Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2006

JUSTICE Briefing for House of Commons Debate

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance 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'). Contrary to the view expressed by the statutory reviewer of the control order scheme,[1] and notwithstanding the serious terrorist attack of 7 July, we consider control orders an unnecessary and unjustified departure from established standards of due process and a disproportionate response to the threat of terrorism.

3. We are also deeply concerned at the lack of sufficient parliamentary time being given to the question of renewal, particularly given the extraordinary speed at which the Act was originally passed in March 2005.[2] Indeed, we note the Home Secretary gave a commitment to Parliament during the passage of the Act:[3]

> that the Government will ensure that the new legislation that I announced some weeks ago is timetabled in such a way that hon. Members will have had the opportunity to consider the first report of the independent reviewer before they seek to table amendments.

4. On 2 February, however, the Home Secretary announced that – due to the passage of the Terrorism Bill – he would not be tabling fresh legislation to allow amendment to the control order legislation, but instead allow the opportunity for amendment when consolidating counter-terrorism legislation is introduced in 2007.[4] However, we consider that the affirmative resolution procedure is ill-suited to debate the issues raised by the control order legislation at this time. As the Joint Committee on Human Rights notes in its own report on the draft order:[5]

> 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

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[1] See Lord Carlile of Berriew QC, *First report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006), para 61: 'the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society'.

[2] A mere 18 days from introduction (22 February 2005) until royal assent (11 March 2005).

[3] Hansard, HC Debates, 10 March 2005, Col 1859.

[4] Hansard, HC Debates, 2 February 2006, Col 479.

[5] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006,* (HL 122/HC 915, 14 February 2006), para 89.

Summary

5. It is a basic principle of English law that no person shall be deprived of their liberty without due process of law,[6] and chief among the guarantees of due process is the right to a fair trial. These guarantees are reiterated in the terms of 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.

6. Article 6(1) provides materially as follows:

> 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.

7. By contrast, the system of control orders introduced by the Act allows for an individual to be made subject to an array of serious and potentially open-ended restrictions upon his home life, employment, movement and communications without ever having the opportunity to answer any criminal charge against him. In this briefing, we identify particular problems with:

- the nature and extent of the restrictions imposed;
- the lack of sufficient judicial safeguards; and
- the use of closed proceedings and special advocates.

Nature and extent of restrictions

8. Although all the control orders made since the Act came into force have been non-derogating orders,[7] it is clear that the restrictions imposed by way of those orders have nonetheless been sweeping. As Lord Carlile notes of the conditions 'imposed on most but not quite all of the controlees so far':[8]

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[6] 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'.

[7] See n1 above, para 18: a total of 18 control orders have been made since March 2005, of which 9 subsist.

[8] Ibid, para 42.

> On any view [the] obligations 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.
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> 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* [emphasis added].

9. Later, Lord Carlile notes that 'control orders involve *deprivation of much of normal life*' [emphasis added].[9]

10. In our view, nothing can be drawn from the fact that the restrictions have not yet been successfully challenged – as Lord Carlile notes elsewhere in his report, '[t]he effectiveness of the court procedures for non-derogating orders is almost impossible to report upon at this stage'.[10] Instead, the nature of the restrictions imposed in the majority of non-derogating orders demonstrate a central flaw in the scheme of the Act: restrictions short of house arrest may nonetheless amount, in their collective effect, to a deprivation of liberty contrary to article 5 ECHR. (We note that the individual restrictions set out in Annex 2 of Lord Carlile's report may also amount to a disproportionate interference with the right to respect for one's home (article 8), freedom of religion (article 9), freedom of expression (article 10) and freedom of association (article 11) among others). As the Court of Appeal noted in *R (Gillan) v Commissioner of Police for the Metropolis,*[11] discussing the judgment of the European Court of Human Rights in *Guzzardi v Italy*:[12] the 'distinction between 'deprivation of liberty' and 'deprivation of liberty of movement' can prove very difficult to make'.[13] As the Strasbourg Court stated in *Guzzardi*:[14]

> The difference between deprivation of and restriction upon liberty is none the less merely one of *degree or intensity*, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of

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[9] Ibid, para 49.

