accepted and respected. Therefore, to, 'invoke national security to deny that role' would be to 'subvert' the nation's 'traditional constitutional division of powers'.¹⁰⁰ This is very strong language and reflects a real difference in the perception of executive and judicial roles.

After strong opposition in the House of Lords in particular, the government accepted amendments under which judges authorised control orders (except for temporary emergency orders) and that there would be a review of the legislation after a year.

5.1 Control Orders

The PTA 2005 provides 'legislative power to subject to a 'control order' any terrorist suspect whatever his/her citizenship and whatever the terrorism involved'.¹⁰¹ It was designed therefore to avoid dealing with non-nationals differently. The ATCSA provisions on detention without trial were repealed with effect from 14 March 2005. Two forms of control orders replaced them: 'non-derogating' and 'derogating'. The intended distinction was that the conditions in a derogating control order would constitute an interference with the right to liberty and security of person in article 5 ECHR and would not fall within the exhaustive range of permissible heads of legitimate interference. An example would be if the person were effectively under house arrest. A derogating control order would require parliamentary approval via an article 15 ECHR designated derogation order under the HRA 1998¹⁰² and could only be authorised by a judge. Derogating control orders can be imposed on application to a judge where there is a belief that it is more likely than not that someone is or has been involved in terrorism-related activities. As of March 2007 no such orders had yet been made, though, as explained below, it is arguable that should have been.

A 'control order' is an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.¹⁰³ The Secretary of State may make a control order against an individual if he: (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.¹⁰⁴ The obligations that may be imposed by a

⁹⁹ Charles Clarke, Secretary of State for the Home Department, HC Deb vol 431 col 151-155 (22 February 2005).

¹⁰⁰ Ninth Report of the JCHR, above n 97 above, para 12.

¹⁰¹ See D Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights' 12(1) European Public Law (2006) 45-71 at 61.

¹⁰² See s.14(1) Human Rights Act 1998.

¹⁰³ S. 1(1) PTA (2005).

¹⁰⁴ S. 2(1) PTA (2005).

non-derogating control order are, ‘any obligations that the Secretary of State ... considers necessary for purposes connected with preventing or restricting involvement by that individual in the terrorism-related activity’.¹⁰⁵ A non-exhaustive list includes: a prohibition or restriction on his possession or use of specified articles or substances; a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities; a restriction in respect of his work or other occupation, or in respect of his business; a restriction on his association or communications with specified persons or with other persons generally; a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence; a prohibition on his being at specified places or within a specified area at specified times or on specified days; a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom; a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order; a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force; a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access; a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened; a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force; a requirement on him to allow himself to be photographed; a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means; a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand; a requirement on him to report to a specified person at specified times and places.¹⁰⁶ The intention was that each order would be tailored to the particular risk posed by the individual concerned. In fact many of the early orders appeared to follow a standard format.¹⁰⁷ However, gradually there were more variations. Before making, or applying for the making of, a control order against the individual, the Secretary of State must consult the chief officer of the police force about whether there is evidence

¹⁰⁵ S. 1(3) PTA (2005).

¹⁰⁶ S 1(4) PTA (2005). See also ss. 1 (5)-(7).

¹⁰⁷ See T de la Mare, ‘Control Orders and Restrictions on Liberty’

<<http://www.blackstonechambers.com/papers/asp>> He also examines potential conflicts with EU law.

available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism.¹⁰⁸

The PTA 2005 thus permits a range of conditions from house arrest, tagging, curfews, controlling access to visitors and restrictions on meetings and communications. As of the end of 2005 a total of 18 ‘non-derogating’ control orders had been made. All were male men. They are normally protected by an anonymity order.¹⁰⁹ One was a UK national, all the rest were non-UK nationals. During the period 11 June to 10 September 2006, nine orders were made with the permission of the court under section 3(1)(a) of the 2005 Act - one in respect of a British citizen on 19 June 2006, one in respect of a foreign national on 31 July 2006, six in respect of foreign nationals on 1 August 2006 and one in respect of a British citizen on 5 September 2006.

The Secretary of State also renewed one control order in accordance with Section 2 (4) (b) of the 2005 Act on 30 August 2006. As of 11 September 2006, there are 15 control orders currently in force, six of which are in respect of British citizens. During the period two requests to modify a control order obligation were agreed, and seven requests to modify a control order obligation were refused.¹¹⁰ By the 10 June 2007, 17 control orders were in existence, eight of which were in respect of British citizens.¹¹¹ The first use was made using the urgency procedures under section 3(1)(b) of the 2005 Act in February 2007.¹¹² Four of the seventeen individuals subject to a control order have absconded¹¹³ as has another individual in relation to whom a control order was made (i.e. signed) against that individual, but before the order had been served. This order was therefore not in operation.

The Minister can impose such an order when he or she has ‘reasonable grounds’ to suspect that someone is or has been involved in terrorism-related activities, and considers it necessary to do so ‘for purposes connected with protecting members of the public from a risk of terrorism’. The imposition must be reviewed by the courts within seven days. Individuals subject to these control orders can appeal against them, and the conditions in them, on the principles of judicial review. The order will remain in place

¹⁰⁸ S 8(2) PTA (2005). If a control order is imposed the possibility of prosecution must be kept under review, id, s. 8(4) PTA (2005.)

¹⁰⁹ Anonymity is based on the operational advice of the police.

¹¹⁰ House of Commons, Hansard, Ministerial Statements for 11 Sep 2006, <<http://www.publications.parliament.uk>>

¹¹¹ See ‘Update on control orders’, Written Ministerial Statement by the Secretary of State for the Home Department, 22 March 2007 <<http://www.publications.parliament.uk>>

¹¹² ‘Control Order Update’, Written Ministerial Statement by the Minister for Security, Counter-terrorism and Police, 21 June 2007.

¹¹³ The independent reviewer submitted that, ‘the 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’ n 00 above, pr 59.

unless it is ‘obviously flawed’.¹¹⁴ The High Court may consider the case in open or closed session. Where national security requires a closed session in the absence of the controlee and his chosen legal advisers, a trained and security cleared independent lawyer described as a Special Advocate represents the interests of the controlee in the closed sessions. Control orders are limited to 12 months’ duration. A fresh application has to be made if it is desired that the person concerned should remain a controlee at the end of each 12 month period. Breach of any conditions without reasonable excuse is a criminal offence punishable on indictment by imprisonment of up to 5 years, or an unlimited fine.¹¹⁵ Controlees and the Government both have the option of applying to the court for anonymity to apply to the identity of the controlee. For the controlee this avoids publicity that might lead to harassment in the community where he/she lives, or that might prejudice a fair trial if criminal charges are brought later. Finally, s.14(1) of the PTA 2005 requires the Secretary of State for Home Affairs to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period.

5.2 The Distinction Between Derogating and Non-Derogating Control Orders

The distinction between the two forms of control orders is obviously one of degree. Lord Carlisle of Berriew QC, the independent reviewer of the legislation, has noted that, ‘The intention is that conditions imposed under a control order should be specific and tailored to the individual. The aim is to secure the safety of the State by the minimum measures needed to ensure effective disruption and prevention of terrorist activity’.¹¹⁶ He also observed how restrictive the orders could be:

On any view those obligations [the restrictions imposed under non-derogating ‘control orders’] are extremely restrictive. They have not been found to amount to the triggering of derogation, indeed there has been no challenge so far on that basis – but the cusp is narrow...The obligations include an eighteen hour curfew, limitation of visitors and meetings to those persons approved by the Home Office, submission to searches, no cellular communications or internet, and a geographical restriction on travel. They fall not very far short of house arrest, and certainly inhibit normal life considerably.¹¹⁷

¹¹⁴ S 3(2)(b) Terrorism Act 2005.

¹¹⁵ In January 2007 one controlee was convicted on his plea of guilty of offences of breach, founded on persistent late reporting and unauthorized change of residence. He was sentenced to 5 months’ imprisonment.

¹¹⁶ First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2 February 2006, para 10. For the view of a person subject to an order see A Gillan and F al Yafai, ‘Control Order Flaws Exposed’ The Guardian, 24 March 2005.

