Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2007

JUSTICE Briefing for House of Lords 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 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').

3. We recognise the seriousness of the terrorist attack of 7 July 2005, the need to guard against further attacks, and continuing evidential difficulties in prosecuting those suspected of plotting them. We nonetheless regard control orders as a needless departure from long-established standards of due process[1] 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.

4. We have produced numerous detailed briefings on control orders since their introduction in March 2005.[2] It is therefore not necessary to repeat those arguments in this briefing. Instead, we raise specific concerns with:

    - the failure to consider prosecutions of those subject to control orders;
    - the flawed assessment of risk posed by those subject to control orders;
    - the nature and extent of the restrictions imposed; and
    - the use of closed proceedings and special advocates.

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[1] 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'.

[2] 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 Court of Appeal in *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 and *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141.

Failure to consider prosecutions

5. The government has long maintained that criminal prosecutions are its preferred option for dealing with those suspected of involvement in terrorism, and that it seeks to rely on control orders only as a last resort in cases where prosecution is not possible.[3]

6. On 16 February 2007, however, the High Court quashed a control order against an individual identified as 'E' because – among other things – the Home Secretary had failed to keep the prospects of prosecuting E for terrorism offences under review.[4] In particular, the court found that the Home Secretary had failed to consider whether publicly-available court judgments in Belgium could be used as evidence to prosecute E in the UK.[5] This failure is particularly striking, given that the judgments had been in the possession of the Home Office since November 2005 and since the government had already begun to use those same judgments as open evidence against other individuals in proceedings before the Special Immigration Appeals Commission ('SIAC') by September 2006.[6]

7. It is also apparent from the court's findings in *E* that – in the case of 10 individuals previously detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 and now subject to control orders – the Crown Prosecution Service did not consider the question of prosecution until 19 February 2005.[7] Nor does the CPS appear to have revisited its decisions in those cases at any time in the past two years.[8]

8. Although we recognise that the police and the Control Order Review Group ('CORG') seek to keep the issue of prosecution in control order cases under continuous review, the judgment of the High Court in the case of E shows that this process of internal review is plainly inadequate. As Mr Justice Beatson noted in his judgment, '*a process which simply relied on the chief officer of the Police force or the Police officer present at the relevant meeting of CORG to bring matters forward is insufficient*'.[9]

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[3] See e.g. the statement made by Home Secretary Charles Clarke MP when introducing the Prevention of Terrorism Bill: 'I want to make it clear that prosecution is, and will remain, our preferred way forward when dealing with all terrorists', Hansard, HC Debates, 26 Jan 2005: Col 305.

[4] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin).

[5] Ibid, paras 286-293.

[6] See e.g. paras 52 and 124, ibid.

[7] Ibid, paras 108 and 111.

[8] Ibid, para 111.

[9] Ibid, para 292.

9. More generally, we are at a loss to understand how – if prosecution is indeed the government's preferred way forward – the issue of prosecution in the majority of control order cases has only been referred to the CPS once in the entire five and a half year period since 9/11.

10. The failure of the government to vigorously pursue prosecutions in control order cases is sadly consistent with its more general failure to address evidential difficulties in prosecuting terrorism cases – difficulties which it has used to justify the introduction of indefinite detention, control orders, and the extension of pre-charge detention under the Terrorism Act 2000 to 28 days.[10] In our recent report, *Intercept Evidence: Lifting the ban*,[11] for example, we noted that the UK remains virtually the only country in the world to ban the use of intercept material as evidence in criminal proceedings. Despite two internal Home Office reviews since 9/11, the government has yet to bring forward proposals to lift the ban. In light of such dilatory efforts, it is difficult to take the government's professed commitment to prosecute suspected terrorists seriously.

Flawed assessments of risk

11. The recent abscondment of two[12] individuals subject to control orders – one from a psychiatric hospital and one from a mosque[13] – also raises serious questions about the use of control orders. In the case of the individual who escaped from a psychiatric hospital, news of the escape was not made public for two weeks. [14] Home Office Minister Tony McNulty stated that

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[10] See e.g. Home Office Minister Lord Rooker in debates on the Anti-Terrorism Crime and Security Bill: 'If we could prosecute on the basis of the available evidence in open court, we would do so. *There are circumstances in which we simply cannot do that because we do not use intercept evidence in our courts*', Hansard, HL Debates, 27 November 2001: Column 146, emphasis added. Home Secretary Charles Clarke MP also referred to the evidential difficulties associated with terrorism cases as justification for the introduction of control orders: 'I want to make it clear that prosecution is, and will remain, our preferred way forward when dealing with all terrorists. All agencies operate on that basis, and will continue to do so, but all of us need to recognise *that it is not always possible to bring charges, given the need to protect highly sensitive sources and techniques*' Hansard, HC Debates, 26 Jan 2005: Col 305. Emphasis added. The Lord Chancellor Lord Falconer similarly cited 'the evidential problems in proving the link between the individual, his activity and terrorism' in the Lords debates on the Prevention of Terrorism Bill (Hansard, HL Debates, 1 March 2005: Column 119).

[11] JUSTICE, October 2006.