[10] Ibid, para 51.

[11] [2004] EWCA (Civ) 1067.

[12] (1980) 3 EHRR 333.

[13] *Gillan*, n6, para 38.

[14] Para 93.

article 5 depends.

11. 'The starting point', according to the Strasbourg Court, 'must be [the] concrete situation and account must be taken of a whole range of criteria such as the *type, duration, effects and manner of implementation* of the measure in question'.[15] Having regard to the broad-ranging and intrusive quality of the restrictions set out in Annex 2 of Lord Carlile's report and their long-term nature, we consider that the collective effect of the conditions imposed in the majority of control orders thus far are likely to amount to a deprivation of liberty contrary to article 5 ECHR. Nor, as we submit in the following sections, do the safeguards of the Act comply with those required by article 5(4) ECHR.

12. More generally, though, we consider that the use of control orders is also incompatible with the requirements of article 6 ECHR because – predicated upon an individual's suspected involvement in terrorist (and hence criminal) activity – they are, in substantive terms, criminal charges[16] but without any of the specific guarantees of fair criminal proceedings under articles 6(2) or 6(3). Even if non-derogating orders are found to be essentially civil rather than criminal, however, we consider that it is likely that they would still breach the requirements of article 6(1) due to the limited judicial control exercised over executive decision-making in this area. We detail these concerns in the next section.

Lack of sufficient judicial safeguards

13. Given the extent of restrictions that have been imposed even under the non-derogating orders, the low level of safeguards provided by the Act is striking.

14. A non-derogating control order may be made against a person where the Secretary of State '*has reasonable grounds for suspecting* that the individual is or has been involved in terrorism-related activity' (emphasis added).[17]

15. Although the default position under the Act is that the Secretary of State requires the permission of the court to make a non-derogating order,[18] permission is not required where it is thought urgent[19] or where the subject of the order was previously detained under Part 4 of

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[15] Ibid, para 92.

[16] See *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 82-83; *Lauko v Slovakia* (1998) 33 EHRR 994, para 57.

[17] Section 2(1)(a).

[18] Section 3(1).

[19] Section 3(1)(b).

the Anti-Terrorism Crime and Security Act 2001 ('ATSCA').[20] Indeed, the first 10 of the 18 orders made so far were made under this latter exception.

16. In the event that the court's permission *is* required, however, section 3(2)(a) directs it only to consider 'whether the Secretary of State's decision to make the order is *obviously flawed*' (emphasis added). The same test applies where an order has been made without permission and is subsequently referred to the court under sections 3(3)(a) and (b). Section 3(5) allows the court to consider an application for permission or an order referred to it without notice, without the individual being present, or being given the opportunity to make representations.

17. Following the initial grant of permission or reference, the making of a non-derogating order will be reviewed in a hearing. The court's role, at this point, is to determine whether the decision to make the order or impose a specific obligation was 'flawed'.[21] Section 3(11) provides the standard to be applied at this stage to be 'the principles applicable on an application for judicial review'. Of this jurisdiction, Lord Carlile states:

> Judicial review is a robust jurisdiction, as even cursory examination of its developing history shows. My observations between UK human rights law and that applied in other ECHR countries leaves me in no doubt that, despite imperfections, it stands any comparative test – both in terms of accessibility and results.

18. Given the obvious limitations on the court's role, however, we consider Lord Carlile's assessment to be overly-sanguine. It is worth recalling in this context that judicial review of the 'reasonable suspicion' of the Home Secretary was the same jurisdiction enjoyed by the Special Immigration Appeals Commission under Part 4 of ATSCA, of which SIAC itself noted: 'it is not a demanding standard for the Secretary of State to meet'.[22] The application of judicial review principles to control order proceedings has also been criticised by the House of Commons Constitutional Affairs Committee in its report on SIAC.[23] In our view, such a weak standard of proof fails to provide effective judicial control of executive interference with individual liberty, and certainly does not meet the standard required of criminal proceedings under article 6 ECHR.