¹¹⁷ Id. See also De La Mere n 107 above

The JCHR has continued to express strong doubts about the ECHR compatibility of the control orders system in the Terrorism Act 2005:

we seriously question renewal without a proper opportunity for a parliamentary debate on whether a derogation from Articles 5(1), 5(4) and 6(1) ECHR is justifiable, that is, whether the extraordinary measures in the Prevention of Terrorism Act 2005, which the Government seeks to continue in force, are strictly required by the exigencies of the situation. It would be premature for us to express a view on that question. We merely conclude at this stage that we cannot endorse a renewal without a derogation and believe that Parliament should therefore be given an opportunity to debate and decide that question.¹¹⁸

The then Home Secretary, Charles Clarke, had agreed to table legislation in Spring 2006 to allow Parliament to consider amendments to the 2005 Act following the first report of the Independent Reviewer, Lord Carlile. He reported on 2 February 2006 but the Home Secretary announced that he would not be introducing fresh legislation, given that a Terrorism Bill was already under consideration. Instead, the government indicated that it would allow amendment to the Act in consolidating counter-terrorism legislation scheduled for 2007. In any event, sections 1-9 of the 2005 Act were subject to annual renewal by affirmative resolution of both Houses of Parliament. The provisions were renewed from 11 March 2006.¹¹⁹ A year later there was still no Terrorism Consolidation Bill and the provisions were again renewed until 10 March 2008.¹²⁰ The JCHR was strongly critical of the parliamentary procedure used:

a debate on a motion to approve an affirmative resolution is a wholly inappropriate procedure for renewal of provisions of such significance. To fail to provide an opportunity to amend the legislation is also, for the second year running, a serious breach of commitments made to Parliament. Parliament is being deprived once again of an opportunity to debate in detail and amend the control orders regime in the light of experience of its operation and concerns about its human rights compatibility.¹²¹

¹¹⁸ See JCHR, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006, Twelfth Report of Session 2005–06, HL Paper 122 HC 915. *Id.*, para 89.

¹¹⁹ See PTA 2005 (Continuance in force of sections 1 to 9) Order (2006), SI 2006/512. For the debate on renewal see Hansard, HC, Vol 442, Cols 1499-1523 (15 February 2006.)

¹²⁰ See PTA 2005 (Continuance in force of sections 1 to 9) Order (2007), SI 2007/706. For the debate on renewal see Hansard, HC, Vol 457, Cols 434-460 (22 February 2007), Hansard HL, Vol 690 Cols. 12-42 (5 March 2007).

¹²¹ JCHR, Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007 (Eighth Report of Session 2006-07) HL Paper 60, HC 365 (28 February 2007), para 15.

Moreover, Parliament was being asked to be complicit in a de facto derogation from Article 5, without an opportunity to debate whether such a derogation was justified.¹²² The Government maintains that the affirmative resolution procedure is the appropriate mechanism for annual renewal of the Prevention of Terrorism Act 2005, providing both Houses with the opportunity to debate renewal and the legislation.¹²³

5.3 Judicial Control of Control Orders

Non-derogating control orders once made by the Secretary of State under s. 2 and derogating control orders once made by the court under s. 4, go their wholly separate and very different procedural ways.¹²⁴ In particular, in the former case the court's role is supervisory and the standard of proof is a reasonable suspicion, whereas in the later case the court decides whether to confirm its order on the balance of probabilities.

Under s 10(2) PTA (2005) where the Secretary of State makes an application for permission to make a non-derogating control order against an individual, 'the application must set out the order for which he seeks permission and (a) the function of the court is to consider whether the Secretary of State's decision that there are grounds to make that order is obviously flawed; (b) the court may give that permission unless it determines that the decision is obviously flawed; c) if it gives permission, the court must give directions for a hearing in relation to the order as soon as reasonably practicable after it is made'. Under s 3(10) on a hearing in pursuance of directions under s 3(2) (c) the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed (a) his decision that the requirements of section 2(1)(a) and (b) were satisfied for the making of the order; and (b) his decisions on the imposition of each of the obligations imposed by the order. In determining (a) what constitutes a flawed decision for the purposes of subsection (2) ... or (b) the matters mentioned in subsection (10), the court must apply the principles applicable on an application for judicial review.¹²⁵

The House of Commons Constitutional Affairs Committee had expressed concern that under the PTA (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 had 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

¹²² Id paras 17-29.

¹²³ Government Response to the Committee's Eighth Report... [see n. 00 above] p.4.

¹²⁴ See Re MB, Part 00 below.

¹²⁵ S 3 (11) PTA (2005). See M Zander, 'The Prevention of Terrorism Act 2005' 155 New Law Journal (2005) 438.

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'.¹²⁶

The Committee recommended that the Government 'moves from a judicial review on non-derogating control orders to an objective appeal considering whether or not there is a 'reasonable suspicion' that an appellant is involved in terrorist related activities'.¹²⁷

In the *A (Belmarsh Detainees)* Case the House of Lords focused exclusively upon the issue of whether or not detention without trial was justified. Little or no attention was focused upon the particular means by which an individual's case was assessed by SIAC on appeal, or upon the mechanics and procedures used by SIAC to conduct secret hearings. In particular, the House of Lords declined to rule (either way) upon the arguments advanced by the appellants based upon the criminal aspects of Article 6 ECHR relating to fair trial provisions.¹²⁸ It was perhaps inevitable that there would be a judicial challenge to the orders.

6 Judicial Challenges to Control Orders: Procedures

6.1 The High Court in *Re MB*

In April 2006, in *Re MB*,¹²⁹ the High Court held the first hearing under section 3(10) of the PTA (2005) in relation to the non-derogating control order made under section 2(1) of the Act. On 1 September, on an application by the home Secretary, the court had made a non-derogating control order against MB. The basis for the decision was that the Home Secretary of State believed that MB intended to go to Iraq to fight against coalition forces. The open statement asserted that MB was an Islamic extremist and that the Security Service considered that he was involved in terrorism-related activities. The control obligations on MB were as follows:

(1) You will reside at [address given] ('the residence') and shall give the Home Office at least 7 days prior notice of any change of residence. (2) You shall report in person to your local police station (the location of which will be notified in writing to you at the imposition of this order) each day at a time to be notified in writing by your contact officer, details to be provided in writing upon service of the order. (3) You must surrender your passport, identity card or any other travel document to a police officer or persons authorised by the Secretary of State within 24 hours. You shall not apply for or have in your possession any passport, identity card, travel document(s) or travel ticket which would enable you to travel outside the UK. (4) You must not leave the UK. (5) You are prohibited from entering or

¹²⁶ Constitutional Affairs Committee, HC, *The Operation of the SIAC and the Use of Special Advocates*, Seventh Report of Session 2004-05, HC 323-1, para105.

¹²⁷ *Id.*, para 112.

¹²⁸ *A Case (Belmarsh Detainees)*, Lord Bingham, para 71.

¹²⁹ [2006] EWHC 1000 (Admin), [2006] HRLR 29.

being present at any of the following:- (a) any airport or sea port; (b) any part of a railway station that provides access to an international rail service. (6) You must permit entry to police officers and persons authorised by the Secretary of State, on production of identification, at any time to verify your presence at the residence and/or to ensure that you can comply with and are complying with the obligations imposed by the control order. Such monitoring may include but is not limited to:- (a) a search of the residence; (b) removal of any item to ensure compliance with the remainder of the obligations in these orders; and (c) the taking of your photograph.¹³⁰

There was no argument to the effect that the controls on MB were incompatible with Article 5 ECHR. Two special advocates were appointed. They agreed with counsel for the Home Secretary that it would not be possible to serve a summary of the closed material on the respondent or his legal advisers which would not contain information or other material the disclosure of which would be contrary to the public interest. Sullivan J endorsed this view. Therefore, MB had not been provided with even a summary of the closed evidence against him.