[12] We do not include the individual who disappeared from his accommodation following the quashing of his order by the Court of Appeal in August 2006 as an abscondee, as he was under no legal obligation to present himself to police once the control order had been quashed

[13] See Lord Carlile of Berriew QC, *Second Report Of The Independent Reviewer Pursuant To Section 14(3) Of The Prevention Of Terrorism Act 2005* (Home Office: 19 February 2007), paras 24 and 26.

[14] BBC, 'Two terror suspects 'on the run'', 17 October 2006, http://news.bbc.co.uk/2/hi/uk_news/6057140.stm

he 'did not believe the public was at risk' from the escaped men.[15] Lord Carlile similarly gave his view that:[16]

> The two disappearances … present little direct risk to public safety in the UK at the present time.

12. If it is correct, however, that the suspects pose little risk to public safety, then it seems to us extremely difficult to justify the resort to such exceptional measures as control orders in the first place. As the then-Home Secretary told Parliament during debates on the Prevention of Terrorism Bill:[17]

> These orders are 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.

13. For ourselves, we find it impossible to reconcile the supposed dangerousness of the individuals on the one hand with their seemingly negligible risk to the public on the other. The apparent lack of urgency concerning their escape suggests to us that the very assessment of risk underpinning the making of control orders is itself seriously flawed.

Nature and extent of restrictions

14. Although all the control orders made since the Act came into force have purported to be non-derogating orders,[18] no less than six control orders have now been quashed by the courts on the basis that the Home Secretary exceeded his powers under the Prevention of Terrorism Act 2005 by imposing conditions that breached the right to liberty under Article 5 of the European Convention on Human Rights.

15. In August 2006, the Court of Appeal upheld the decision of Mr Justice Sullivan in the High Court to quash control orders in respect of 5 individuals who were subject to, among other things, an 18 hour curfew and serious restrictions on their ability to meet and communicate

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[15] Ibid.

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

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

[18] See Lord Carlile's 2nd report, n12 above: 18 control orders are currently in force.

with others.[19] On 16 February 2007, a control order imposing (among other things) a 12 hour curfew and other similar restrictions was quashed by Mr Justice Beatson in the High Court.[20]

16. As we predicted in our briefing on the 2006 renewal order, the nature of the restrictions imposed in the majority of supposedly non-derogating orders demonstrate a central flaw in the scheme of the Act, i.e. restrictions short of house arrest may nonetheless amount, in their collective effect, to a deprivation of liberty contrary to Article 5 ECHR. As the Court of Appeal noted in *R (Gillan) v Commissioner of Police for the Metropolis,*[21] discussing the judgment of the European Court of Human Rights in *Guzzardi v Italy*:[22] the 'distinction between 'deprivation of liberty' and 'deprivation of liberty of movement' can prove very difficult to make'.[23] As the Strasbourg Court stated in *Guzzardi*:[24]

> 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 article 5 depends.

17. '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'.[25] Having regard to the broad-ranging and intrusive quality of the restrictions set out in Annex 2 of Lord Carlile's first control order report and their long-term nature, the Court of Appeal in *Secretary of State for the Home Department v JJ and others* determined that the collective effect of the conditions imposed in the control orders amounted to a deprivation of liberty contrary to Article 5 ECHR.[26] In particular, the Court of Appeal – led by the Lord Chief Justice – endorsed the following

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[19] *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141.

[20] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin)

[21] [2004] EWCA (Civ) 1067. This analysis was upheld by the House of Lords in *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12.

[22] (1980) 3 EHRR 333.

[23] *Gillan*, para 38.

[24] Para 93.

[25] Ibid, para 92.

[26] See n19 above.

conclusions of Mr Justice Sullivan in the High Court:[27]

> 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.

18. A similar finding was made by Mr Justice Beatson in respect of E's control order.[28]

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.[29] 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.[30] 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;[31] be present at an adversarial hearing;[32] examine or have examined witnesses against him;[33] be represented in proceedings by counsel of his own choosing;[34] and to equality of arms.[35]

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[27] *JJ and others v Secretary of State for the Home Department* [2006] EWHC 1623 (Admin) per Sullivan J at para 73, endorsed by the Court of Appeal [2006] EWCA Civ 1141 at para 23: 'We agree that the facts of this case fall clearly on the wrong side of the dividing line. The orders amounted to a deprivation of liberty contrary to Article 5'.

[28] *E,* n18 above, para 242: 'I have concluded that, although E's is a more finely balanced case than the *JJ cases* … the cumulative effect of the restrictions does deprive E of his liberty in breach of Article 5 of the Convention'.

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

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

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

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

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

[34] Articles 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.

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:

21. The individual controlee is not entitled to be present throughout the proceedings. He is further 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.

22. By contrast, not only is the Home Secretary able to withhold relevant material from the appellant, but his lawyers are entitled to be present at all times, in both open and closed session. Nor does the Home Secretary suffer any of the kinds of restrictions upon communication with counsel that are imposed on the individual controlee.

23. Although the Court of Appeal in *MB v Secretary of State for the Home Department* declined to find that the use of special advocates was contrary to the right to fair proceedings under Article 6,[36] the matter is now on appeal to the House of Lords. 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*:[37]

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[35] Article 6(1) ECHR implies a 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.

[36] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.

[37] [2005] UKHL 45 at para 88.

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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