Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2009

JUSTICE Briefing for House of Commons Debate

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For further information contact
Eric Metcalfe, Director of Human Rights Policy
email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE continues to oppose the use of control orders, introduced under the Prevention of Terrorism Act 2005 ('the Act'). We recognise that the UK faces a serious threat of terrorism and that public officials are under a duty to take effective measures to prevent further attacks. Nonetheless, we consider that control orders are:

    - unnecessary;
    - ineffective; and
    - offensive to basic principle.

3. Rather than repeat at length material contained in the many previous briefings we have produced on control orders since they were first introduced in March 2005,[1] this briefing provides a summary of our key arguments against control orders and sets out details on specific developments relating to:

    - international criticism of the use of control orders; and
    - the use of secret evidence and special advocates in control order proceedings.

Control orders are unnecessary

4. The UK faces the same threat of terrorism as that faced by other western countries and yet no other country apart from Australia has introduced control order legislation. Indeed, of the two control orders made in the Australia, both have been discharged and no control orders are currently in force. The United States, by contrast, has signalled the end to its resort to exceptional measures – c.f. the executive order of President Obama in January directing the

[1] See e.g. our various briefings on the Prevention of Terrorism Bill in February and March 2005, our briefings on the 2006 renewal order, and our submissions to the House of Commons Constitutional Affairs Committee in February 2005 and the Joint Committee on Human Rights in February 2006. See also our interventions before the House of Lords in *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45; *Secretary of State for the Home Department v MB* [2007] UKHL 46; *AF and others v Secretary of State for the Home Department* [2008] EWCA Civ 1148 before the Court of Appeal; and *A and others v United Kingdom* before the Grand Chamber of the European Court of Human Rights (19 February 2009).

closure of Guantanamo Bay, and emphasising the renewed priority of prosecuting suspects instead of merely detaining them:[2]

> (3) Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government *should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court* established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

5. At the time that the 2005 Act was passed, there was already a comprehensive scheme of terrorism offences contained in the Terrorism Act 2000. This was added to in the Anti-Terrorism Crime and Security Act 2001. Since the 2005 Act was passed, there have now been two further Acts of Parliament creating new terrorism offences – the Terrorism Act 2006 and the Counter-Terrorism Act 2008 – including the offence of preparing terrorist acts contrary to section 5 of the 2006 Act. It beggars belief that there are insufficient criminal offences with which to charge those suspected of involvement of terrorism.

6. If the Home Secretary sincerely believes that 'prosecution and conviction by a jury of criminal offences is a far more wholesome and satisfactory way of dealing with suspected terrorists'[3] than control orders, it would be far better to lift the ban on intercept evidence to enhance the ability of prosecutors to actually prosecute suspects than to seek renewal of the control order legislation.

Control orders are ineffective

7. At the time they were introduced, control orders were described by the Home Secretary as being:[4]

> for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked *because of the seriousness of the risk that they pose to everybody else in the country*.

8. Since the 2005 Act was introduced, 38 people have been subject to control orders at some point, of which 7 have absconded – an apparent failure rate of nearly 20%.[5] Following two

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[2] Executive Order, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,* 22 January 2009.

[3] Home Office press release, 'Home Secretary renews control order legislation', 3 February 2009.

ascondments in late 2006, a junior Home Office Minister said that he 'did not believe the public was at risk' from the escaped men,[6] and the government-appointed reviewer of terrorism legislation agreed that the disappearances 'present little direct risk to public safety in the UK at the present time'.[7] We find it difficult to reconcile the Home Secretary's original claims of dangerousness in 2005 with the mild assessments offered the following year. It is equally hard to see how control orders could in any event be effective in preventing terror attacks with a failure rate now approaching 1 in 5.

Control orders are offensive to basic principle

9. In JUSTICE's view, control orders are a needless departure from long-established standards of due process[8] and a disproportionate response to the threat of terrorism. They offend the most basic principles of our system of justice, and risk harm to the same democratic values that terrorists seek to attack. These views are borne out by recent international criticism of control orders and, most recently, the adverse judgment of the European Court of Human Rights in *A and others v United Kingdom* in February 2009.

Parliamentary Assembly of the Council of Europe

10. In September 2008, the Parliamentary Assembly of the Council of Europe criticised the use of secret evidence in control order proceedings, stating that:[9]

> although the use of special advocates can help enhance procedural justice, the controlled person does not know the allegations made against him and cannot give meaningful instructions. Once the special advocate knows what the allegations are,

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[4] Rt Hon Charles Clarke MP, Hansard, HC Debates, 23 Feb 2005: Column 339. Emphasis added.

[5] Lord Carlile of Berriew QC, *Fourth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2009), para 4.

[6] BBC News, 'Two terror suspects 'on the run'', 17 October 2006.

[7] Lord Carlile, *Report in connection with the Home Secretary's quarterly reports to parliament on control orders* (Home Office, 11 December 2006), para 21.

[8] See e.g. Magna Carta 1215, art 39: 'No free man shall be seized or imprisoned … or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land'. These common law principles are reiterated by Articles 5(4) and 6(1) of the European Convention on Human Rights ('ECHR') respectively. Article 5(4) provides 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Article 6(1) provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

[9] Report of the Parliamentary Assembly, *Proposed 42-day pre-charge detention in the United Kingdom* (30 September 2008), para 54.

> he cannot tell the controlled person or seek instructions from him without permission, effectively denying the controlled person an opportunity to challenge or rebut allegations. In such a case … even involving a special advocate would impair the very essence of the right to a fair hearing set out in Article 6 ECHR.

Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights

11. In February 2009, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights identified the UK use of control orders as part of an international trend undermining the priority of the criminal law in the fight against terrorism:[10]

> an effective criminal justice system based on respect for human rights and the rule of law is, in the long term, the best possible protection for society against terrorism. This is the lesson of history. Yet, ignoring lessons from the past, long held systems of criminal justice are being set aside as being inadequate. Principles of fairness and due process, which should be at the heart of any system of criminal justice, are being ignored by some countries in light of the supposed exceptional nature of the threat from terrorism.

12. In particular, the Panel noted that there are 'many important safeguards missing in the control order system currently in operation in places like Australia and the UK', including:[11]

- the evidentiary standard required is often low – that of "reasonable suspicion";
- there is a limited ability to test the underlying intelligence information;
- there are no definite time-limits and the orders can last for long periods;
- there are limitations on effective legal representation and to legal counsel of one's own choose the right to a full fair hearing (guaranteed in both civil and criminal proceedings) is denied;

Judgment of the European Court of Human Rights in A and others v United Kingdom

13. In October 2008, a majority of the Court of Appeal came to the surprising conclusion that it was possible for a defendant in a control order appeal to have a fair hearing despite the fact that he had not been told any of the evidence against him.[12] This matter is now on appeal and a hearing before a panel of nine Law Lords will begin on 2 March. However, the issue has

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[10] *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, February 2009), p161.

[11] Ibid, p121.

[12] *AF and others v Secretary of State for the Home Department* [2008] EWCA Civ 1148, at para 64(iv).

been overtaken by the decision of the Grand Chamber of the European Court of Human Rights in *A and others v United Kingdom* on 19 February, in which the Grand Chamber held that the use of secret evidence in proceedings before the Special Immigration Appeals Commission violated the right to liberty in situations where the defendant was not ‘provided with sufficient information about the allegations against him’.[13] Although the ruling concerns SIAC proceedings, it will undoubtedly apply with even greater force to control order proceedings in the High Court in which the right to a fair hearing is engaged.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
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[13] Application no. 3455/05, para