The key focus in *Re MB* was on whether, in discharging its role in hearings under section 3(10), the court was able to give MB a fair hearing for the purposes of Article 6 ECHR. Sullivan J thought not. He issued a declaration under s. 4 of the HRA (1998) that s. 3 of the PTA (2005) was incompatible with the right to fair hearing under Article 6. He identified the six features of the decision-making process: The order was made by the executive, not by the court; although the order was made with the permission of the court, the ability of the court to exercise a supervisory role at the section 3(2) stage was very limited indeed; the standard of proof to be applied by the decision taker in making the decision subject to review was very low: reasonable grounds for suspicion, even though the allegation made against the respondent, that he is or has been involved in terrorism-related activity, was a very serious one and may in some cases amount to an allegation that he has committed very serious crimes which would be punishable upon conviction in a criminal court with life imprisonment; in proceedings under section 3 the Secretary of State was able to deploy the whole of his case, relying on evidence which would not be admissible in ordinary criminal or civil proceedings, and he may adduce any ‘sensitive’ intelligence material in closed documents and closed session. The procedure enabled to the Secretary of State to place a significant part, and in some cases the significant part of his case, before the court in the absence of the respondent and his legal representatives.¹³¹ The central issue was whether the use of a Special Advocate could sufficiently reduce the unfairness of using closed material against a respondent in cases where the court was not coming to its own judgment upon the totality of the evidence, open and closed, but was merely reviewing the lawfulness of the Secretary of State's decision based upon the open and closed material before the Secretary of State at an earlier stage. Sullivan J concluded that, in the absence of a merits review at the section 3(10) stage, the overall procedure was ‘manifestly ineffective and unfair’.¹³² Moreover, ‘nothing short of an ability to re-

¹³⁰ MB, para 18. The open evidence against MB is reproduced in para 20.

¹³¹ See MB, High Court, paras 51-87.

¹³² Id para 86.

examine and reach its own conclusions on the merits of the case (applying the higher civil standard of proof ...) would be sufficient to give the court ‘full jurisdiction’ for the purposes of determining the respondent’s rights under Article 8 ECHR in compliance with Article 6(1) of the ECHR.¹³³ Sullivan J was particularly damning in his overall criticism:

To say that the Act does not give the respondent in this case, against whom a non-derogating control order has been made by the Secretary of State, a fair hearing in the determination of his rights under Article 8 of the Convention would be an understatement. The court would be failing in its duty under the 1998 Act, a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the procedure under the Act whereby the court merely reviews the lawfulness of the Secretary of State’s decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees’ rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.¹³⁴

Sullivan J was unable to envisage any circumstances in which it would realistically have been possible for the court to conclude that the Secretary of State’s decisions were legally flawed upon the basis of the one-sided information then available to him. It followed that the control order was to continue in force. However, he made a declaration under s.4 HRA that that the procedures under s. 3 of the PTA (2005) relating to the supervision of the court of non-derogating control orders made by the Secretary of State were incompatible with the respondent’s right to a fair hearing under Article 6(1) ECHR.¹³⁵

6.2 The Court of Appeal in *Re MB*

In *Secretary of State for the Home Department v MB*¹³⁶ the Court of Appeal ‘unravelling’ each strand of Sullivan J’s reasoning.¹³⁷ Interestingly, before the Court of Appeal the executive was in an interesting position of having to argue that the High Court’s powers of review of the Secretary of State’s decision were more extensive than Sullivan J had considered them to be. He argued, first, that given the appropriate purposive construction, section 3(10) PTA (2005) required the court to review the Secretary of State’s decision having regard to the evidence before the court at the time of conducting the review and not solely at the time of the original decision. Secondly, s 1(2) PTA (2005) required the

¹³³ *Id* para 87.

¹³⁴ *Id* para 103 (emphasis added).

¹³⁵ *Id* para 104.

¹³⁶ [2006] EWCA Civ 1140, [2006] 3 WLR 839, [2006] HRLR 37. The CA was composed of the Lord Chief Justice, the Master of the Rolls and the President of the Queen’s Bench Division.

¹³⁷ *Id* para 87.

court to consider whether, as at the time of the review, there was any interference with the suspect's human rights.¹³⁸ The CA agreed with these submissions. It considered that, in accordance with s 3 HRA, s. 3(1) PTA (2005), 'can and should be "read down" so as to require the court to consider whether the decisions of the Secretary of State in relation to the control order are flawed as at the time of the court's determination'.¹³⁹

As for the standard of review, the CA did not consider that the terms of s. 3(10), when read in the light of s. 1(2), restricted the court to a standard of review that fell short of that required to satisfy Article 6. Proceedings under s 3 PTA (2005) did not involve the determination of a criminal charge. The CA took a sophisticated approach to the courts' powers of review by focusing on the distinction, 'between a finding of fact and a decision which turns on a question of policy or expediency. So far as the former is concerned, Article 6 may require the factual evaluation to be carried out by a judicial officer. So far as the latter is concerned, the role of the court may be no more than reviewing the fairness and legality of the administrator to whom Parliament has entrusted the policy decision'.¹⁴⁰ The first requirement in s 2 PTA was that the Secretary of State must have reasonable grounds for suspecting that the controlled person is or has been involved in terrorist-related activity. For the CA this element involved an assessment of fact. As involvement in terrorist-related activity was likely to constitute a serious criminal offence, this suggested that when reviewing a decision by the Secretary of State to make a control order, the court must make up its own mind as to whether there were reasonable grounds for the necessary suspicion.¹⁴¹ Whether there were reasonable grounds for suspicion was an objective question of fact. A court could not review the decision of the Secretary of State without itself deciding whether the facts relied upon by the Secretary of State amounted to reasonable grounds for suspecting that the subject of the control order, 'is or has been involved in terrorism-related activity'.¹⁴²

The second requirement for a control order was that the Secretary of State must consider that it was necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make the order. For the CA this second element required a value judgment as to what was necessary by way of protection of the public. In reviewing this second element different considerations applied:

Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources

¹³⁸ This provides that, 'The court is the appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 (c. 42) in relation to proceedings all or any part of which call a control order decision or derogation matter into question'.

¹³⁹ [2006] EWCA Civ 1140, para 46.

¹⁴⁰ *Id.*, para 56.

¹⁴¹ *Id.* para 58.

¹⁴² *Id.* para 60.

available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.

The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for instance: *Secretary of State for the Home Department v Rehman* [2001]UKHL 47; [2003] AC 153; *The Republic of Ireland v the United Kingdom* (1978) 2 EHRR 25.

Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so. The exercise has something in common with the familiar one of fixing conditions of bail. Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the same result. The provision of section 7(2) for modification of a control order ‘with the consent of the controlled person’ envisages dialogue between those acting for the Secretary of State and the controlled person, and this is likely to be appropriate, with the assistance of the court, at the stage that the court is considering the necessity for the individual obligations.¹⁴³

As for the low standard of proof for the requirement that find that the controlled person was or had been involved in terrorism-related activities, the CA considered that Sullivan J had confused substance, relevant to the substantive Articles of the Convention, and procedure, relevant to Article 6:

The PTA authorises the imposition of obligations where there are reasonable grounds for suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof. It is the procedure for determining whether reasonable grounds for suspicion exist that has to be fair if Article 6 is to be satisfied.¹⁴⁴

¹⁴³ Id paras 63-5. In the E and S case, considered below, that court of Appeal stated that, ‘The jurisdiction to give such directions has not been challenged on the hearing of this appeal. While the point has not been fully argued, we are inclined to the view that the court has jurisdiction to direct modifications of the obligations in the order ... , pr 70.

¹⁴⁴ Id para 67.

The aspect of the case that caused the CA most concern was the use of closed material but it accepted that both Strasbourg (i.e. ECHR) and domestic authorities had accepted that there were circumstances where the use of closed material was permissible and might not be incompatible with Articles 5(4), 6 and 13 ECHR.¹⁴⁵ For the CA the issue was whether Article 6 required an absolute standard of fairness to be applied, or whether, in a case such as that before it, present, some derogation from that standard was permissible in the interests of national security. It considered that the Strasbourg jurisprudence accepted the latter approach. In particular:

If one starts with the premise that the risk of terrorism may justify [powers conferred on the executive to interfere with individual rights in order to protect the public against the risk of terrorism] such measures, we consider that it must follow that Article 6 cannot automatically require disclosure of the evidence of the grounds for suspicion. Were this not so, the Secretary of State would be in the invidious position of choosing between disclosing information which would be damaging to security operations against terrorists, or refraining from imposing restrictions on a terrorist suspect which appear necessary in order to protect members of the public from the risk of terrorism.

