Security Detention - United Kingdom Practice

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SECURITY DETENTION—UNITED KINGDOM PRACTICE

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This article assesses the role of security detention within the context of a number of the United Kingdom’s anti-terrorism policies. It considers the U.K. provisions on indefinite detention and the judicial response to those policies. Close attention is given to the Prevention of Terrorism Act 2005 (PTA 2005), and in particular the detailed regime of “control orders” it introduced. The different substantive and procedural bases for judicial challenges to control orders are illustrated by reference to the leading judicial decisions. The challenges have principally been based on the human rights provisions in the European convention on human rights. These have been given a degree of domestic incorporation by the Human Rights Act (1998). Consideration is given to the future use of control orders and how an "exit strategy" from them could be devised. Finally, the article analyses the place of security detention within the context of other policy options that form part of an Anti-Terrorism Strategy. It is submitted that none of them is cost-free in human rights terms.

I. INTRODUCTION: THE U.K. AND TERRORISM

The U.K. has assumed a leadership role on the War on Terrorism, serving as the principal ally of the United States in the War on Terrorism generally, and the wars in Afghanistan and in Iraq in particular.1 The U.K.‘s Security Service (MI5) monitors the activities of 200 terrorist networks, involving some 2,000 suspects.2 Its domestic anti-terrorism law is wide-ranging, highly sophisticated, and reflects a variety of anti-terrorist policies.3 Under the Human Rights Act 1998 (HRA), all of that legislation can

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2 See Jonathan Evans, MI5 Director General, Speech on Intelligence, Counter-Terrorism and Trust (Nov. 5, 2007), available at http://www.mi5.gov.uk/output/Page562.html.
now be tested for its compatibility with the European Convention on Human Rights (ECHR). The HRA represents an ingenious construction that impacts on legislative, executive and judicial powers, and involves all institutional actors in rights review. Under HRA Section 3, 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 ECHR. It if is not possible, the higher courts can issue a “declaration of incompatibility” under Section 4 of the HRA. In all cases so far, these have been followed by remedial legislation. Finally, under Section 6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with any Convention rights. In any historical circumstances the HRA would have represented a significant challenge to the U.K. constitutional system. The post 9/11 context has subjected the HRA to the most searching forensic testing conceivable.

This article assesses the role of security detention within the context of a number of U.K. anti-terrorism policies. Part II considers the U.K. provisions on indefinite detention and the judicial response to those policies. Part III examines the Prevention of Terrorism Act 2005 (PTA 2005), and in particular the detailed regime of “control orders” it introduced. Parts IV–VI considers the different bases for judicial challenges to control orders. Part VII considers the future use of control orders. Finally, Part VIII puts security detention within the context of other policy options that form part of an Anti-Terrorism Strategy.

II. CONTROLLING THE TERROR THREAT: THE ATCSA PART 4 REGIME FOR INDEFINITE DETENTION

Responding to the attacks of 9/11, the U.K Parliament passed the Anti-Terrorism, Crime, and Security Act of 2001 (ATCSA), which modified the Terrorism Act of 2000. The most controversial new measures in the ATCSA were those in Part 4, entitled “Immigration and Asylum,” which permit indefinite detention for foreign nationals suspected of being international terrorists. These provisions required the U.K. to derogate from Ar-

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5 Human Rights Act, 1998, c. 42, § 3(1) (Eng.).
6 Id. § 4(2).
8 Human Rights Act, 1998, c. 42, § 6(1) (Eng.).
11 See ATCSA pt. 4, § 29. See also AMNESTY INTERNATIONAL, UNITED KINGDOM HUMAN RIGHTS: A BROKEN PROMISE, 14 (Feb. 23, 2006),
article 5 of the ECHR and Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Section 21 of ATCSA provided that the Home Secretary could certify an individual as a “suspected international terrorist” if the Secretary reasonably believed that that person’s presence in the U.K. was a threat to national security and that the Secretary 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 by the appropriate authorities 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 would face a real risk of treatment incompatible with the ECHR. In the anti-terrorist context, this would normally be ill-treatment or the death penalty, but in principle it could extend to other rights.