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[20] Section 3(1)(c).

[21] Section 3(10)(a) and (b).

[22] *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 71.

[23] Para 105.

Use of closed proceedings and special advocates

19. Among the most problematic features of the control order system is the Act's provision for the use of closed proceedings and special advocates.[24] Since the Act was passed, the use of special advocates in SIAC proceedings was subject to criticism by the House of Commons Constitutional Affairs Committee in April 2005.[25] In our own view, the use of closed sessions and special advocates involves serious limitations on an appellant's right to fair proceedings. The rights limited include the individual's right to know the case against him;[26] be present at an adversarial hearing;[27] examine or have examined witnesses against him;[28] be represented in proceedings by counsel of his own choosing;[29] and to equality of arms.[30]

20. As regards the notion of 'equality of arms' in particular, it is plain that the individual who is made subject to a control order in closed proceedings does not enjoy anything remotely close to an equal footing with the respondent Secretary of State: not only is the respondent able to withhold relevant material from the appellant, but the respondent is entitled to be present at all times. Nor does the respondent suffer any of the kinds of restrictions upon communication with counsel that are imposed on the individual controlee.

21. The individual controlee, by contrast, is not entitled to be present throughout the proceedings. He is also prevented from knowing all the evidence against him, as the special advocate who represents him in closed session is forbidden to discuss the closed material with him. Although the special advocate is able to cross-examine witnesses on the appellant's behalf, the appellant is denied the full benefit of this right – without knowing the closed evidence against him, he cannot indicate to counsel the points upon which witnesses should be challenged. In the same way, the entitlement of the appellant to his own counsel throughout the proceedings is useless to the extent that his own counsel would also be prohibited from attending the closed hearings and knowing the closed evidence against him.

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[24] See Schedule, paras 4-7 and CPR 76.

[25] *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (HC 323, 3 April 2005).

[26] Art 5(4) and Art 6(3)(a) ECHR. see e.g. *Nielsen v Denmark* (1959) 2 YB 412 (Commission).

[27] Art 6(1) ECHR. See e.g. *Brandstetter v Austria* (1991) 15 EHRR 378, para 66; *Mantovanelli v France* (1997) 24 EHRR.

[28] Article 6(1) and 6(3)(d) ECHR. See e.g. *Unterpertinger v Austria* (1986) 13 EHRR 175.

[29] Article 6(1) and 6(3)(c) ECHR. See e.g. *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457.

[30] Article 6(1) ECHR has been interpreted as providing an implied right to each party to a 'reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent', *De Haes and Gijsels v Belgium* (1997) EHRR 1 at para 53.

22. The fact that a special advocate is appointed by a government official and that the appellant has no say in the choice of advocate is another plain interference with the appellant's right to counsel 'of his own choosing'.[31] This lack of choice is significant, not least because choice of counsel is an important factor in promoting the confidence of persons subject to proceedings in their legal representatives. Such choice is even more important in proceedings where the government is the respondent.

23. In our view, the use of special advocates cannot be justified in situations where an appellant's right to liberty is engaged. This is because the kinds of restrictions that may be acceptable to protect national security in an employment tribunal hearing or a deportation hearing are unacceptable where an individual faces imprisonment or other serious interference with their right to liberty. Although special advocates might be used to determine *preliminary* issues in such cases (such as non-disclosure applications on grounds of public interest immunity), the notion that a person could ever be subject to criminal sanction or other deprivation of liberty without knowing the full case against them is antithetical to basic concepts of justice. As Lord Steyn noted in his dissenting judgment in *Roberts v Parole Board*:[32]

> It is not to the point to say that the special advocate procedure is 'better than nothing'. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.

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JUSTICE
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[31] The right to a counsel of one's own choice is not absolute under Article 6(3)(c) ECHR but the general rule is that the appellant's choice should be respected.

[32] [2005] UKHL 45 at para 88.