If one accepts, as we do, that reliance on closed material is permissible, this can only be on terms that appropriate safeguards against the prejudice that this may cause to the controlled person are in place. We consider that the provisions of the PTA for the use of a special advocate, and of the rules of court made pursuant to paragraph 4 of the Schedule to the PTA, constitute appropriate safeguards, and no suggestion has been made to the contrary.¹⁴⁶

In conclusion the Court of Appeal found the provisions for review by the court of the making of a non-derogating control order complied with the requirements of Article 6. The MB case has been appealed to the House of Lords.¹⁴⁷

7 Judicial Challenges to Control Orders: Substance - The Right to Liberty

¹⁴⁵ Id 70-78, citing *Chahal v UK* (1996) 23 EHRR 413, prs 131, 144; *Tinnely & McElduff v UK* (1999) 27 EHRR 249, pr 78; *Rowe v United Kingdom* (2000) 30 EHRR 1, pr 61; *R v H* [2004] UKHL 3; [2004] 2 AC 134; *A v Secretary of State for the Home Department* [2002] EWCA Civ 1202; [2004] QB 335, pr 57; *A v Secretary of State for the Home Department (No 2)* [2004] EWCA Civ 1123; [2005] 1 WLR 414, prs 51, 235; *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738.

¹⁴⁶ Id paras 85-86.

¹⁴⁷ The JCHR remains of the view that ‘due process standards should apply to control orders in view of the severity of the restrictions they contain’ JCHR, Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007 (Eighth Report of Session 2006-07) HL Paper 60, HC 365 (28 February 2007), paras 30-38. See also Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, paras 176-205 (Special Advocate system does not afford the individual a fair hearing and recommends changes).

7.1 The High Court in JJ and others

In June 2006, in *Secretary of State for the Home Department v JJ and others*¹⁴⁸ Sullivan J also heard an application from six individuals subject to control orders. The obligations on them were far more restrictive than those imposed on MB. They related to: Electronic tagging (to be worn at all times); Residence (being required for 18 hours per day, and for five of the controlees, in areas with which they had no previous connection); Reporting to a monitoring company; Visitors to the residence; Pre-arranged meeting outside the residence; Identified individuals with whom any association or communication Prohibited; Police searches (in each case there had been a number of searches); Further prohibitions or restrictions; Communications equipment (only one fixed telephone line permitted); Mosque attendance; Restriction to geographical area; Notification of international departure and arrival Bank account; Transfer of money/ sending of documents or goods; Passport/ identity card etc; Prohibition from entering air or sea port etc.¹⁴⁹ In JJ and others the only issue considered was whether the cumulative impact of the obligations imposed by the orders amounted to a deprivation of the respondents' liberty in breach of Article 5(1) ECHR? If so, the Secretary of State had made a derogating control order which he had no power to do (and which the court had no power to do in the absence of a designated derogation). Sullivan J emphasised that the restrictions had not been imposed to protect the interests of the individuals. Rather, they had been imposed to protect the public. In the absence of a derogation under Article 15 ECHR the respondents were entitled to the full protection of Article 5, and there was no justification for any attempt to water down that protection in response to the threat of terrorism. He considered that the respondents' liberty to lead a normal life in their residences during the 18-hour curfew period was so curtailed as to be non-existent for all practical purposes. He also observed that the restrictions on social contacts significantly affected their liberty to lead a normal life. Overall he concluded that:

bearing in mind the type, duration, effects and manner of implementation of the obligations in these control orders, I am left in no doubt whatsoever that the cumulative effect of the obligations has been to deprive the respondents of their liberty in breach of Article 5 of the Convention. I do not consider that this is a borderline case. The collective impact of the obligations in Annex I could not sensibly be described as a mere restriction upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations, and their intrusive impact on the respondents' ability to lead anything resembling a normal life, whether inside their residences within the curfew period, or for the 6-hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty.

The respondents' "concrete situation" is the antithesis of liberty, and is

¹⁴⁸ [2006] EWCA 1623 (Admin), [2006] 103 (28) Law Society Gazette 27.

¹⁴⁹ They are set out in Annex I to the judgment, *ibid.* Annex II contains a statement of agreed facts on each individual.

more akin to detention in an open prison... the respondents' lives are not free, but are for all practical purposes under the control of the Home Office.¹⁵⁰

Sullivan J then considered whether he should defer to the Home Secretary's opinion that the control orders were not incompatible with Article 5 ECHR. He saw no reason for such deference:

While the court will defer, to the extent that it is appropriate, to the Secretary of State's views on certain matters, including, for example, what obligations are necessary under subsection 1(3) of the Act, there is no reason for such deference in respect of the Secretary of State's view that the obligations in these control orders merely restrict the respondents' liberty, but do not deprive the respondents of their liberty: see paragraph 221 of the speech of Baroness Hale in [A Case (Belmarsh Detainees)]. The Secretary of State's view on that question is only as good as the analysis of the Strasbourg jurisprudence that was carried out on his behalf before he made the orders. Naturally, I have not seen that analysis, but insofar as it is reflected in the submissions made on behalf of the Secretary of State in these proceedings, I have explained why I have found them unpersuasive. In saying that I intend no disrespect to Mr Eicke, whose ability to construct a silk purse out of a sow's ear was, as always, most impressive.¹⁵¹

Sullivan J noted that his view accorded with that of the JCHR, cited above¹⁵² and with the concerns of Mr Alvaro Gil-Robles, the Council of Europe's Commissioner for Human Rights, in his report to the Committee of Ministers and the Parliamentary Assembly on his visit to the United Kingdom on 4th-12th November 2004.¹⁵³ As to the appropriate remedy the Home Secretary argued that the court should direct the Home Secretary to revoke or modify the orders rather than quash them. Sullivan J expressed concern at this view because the UK had previously given an assurance to the Committee of Ministers of the Council of Europe that the court could quash such an order. Sullivan J regarded this change of position as having the:

the potential to undermine confidence in the integrity of public administration. The United Kingdom government's comments in 2005 would have left the Committee of Ministers of the Council of Europe with the reassuring impression that if a control order made by the Secretary of State did constitute a deprivation of liberty, then the court could be expected to use its powers to quash that order, but now that the crunch has come in 2006, the Secretary of State is strenuously

¹⁵⁰ Id paras 73-74. The same conclusion was reached for the one individual, GG, who continued to reside at his home, id para 60.

¹⁵¹ Id para 79.

¹⁵² See JCHR Report, n 000 above.

¹⁵³ See n 000 above. Gil-Robles noted that 'Control orders raise ... general points of constitutional principle concerning the rule of law and the separation of powers...', para 16.

seeking to persuade the court that it would not be appropriate to exercise that power. One would have thought that public assurances given by the UK government in response to concerns expressed in an official report could be relied upon, particularly where a Convention right of ‘fundamental importance’ was in issue.¹⁵⁴

Sullivan J considered that the proper course was to quash the control orders. Unsurprisingly, the decisions of Sullivan J on control orders attracted wide publicity.¹⁵⁵ They were attacked by the new Home Secretary, John Reid, and appealed.¹⁵⁶

7.2 The Court of Appeal in JJ and others

In *Secretary of State for the Home Department v JJ and Others*,¹⁵⁷ decided on the same day, and with the same composition as the appeal in *Re MB*, the Court of Appeal upheld the decision of Sullivan J that the control orders amounted to a deprivation of liberty contrary to Article 5 ECHR. In the Court of Appeal’s view they, ‘clearly fell on the wrong side of the dividing line’.¹⁵⁸ The Court also held that Sullivan J was correct to conclude that he had jurisdiction to quash the orders and that the reasons he gave for quashing them were compelling. It gave an additional reason, namely that if the Secretary of state decided to make new control orders to replace those that had been quashed, he would have to devise a new package of measures imposing control on the respondents. In the courts’ view that was an exercise that the Secretary of State was, ‘very much better placed to perform than the courts’.¹⁵⁹ The response of the Secretary of State was that he would appeal the matter to the House of Lords. In the meantime some of the conditions have been relaxed e.g. in one case by reducing the curfew from 18 hours to 14. There was further political controversy over control orders in October 2006 when it emerged that two people subject to orders had escaped and were missing.¹⁶⁰ They had been missing for a month but the government had not informed the public.