Of the seventeen persons that were detained under the Part 4 regime, only one person won an appeal against certification. According to Amnesty International, “most of the ATCSA detainees were held in the High Security Unit (USU) in Belmarsh” prison. Amnesty International concluded that those held at Belmarsh suffered 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. There also was evidence that the conditions of detention were causing psychiatric problems. Legally, the detainees 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 would face a real risk of serious ill-treatment. Although two individuals did just this, it was not be realistic to expect detainees make this


12 See ATCSA pt. 4, § 30. See also AMNESTY INTERNATIONAL, supra note 11, at 14–15.
13 See ATCSA, c. 24, pt. 4, § 21 (Eng.).
14 See id. pt. 4, § 22.
15 It could also have been that they satisfied the criteria for being granted asylum.
17 See Who are the Terror Detainees?, BBC News, Mar. 11, 2005, http://news.bbc.co.uk/2 /hi/uk_news/4101751.stm (detailing the detainees’ national origins and the allegations with which they are faced).
18 AMNESTY INTERNATIONAL, supra note 11, at 21
19 Id. at 21–23.
20 Id.
21 See id. at 14.
choice. By the time of the decision of the House of Lords in the Belmarsh Detainees Case, those detained had already been held for three and a half years and faced the prospect of indefinite detention.22

The detention system in ATCSA was challenged in A (FC) and Others v. Secretary of State for the Home Department.23 In a rare move, a nine-member panel of the House of Lords (HL) heard the appeal. The panel rejected the challenge to the existence of a public emergency with some misgivings and one dissent.24 However, the House of Lords accepted a proportionality challenge to the derogation order and to Section 23 ATCSA.25 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 to adequately address that problem.26 It allowed non-U.K. suspected terrorists to leave the country with 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.27 The detainees also successfully attacked Section 23 as discriminatory on the basis of nationality.28

The House of Lords decision in the Belmarsh Detainees Case was greeted with acclaim by human rights lawyers and with shock by the government.29 Legally, under the structure of the HRA, the government did not have to accept the declaration of incompatibility.30 In January 2005, however, the government announced that it accepted the declaration of incompati-

22 See id. at 17.
24 See, e.g., id. ¶ 26; ¶ 154 (acknowledging misgivings).
25 See [2004] UKHL 56, ¶ 43.
26 See also id. ¶ 103 (finding serious error in regarding the case as about the right to control immigration rather than about the aliens’ right to liberty); id. ¶ 129 (holding indefinite detention without trial of foreign nationals cannot be strictly required to meet the exigencies of the situation where 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 nationals); id. ¶ 133 (holding that § 23 of the Act is not rationally connected to the legislative objective).
27 Id. ¶ 43.
28 See id. ¶ 73.
bility and that new legislation would replace indefinite detention in prison.\textsuperscript{31} The new provisions were contained the Prevention of Terrorism Act 2005 (PTA 2005).\textsuperscript{32} It is important to bear in mind that the government resorted to the changes because human rights jurisprudence was restricting the government from its preferred policy options for non-nationals, specifically deportation or indefinite detention.

III. THE PREVENTION OF TERRORISM ACT 2005—CONTROL ORDERS

After the Belmarsh Detainees Case the government proposed a new system of control orders.\textsuperscript{33} The controversial proposals applied to British nationals and non-nationals. The government accepted that the proposals represented a “very substantial increase in the executive powers of the State in relation to British citizens.”\textsuperscript{34} In response to these proposals, backbench Labour Members of Parliament in the House of Commons rebelled and the House of Lords also voiced opposition.\textsuperscript{35} After strong opposition in the House of Lords in particular, the government accepted amendments which required judges to authorize control orders (except for temporary emergency orders) and which required review of the legislation after one year.\textsuperscript{36} The Home Secretary immediately issued the first control orders to deal with the ten suspects previously interned in Belmarsh.\textsuperscript{37}

A. 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.”\textsuperscript{38} It was designed, therefore, to avoid dealing with non-nationals differently. Provision was made for two forms of control orders:

\begin{footnotesize}
\begin{enumerate}
\item See id. § 2.
\item See Martin Bright & Gaby Hinslif, Chaos: How War On Terror Became A Political Dogfight, Observer (London), Mar. 13, 2005.
\item See Prevention of Terrorism Act, 2005, c. 2, §§ 4(1), 13(1).
\item See Amnesty International, supra note 11, at 27.
\end{enumerate}
\end{footnotesize}
“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 its 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 1998 and could only be authorized 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 September 2008, no such orders had been made.