7.3 The High Court in the E Case

¹⁵⁴ Id para 87.

¹⁵⁵ R Ford, ‘Key anti-terror law is a Breach of Human Rights, Judge Rules’, *The Times*, 29 June 2006; F Gibb, ‘Anti-terror law ‘sinister’ says judge’ *The Times*, 9 June 2006 (more general criticisms by Lord Lloyd).

¹⁵⁶ See A Travis, ‘Judge “Misunderstood” Anti-Terror Legislation’ *The Guardian*, 4 July 2006.

¹⁵⁷ [2006] EWCA Civ 1141, [2006] 3 WLR 866, [2006] HRLR 38.

¹⁵⁸ Id para 23. In February 2007, a judge at Manchester Crown Court quashed another control order. The control order was revised. See N Morris, ‘Terror suspects put on control orders “should be prosecuted”’ *The Independent*, 20 February 2007.

¹⁵⁹ Id para 27.

¹⁶⁰ See R Ford and S Tendler, ‘Terror Suspect Fled As His Curfew Order Was Quashed’ *The Times*, 18 October 2006; See A Travis and A Kumi, ‘Manhunt as terror suspect escapes control order’ *The Guardian*, 17 January 2007.

The third major judicial challenge to control orders came in *E v Secretary of State for the Home Department*.¹⁶¹ This was the first full hearing with evidence about the relevant factual issues. In the *E* case the High Court considered whether a less restrictive control order amounted to a deprivation of liberty. The subject of the control order was a Tunisian national who had been in the UK since 1994. He had been convicted in his absence by a Tunisian military court for various terrorism offences under Tunisian law. His claim for asylum in the UK had been refused but he had been granted exceptional leave to remain in the UK until 2005. He was married with four young children under the age of 7, and, at the time of High Court hearing, *E*'s wife (*S*) was five months pregnant. *E* lived in his own home. It is helpful to set out the terms of the control order and the justification for it. *E* was required to reside in his home and remain there, save between 7am and 7pm, or as specified in written directions. By a variation, the residence included the garden. He was required to report to a monitoring company by telephone each day on the first occasion he left the residence and on the last occasion he returned to it. Except by prior agreement with the Home Office, he could not permit any person to enter the residence, apart from his wife and children, his nominated legal representative, members of the emergency services or health care or social work professionals, any person aged 10 or under and any person required to be given access under the tenancy agreement. When seeking agreement for the entry of other persons, *E* was required to supply the name, address, date of birth and photographic identity of the individual to be admitted. The prior agreement of the Home Office was not required for subsequent visits by an agreed individual unless the existing agreement was withdrawn. *E* could not, outside the residence, meet any person by prior arrangement other than his wife and children, his legal representative, for health and welfare purposes at establishments to be agreed by the Home Office, or for educational purposes at establishments similarly agreed. He could not attend any pre-arranged meetings or gatherings, other than attending group prayers at a mosque, save, in all the above cases, with the prior agreement of the Home Office. *E* had to permit entry to his residence to police officers and persons authorised by the Secretary of State or by the monitoring company, on production of identification, to verify his presence at the residence and to ensure that he could comply and was complying with the obligations imposed by the order. Monitoring could include searches of the residence, inspection and removal of articles to ensure that they do not breach obligations imposed by the order, and the installation of equipment considered necessary to ensure compliance with the obligations. *E* could not bring or permit into the residence, or use, whether in or outside the residence, any communications equipment (including mobile phones) other than one fixed telephone line in the residence and one or more computers. The computer had to be disabled from connecting to the internet. Other persons entering the residence could bring in a mobile phone, provided it was switched off while *E* was in the residence. *E* had to notify the Home Office of any intended departure from the United Kingdom and report to the Home Office immediately upon arrival on return. He could not hold more than one bank account. He could not transfer any money, or send any documents or goods, to a destination outside the United Kingdom, without the prior agreement of the Home Office.

¹⁶¹ [2007] EWHC 233 (Admin).

The justification for the order was set out by the Secretary of State in an open statement made in March 2005:

E was detained under the ATCSA in December 2001 on the basis of his current involvement with, and activities in support of, terrorist groups and networks which pose a direct threat to the national security of the UK. The Secretary of State assesses that unless stringent bail conditions are imposed upon him, E would resume his extremist activities in connection with these groups and networks, and would continue to pose a threat to the UK's national security.

The justification for restrictions relating to meetings, contacts and visitors was stated to be that much of E's terrorism-related activity necessarily involved regular contact with associates who were themselves involved in the same or other terrorism-related activity. Restrictions on E's capacity to contact such persons or to share his expertise and contacts reduced the risk that he would involve himself again in those activities.

The High Court concluded that, although this was more finely balanced than the JJ cases, the cumulative effect of the restrictions deprived E of his liberty in breach of Article 5 ECHR. It was the subjection to police and other searches of E's home and the requirement that all visitors (and pre-arranged meetings outside the house) be approved in advance which made the requirements particularly intense. The restrictions that applied within the house give E's home some of the, 'characteristics of prison accommodation in which the prisoner has no private space and his visitors are all vetted'.¹⁶²

7.4 The Court of Appeal in the E Case

The CA reversed the decision.¹⁶³ By reference to the ECHR jurisprudence in *Engel & Ors v Netherlands (No.1)*,¹⁶⁴ *Guzzardi v Italy*,¹⁶⁵ *Ciancimino v Italy*,¹⁶⁶ and *Trijonis v Lithuania*¹⁶⁷ it set out the principles by which it approached the issue. The starting point was to consider the 'physical liberty' of the person, individual liberty in the classic sense. Article 5(1) was not concerned with mere restrictions on liberty of movement which are governed by article 2 of Protocol No. 4 and which had not been ratified by the United Kingdom. The effect of the physical restraint had to be considered in the context of restrictions applied when the restraint was not operating. Whether the confinement was in the individual's own home could be very relevant but the inviolability or otherwise of the home was a relevant consideration. The opportunity for social contacts was also a

¹⁶² E Case, High Court, pr 240 (Beatson J.). On similar facts, the same judge reached the same conclusion in *Abu Rideh & J* [2007] EWHC 804 (Admin), pr 147.

¹⁶³ *Secretary of State for the Home Department v E and S* [2007] EWCA Civ 459.

¹⁶⁴ [1976] 1 EHRR 647.

¹⁶⁵ [1983] 3 EHRR 333.

¹⁶⁶ (1991) 70 Decision & Reports of the European Commission on Human Rights 103.

¹⁶⁷ Application No.2333/02, (17 March 2005) (unreported).

factor. The difference between deprivation of liberty, contrary to article 5(1), and restriction upon liberty was one of degree or intensity. The court was concerned with the ‘effect’, ‘duration’ and ‘manner of implementation’ of the restrictions, as well as the ‘type’ of restriction.¹⁶⁸ The state of a controlled person’s health, whether the disability was physical or mental, and possibly other ‘person specific’ characteristics, might have an impact upon the severity of the effect, in his case, of restrictions imposed. In this case, only very limited weight could be given to this factor.¹⁶⁹ With respect to some of the restrictions imposed by this and other orders, and said to contribute to the breach of article 5, their duration, and their intensity, may be relevant to whether the overall restrictions amount to a deprivation of liberty.¹⁷⁰ The restrictions were to be considered on the basis that they were likely to be renewed.¹⁷¹ That restrictions engaged other articles in the Convention, such as article 8, did not mean that they should be disregarded in an article 5 context, but it had to be kept in mind that it was deprivation of liberty, and not some other right, which was under consideration.

Applying these principles to the facts the CA stressed that E was free to practise a range of activities, during the day time, in an area with which he was very familiar, and beyond it. He could attend the mosque and educational courses where he was likely to meet a range of persons and to do so regularly. The facts were very different from the cases in JJ in that (a) a period of curfew in the present case was substantially shorter, 12 hours out of 24 as against 18; (b) E was living with his family in his own home, with garden, whereas the specified residences in the JJ cases were one bedroom flats away from areas in which the controlled persons had previously lived; (c) the controlled persons in the JJ cases were confined to restricted urban areas which, save in one case, did not extend to any area in where they had previously lived. The physical liberty of E, that is individual liberty in its classic sense, was both the starting point and the central issue. E was deprived of the right to leave his home, and was detained in it, for 12 hours a day, the overnight hours. It was, however, his own home (and garden) and he could live there with his wife and young family. During the remaining 12 hours, the daytime hours, not only was there no geographical restriction on where he might go but his starting point, his home, was in the area he knew well as a result of having lived there for four years. That degree of physical restraint upon liberty was, ‘far from a deprivation of liberty in article 5 terms’.¹⁷²

The intrusion into E’s life at home and the restriction on his outside activities also had to be considered. Combined with a degree of physical restraint, such restrictions might create a breach of article 5 but it had to be kept in mind that it was the concept of individual liberty in its classic sense which was in issue, a different concept from, for example, respect for private and family life. Intrusions into home and family life might

¹⁶⁸ E and S, CA, pr 52.

¹⁶⁹ Id, pr 55.

¹⁷⁰ Id, pr 56.

¹⁷¹ Id, pr 57.

¹⁷² Id, pr 63. The CA cited the decision in *Trijonis v Lithuania* (Application No.2333/02, 17 March 2005) where the ‘home arrest’ included an obligation to remain at home throughout weekends, and the complaint was held inadmissible.

contribute to a loss of liberty but their impact and effect on liberty required analysis. While the intrusion, under the control order, was potentially substantial, and applied throughout the 24 hours, the CA did not consider that it led to a finding that the home thereby acquired the characteristics of ‘prison accommodation’ in which E is detained, as had been suggested in the High Court.¹⁷³ It retained the attributes of a family home where domestic life could be enjoyed at all times.¹⁷⁴ As to the alleged ‘chilling effect’ of the restrictions on people visiting the premises, it was the control order itself which essentially created the chill. In AF (considered below), there was evidence to that effect and Ouseley J so found but for the CA an inference could readily be drawn that people would be less ready to visit the home of someone subject to a control order, the existence of which was likely to be known. The requirement to ‘register’ visitors might add to the reluctance to visit but was unlikely to be the sole or main cause, and the restriction should be viewed in that light. The restrictions on E’s outside activities and contents were also significant and their effect on E had to be considered. Keeping in mind that protection of physical liberty was at the heart of any consideration of article 5, they did not make a substantial or decisive contribution to a complaint of deprivation of liberty. Restrictions were placed upon E’s activities in that in that he could not, without the appellant’s agreement, make prior arrangements to meet people or attend pre-arranged meetings or gatherings. He was, however, left with wide opportunities, and in fact did engage in everyday activities, including religious observance and practices. He could take up educational opportunities at agreed establishments. Not only could he engage in these activities, but they provided considerable opportunity to make a wide range of social contacts in an area with which he was very familiar, and beyond. Finally, the court also had to have regard to the ‘manner’ in which restrictions were implemented. Save that there were teething troubles, there was no evidence that the restrictions were being implemented, or the powers granted exercised, in an oppressive manner, or a manner beyond that contemplated by the stated justification for them, or as significantly interfering with domestic life or outside activities. The CA’s conclusion was that, ‘Bearing in mind the ‘type, duration, effects and manner of implementation’ of the order, no deprivation of liberty, within the meaning of article 5 was established. E’s case was in material respects plainly distinguishable from the JJ cases. The facts of E’s case fell on the right side of the dividing line.’¹⁷⁵

7.5 The High Court in the AF Case

Before the CA decision on E, another breach of Article 5 was found in Secretary of State for the Home Department v AF.¹⁷⁶ The facts were different from those in other cases considered. Ouseley J cited the CA’s decision in JJ and the High Court judgment in the E case. He recognised the ‘quite intrusive process’ involved in a restriction on receiving guests without prior approval. He accepted the ‘chilling effect’ of the control order upon the controlled person meeting with other people, in the home and outside. The curfew

¹⁷³ See text to n 00 above.

¹⁷⁴ E and S, CA, pr 64.

¹⁷⁵ Id, pr 69.

¹⁷⁶ [2007] EWHC 651 (Admin).

was of fourteen hours duration. AF was able to meet almost whom he liked either in his home or outside it provided he remained in the permitted area. The real restriction outside curfew hours, the judge held, was in the extent of the permitted area. The area from which the controlled person was excluded included all three mosques to which he used to go, and prevented him from going into any significant educational establishment where he could study English. Ouseley J concluded that taken by themselves, any one of the restrictions which flowed from the way in which the area has been delineated would not amount to a deprivation of liberty. He was not prevented from re-arranging many parts of his life within his area. But together they cut him off to a large extent from his previous life. He attributed particular significance to the cumulative restrictions on mosques and educational establishments or employment opportunities in judging whether there is a deprivation of his liberty. They had to be seen as additional to those which applied during curfew hours.¹⁷⁷ The judge concluded that, although as with E the decision was quite finely balanced, the restrictions cumulatively amount to a deprivation of liberty. They were markedly less severe than those in JJ and Others but broadly they were of comparable severity to those in E, overall. In E the requirement for prior approval for all visitors to the home and for prior approval for any pre-arranged meetings, and the requirement for approval to attend any meetings were very real restrictions which tipped the balance towards there being a deprivation of liberty. Those serious features were not present in that way in AF. Outside, curfew hours AF could have visitors to his flat and he could meet them outside both without prior approval. But instead AF had a longer curfew, and a geographical area which had specific effects in relation to attendance at his preferred mosque and the pursuit of education in English, as well as other specific and more general impacts on what AF used to do. There was no issue over the mosque in E and E had a larger family group, including his children, with whom he had unrestricted contact. Ouseley J permitted AF to adopt a ‘leapfrog’ procedure and petition the House of Lords for leave to appeal.

8 Judicial Challenges to Control Orders: The Possibility of Prosecution

In *E v Secretary of State for the Home Department*¹⁷⁸ even if the High Court had not found there to be a deprivation of liberty and a breach of Article 5 ECHR, it would have quashed the control order in question because of a failure by the Government to keep the possibility of prosecution under review after the control order was made. Under s.8 PTA 2005 the Home Secretary is under a continuing duty to keep the decision to impose and maintain a control order under review and the High Court held that this included keeping the matter of prosecution under review. On the facts in the E case, the Court found that significant new material had become available since the making of the control order, in the form of two Belgian court judgments in cases in which associates of E were successfully prosecuted for terrorism offences, and in which there were references to their association with E and to his activities. In those Belgian proceedings, intercept evidence from Spain and the Netherlands had been admitted, and that evidence would in

¹⁷⁷ Id pr 88.

¹⁷⁸ See n 239 above.

principle be admissible in England because it originated from abroad.¹⁷⁹ The High Court found that the possibility of prosecuting E in the light of the material about him identified in the Belgian judgments needed to be considered by the Home Secretary. The High Court therefore found as a fact that at no point was the question of prosecution reviewed in the light of the Belgian judgments. This failure to consider the impact of significant new material on the prospects of prosecuting E meant that the Home Secretary's continuing decision to maintain E's control order was flawed, and would have been quashed on this basis.

The Court of Appeal agreed in part but saw the matter differently. When properly considered in its statutory context the duty under section 8(2) was not a condition precedent. Once it was accepted that there was a continuing duty to review pursuant to MB, it was implicit in that duty that the Secretary of State must do what he reasonably could to ensure that the continuing review was meaningful. There could be no properly considered answer to the question about the prospect of prosecution unless and until the police were provided with the Belgian judgments. That had not occurred by February and March 2006. There had been a breach by the Secretary of State of his MB duty to keep the question of possible prosecution under review, not in the sense that the decision to prosecute was one for him (for clearly it was not), but in the sense that it was incumbent upon him to provide the police with material in his possession which was or might be relevant to any reconsideration of prosecution. The duty extended to a duty to take reasonable steps to ensure that the prosecuting authorities are keeping the prospects of prosecution under review. The duty did not, however, extend to the Secretary of State becoming the prosecuting authority. The decision whether to prosecute lay elsewhere.¹⁸⁰ The breach arose from the omission of the Secretary of State himself to provide the police with the Belgian judgments so as to prompt and facilitate a reconsideration. That failure rendered nugatory the negative responses of the police at meetings of the Control Orders Review Group (CORG) when asked about prosecution.¹⁸¹

However, the CA differed on the appropriate relief. It did not regard the breach as 'technical'. Beatson J had concluded that the identified breach led inexorably to a finding of a flawed decision and to the quashing of the order. He had stated the question as being 'whether there is now evidence which gives rise to a realistic possibility of prosecuting E'. The CA considered this to be an error as the findings of the Belgian courts were not in themselves evidence capable of supporting a successful prosecution in this country. When properly considered, they may or may not enable investigators and prosecutors to assemble a case with a realistic prospect of success. However, even if the Secretary of State had acted diligently and expeditiously in relation to the Belgian

¹⁷⁹ This is so under the Regulation of Investigatory Powers Act (2000), see *R v P* [2002] 1 AC 146.

¹⁸⁰ *E and S*, CA, pr 97.

¹⁸¹ *Id*, pr 99. CORG was set up by the Home Secretary. Its general purpose is to bring together all departments and agencies involved in making and maintaining control orders on a quarterly basis to keep all orders under frequent, formal and audited review. Its establishment was recommended by the independent reviewer, n 189 below, pr 43.

judgments, we are satisfied that, again taken at their highest, they could not have given rise to a prosecution at any time material to the case. A prosecution in this jurisdiction had to conform with domestic procedural and evidential requirements. The Belgian judgments were not in themselves capable of being evidence in an English trial. At best, they were in a form which might ultimately enable investigators and prosecutors to adduce evidence from relevant and appropriate witnesses. The CA had seen no material to suggest that the material could realistically have been reduced to a form appropriate for prosecution within the relevant timescale. Not every breach of an obligation rendered a subsequent decision flawed. The CA considered that the refusal of Ouseley J to quash a control order by reference to one of the breaches he found in AF was undoubtedly correct. It supported his view that not every breach necessarily made a control order a nullity and required it to be quashed. For the CA the critical question was whether a particular breach materially contributed to and vitiated the decision to make the control order. In the E case the breach delayed the process of review by the police and the CPS but that, absent the breach, no different decision about the maintenance and renewal of the control order would have been taken or required at any material time. It was an error of law to hold that the breach justified the remedy. We consider that it was wrong to describe the Belgian judgments as ‘evidence’ giving rise to a realistic possibility of prosecution. Further analysis of the consequences of the breach was required. More generally, the question, on an appeal under section 10(4), was to decide whether the decision of the appellant was flawed. In deciding that, the duty to be considered was the duty to keep the prosecuting authorities informed and to take reasonable steps to ensure that they are keeping the controlled person’s conduct, with a view to his prosecution for an offence, under review. The duty was not to assume the role of prosecuting authority or to assume responsibility for every decision taken by that authority.¹⁸² The JCHR considered that the High Court decision in the E case and the second report of the independent reviewer cast serious doubt on the seriousness of the Government’s commitment to prosecution as its first preference. Its evidence supported fears that once a control order is imposed it relieved the pressure on the police and the Home Office to bring a criminal prosecution.¹⁸³ It remains the JCHR’s view that the only human rights compatible answer is to find ways of prosecuting such individuals.¹⁸⁴

Finally, the CA dismissed three other sets of arguments: arguments (1) the lack of sufficient scrutiny by the judge of the individual obligations imposed on the respondent; (2) the lack of procedural fairness in the making and / or the renewing of the control order; and (3) - on behalf of S and the children – the alleged breaches of Convention articles 3 and 8 so far as E’s family was concerned.¹⁸⁵

¹⁸² Id, prs 102-06.

¹⁸³ JCHR Report, n 121 above, pr 48.

¹⁸⁴ In support of their view they cited Security and Rights, public lecture to the Criminal Law Bar Association by Sir Ken Macdonald Q.C., Director of Public Prosecutions, (23 January 2007) <http://www.cps.gov.uk/news/nationalnews/security_rights.html>

¹⁸⁵ Id, prs 108-22.

9 The Future for Control Orders

E's appeal against the Court of Appeal's judgment was heard together with the other control order cases in July 2007. The Secretary of State's appeal in relation to the AF judgment has leapfrogged the Court of Appeal, and was heard together with the JJ and others and MB cases in the House of Lords. The government remain of the view that the control order regime, as it is currently being implemented, does not breach Article 5 ECHR.¹⁸⁶ It does not accept that any of the control orders made thus far are derogating control orders or deprive any individual of their liberty. Consequently it does not believe either that a derogation is necessary or that Parliament is being asked to be complicit in a de facto derogation.¹⁸⁷ These are civil procedures with civil procedure rules. The Government does not accept that control order proceedings amount to a criminal charge.¹⁸⁸

Lord Carlile, the statutory reviewer of the Prevention of Terrorism Act (PTA), concluded that the control order system remained necessary, though in some cases the obligations imposed were more cautious and extensive than absolutely necessary.¹⁸⁹ The JCHR has argued that the combination of the degree of restriction imposed by control orders, their indefinite duration, and the limited opportunity to challenge the basis on which they are made, carries a very high risk of subjecting those who are placed under control orders to inhuman and degrading treatment contrary to Article 3 ECHR.¹⁹⁰ The Government accepts that control orders are less than 100% effective in countering terrorism. There are limitations and problems with the legal framework. The Government must operate under the constraints imposed by Parliament, the courts and the law. The Government's view is that, in policy terms, 'Control orders are not even our second - or third - best option for dealing with suspected terrorists. But under our existing laws they are as far as we can go'.¹⁹¹ It considers that control orders are the best available means of addressing the continuing threat posed by suspected terrorists who cannot currently be prosecuted or, in respect of foreign nationals, cannot be removed from the UK.¹⁹² The Independent Reviewer, Lord Carlile, expressed a similar view in his second report in 2007:

I would prefer it if no control order system was necessary. However, in my view it remains necessary given the nature of the risk of terrorist attacks and the

¹⁸⁶ Government Response to the Committee's Eighth Report... [see n. 00 above] p.5.

¹⁸⁷ Id.

¹⁸⁸ Ibid, p.6.

¹⁸⁹ Second Report of The Independent Reviewer Pursuant to Section 14(3) of The Prevention Of Terrorism Act 2005 (19 February 2007), see <<http://security.homeoffice.gov.uk>>

¹⁹⁰ See JCHR Report, n 121 above, para 59. Alleged violations of Article 3 ECHR were rejected in the E case, Part 8 above.

¹⁹¹ 'Control Order Update', Written Ministerial Statement by the Minister for Security, Counter-terrorism and Police, 21 June 2007.

¹⁹² Government Response to JCHR, n 00 above, p.9.

difficulty of dealing with a small number of cases. Control orders provide a proportional means of dealing with those cases, if administered correctly.¹⁹³

The Security Service view is that control orders have been successful in preventing or limiting individuals' involvement in terrorism-related activity.¹⁹⁴ The independent reviewer and the JCHR have referred to the need for an 'exit strategy' from the control order regime.

11 Policy Options

Finally, it remains to note that the control order regime may be impacted by developments in other anti-terrorist strategies. In 2007 the Government announced proposals for new counter-terrorism legislation.¹⁹⁵

11.1 More Prosecutions.

This is the governments preferred strategy. More lower level terrorist related offences have been created¹⁹⁶ and prosecuted.¹⁹⁷ The strategy is supported by the JCHR and some human rights organizations e.g. Liberty.

11.2 Use of Intercepted Intelligence in Courts

To obtain more convictions one strategy would be use intercepted intelligence information in courts, particularly information derived from the tapping of phones. and telephone tapping. To date the government has not been convinced. Under current legislation Regulation of Investigatory Powers Act (RIPA) 2000, there is a statutory ban on the use of intercept as evidence.¹⁹⁸ The Government's position has been that we would

¹⁹³ See n 00 above, pr 7.

¹⁹⁴ Id.

¹⁹⁵ The Secretary of State for the Home Department 'Statement on counter-terrorism', Hansard, House of Commons, Vol. 461, cols.421-3 (7 June); Prime Minister, 'Statement on National Security', Hansard, House of Commons, Vol.463, cols.841-5 (25 July 2007).

¹⁹⁶ Offences include acts preparatory to terrorism, possessing material for a terrorist purpose, being a member of a terrorist organisation, funding terrorism, attending a terror training camp, inciting terrorism. See Prevention of Terrorism Acts 2005 and 2006 (notably the offence of encouragement of terrorism).

¹⁹⁷ 'During the debates on renewal four options were put forward by the opposition parties for increasing the number of successful prosecutions of suspected terrorists: introduction of the so-called 'threshold test'; making greater use of plea-bargaining so 'supergrass' give evidence; the use of intercept as evidence; and extending the use of post-charge questioning. Two of these measures are already in place (plea-bargaining and the 'threshold test')', Government Response to JCHR, n 00 above, p.6.

¹⁹⁸ The prohibition on the use of intercept material does not apply in SIAC.

change the law to permit intercept evidence only if the necessary safeguards could be put in place to protect sensitive techniques and to ensure that the potential benefits outweigh the risks. A comprehensive review of intercept as evidence was conducted in 2003/4 following a request from the Prime Minister in 2003. Following the review's completion in 2004, the Government concluded that was not the right time to change the law and that the impact of new technology needed to be properly considered and factored into the decision making process. The then Attorney General, Lord Goldsmith, has indicated that favoured allowing intercept evidence to be used in court.¹⁹⁹ So has a former Head of MI5.²⁰⁰ In the JCHR has heard substantial evidence on the arguments for using intercept intelligence.²⁰¹ Its Report on Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning the JCHR welcomed in principle the Government's review of the use of intercept as evidence. It remained convinced that the ability to use it would help bring more prosecutions against terrorists. It made recommendations on implementation and considered that the law of public interest immunity would protect the public interest in non-disclosure.²⁰² The Government' has proposed a Privy Council review into the use of this evidence in terror trials

11.3 Longer Pre-Trial Detention

On 25 July 2007, the Prime Minister announced new anti-terror measures, including proposals to extend this maximum limit for pre-trial detention to a possible 56 days (under the Terrorism Act (2000) the current limit is 28 days). The human rights organization Liberty is strongly opposed to this.²⁰³ The JCHR is not convinced of the need for this and recommends thorough scrutiny of the evidence, stronger judicial safeguards and improved parliamentary oversight. The Committee considers that there should be an upper limit on pre-charge detention and that Parliament, not the courts,

¹⁹⁹ 'Goldsmith for phone-tap evidence' <www.bbc.co.uk> (21 September 2006).

²⁰⁰ See Eliza Manningham-Buller, 'The International Terrorist Threat and the Dilemmas in Countering It' The Hague, 1 September 2005 <<http://www.mi5.gov.uk/output/Page387.html>>

²⁰¹ Minutes of Evidence Taken Before Joint Committee On Human Rights, Uncorrected Transcript of Oral Evidence, Monday 12 March 2007, HC 394-i. Among those who gave evidence was Sir Swinton Thomas, who has recently retired from his role as the Interception of Communications Commissioner. He believed that a change in the law was undesirable.

²⁰² HL 157/HC 790 (30 July 2007) prs. 99-155.

²⁰³ See 'Extending Pre-Charge Detention For Terror Suspects' <<http://www.liberty-human-rights.org.uk/issues/2-terrorism/extension-of-pre-charge-detention/index.shtml>> It argued, inter alia, that Emergency measures in the Civil Contingencies Act 2004 could be triggered in a genuine emergency in which the police are overwhelmed by multiple terror plots, allowing the Government to temporarily extend pre-charge detention subject to Parliamentary and judicial oversight. This was preferable to creating a permanent state of emergency by re-introducing internment. The Act contains a broad power to make emergency regulations subject to parliamentary and judicial oversight- including a power to extend pre-charge detention periods for up to 30 days at a time.

should decide that limit after considering all the evidence.²⁰⁴ There is also a proposal to introduce a new police power to question suspects after charges have been brought, possibly with judicial and parliamentary oversight.²⁰⁵ This would allow for a charge to be replaced with a more appropriate offence at a later stage. The context and purpose of detention are now understood differently. The evidence from the police to the HAC made clear that the interviewing of suspects had become virtually irrelevant:

In general it cannot be expected that interviews of suspects during extended detention will lead to significant additional information that can be used in court. While we can understand that there may be cases in which confrontation of a suspect with new evidence might lead to admissions, it appears that the case for extended detention rests on two arguments: first, the need to seek and analyse evidence from a complex range of sources and, second, the need to ensure the protection of the public. This latter point has been referred to in our evidence and the Parliamentary debates. It does not, however, form any part of the legal basis for an application for extended detention.²⁰⁶

The changed nature of terrorism means that arrests are used to disrupt conspiracies. As the HAC made clear, preventive detention is a significant new development but one that was not made explicit during the passage of the Bill, during which extended detention was primarily justified on the grounds of the time needed to collect and analyse evidence.²⁰⁷ One important aspect of this was whether the nature and role of judicial oversight needed to be modified. The HAC was uneasy at the prospect of the existing system being used to provide judicial oversight of even longer pre-charge detention.²⁰⁸ It considered that the combination of pre-charge detention for up to four weeks with ‘a vast amount’ of arrests leading to detention intended to disrupt or prevent terrorist activity meant that new forms of judicial oversight were needed.²⁰⁹ Lord Carlile had recommended a strengthened system of judicial oversight once a suspect has been arrested.²¹⁰ The government’s response to the HAC’s proposals was lukewarm.²¹¹

11.3 Deportations

The governments preferred policy is to deport foreign nationals who are a security risk. In some cases ECHR jurisprudence prevents this. One UK strategy has been to support

²⁰⁴ See n 202 above, prs. 14-57.

²⁰⁵ Id prs 156-75.

²⁰⁶ HAC Report, para 90.

²⁰⁷ Id para 94.

²⁰⁸ Id para 124

²⁰⁹ Id para 125.

²¹⁰ Report by Lord Carlile, Independent Reviewer, *Proposals by Her Majesty’s Government for changes to the laws against terrorism*, paras 65–67

<<http://security.homeoffice.gov.uk>>

²¹¹ The Government Reply To The Fourth Report From The Home Affairs Committee Session 2005-06 HC 910, Cm 6906 (September 2006) p 10.

an attempt to revise rather than reverse the ECHR jurisprudence stemming from the *Chahal* case.²¹² The second has been to seek to deport on bases of Memorandums of understanding or assurances from the foreign governments concerned, e.g. Libya, Algeria. The argument is that the assurances reduce the real risk of a violation of Article 3 ECHR. The argument has been accepted by the courts in principle.²¹³ Argument is now focused on the quality of the assurances.²¹⁴ Of course, this strategy is not open in respect of UK nationals.

11.4 Derogate from Article 5 of the ECHR

The possibility of this has been raised by the Government. In 2007 the relevant Minister's statement on control orders stated that, 'We will consider other options – including derogation – if we have exhausted ways of overturning previous judgments on this issue'.²¹⁵ A nuclear option would be to denounce the ECHR.

²¹² See n 55 above.

²¹³ *Omar Othman (aka Abu Qatada) v. Secretary Of State For The Home Department* [2007] UKSIAC 15/2005 (26 February 2007) (the MOU would reduce the risk sufficiently for removal of the Appellant not to breach the UK's obligations, pr 516).

²¹⁴ See e.g. *BB v Secretary of State for the Home Department* [2006] UKSIAC 39/2005 (05 December 2006); *Y v Secretary of State for the Home Department* [2006] UKSIAC 36/2004, (24 August 2006); *DD & Anor v Secretary of State for the Home Department* [2007] UKSIAC 42/2005 (27 April 2007). Four Algerian citizens have withdrawn their appeals to SIAC and have been deported to Algeria, see the discussion in *U v Secretary of State for the Home Department* [2007] UKSIAC 32/2005 (14 May 2007).

²¹⁵ 'Update on control orders', Written Ministerial Statement by the Secretary of State for the Home Department, 22 March 2007.