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. 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. The Secretary of State has discretion to impose in non-derogating control orders, “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.” A non-exhaustive list is included. 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. Gradually, however, there were more variations. “Before making, or applying for the making of, a control order against an individual, the Secretary of State must consult the chief officer of the police force about whether there is evi-

See id. § 1(10).
Id. § 4(3) (a).
Id. See generally Proceedings Under the Prevention of Terrorism Act 2005, CPR 76.
Prevention of Terrorism Act, 2005, c. 2, § 1(3).
Id. § 1(4); See also id. § 1(5)-(7).
dence available that could realistically be used for the purposes of a prosecution of the individual for an offense relating to terrorism. 50

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 2007, a total of eighteen “non-derogating” control orders had been issued in total. 51 All orders were for men. The controlees are normally protected by an anonymity order. 52 At the end of 2007, fourteen control orders were in existence, “eight of which [were] in respect of British nationals.” 53

Modifications of control order obligations are now more frequently made and there are an increasing number of requests for modifications. 54 The first use was made using the urgency procedures under Section 3(1)(b) of the 2005 Act in February 2007. 55 Four individuals subject to a control order have absconded, 56 as has another individual in relation to whom a control order was made (i.e. signed) against that individual, but had not been served. 57 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.” 58 The imposition must be reviewed by the courts within seven days. 59 Individuals subject to these control orders can appeal the orders and the condi-

50 Prevention of Terrorism Act, 2005, c. 2, § 8(2). If a control order is imposed the possibility of prosecution must be kept under review. Id. § 8(4); see also infra Part VI.


53 See McNulty, supra note 51.

54 See McNulty, supra note 44, for statistics.


56 The independent reviewer submitted that “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.” Carlile, supra note 52, ¶ 59.

57 See McNulty, supra note 51.

58 See id.


60 See id. § 3(4).
tions contained in them under a process for judicial review. 61 The order will remain in place, however, unless it is “obviously flawed.” 62 The High Court “may consider the case in open and/or closed session.” 63 Moreover, “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.” 64

Non-derogating control orders, however, are limited to twelve months’ duration. 65 A fresh application has to be made if it is desired that the person concerned should remain a controlee at the end of each twelve month period. 66 Breach of any conditions without reasonable excuse is a criminal offence punishable on indictment by imprisonment of up to five years, or an unlimited fine. 67 Additionally, “[c]ontrolees and the Government both have the option of applying to the court for anonymity to apply to the identity of the controlee.” 68 Under this option, “the controlee . . . avoids publicity that might lead to harassment in the community where he or she lives, or that might prejudice a fair trial if criminal charges are brought later.” 69 Anonymity orders are imposed by the court and can only be lifted by the court. For operational reasons, the Government has never sought to overturn the anonymity orders. 70 Finally, Section 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. 71

B. Judicial Control of Control Orders

Non-derogating control orders once made by the Secretary of State under Section 2 and derogating control orders once made by the court under Section 4, go their wholly separate and very different procedural ways. In particular, in the former case the court’s role is supervisory and the standard

61 See id. § 3(11).
62 See id. § 3(2)(b).
63 Carlile, supra note 52, ¶ 15.
64 Id.
66 See id. § 2(4)(b).
67 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 [five] months’ imprisonment.” Carlile, supra note 52, ¶ 18.
68 Id ¶ 19.
69 Id.
70 See McNulty, supra note 51.
71 Prevention of Terrorism Act, 2005, c. 2, § 14(1).
of proof is reasonable suspicion, whereas in the later case the court decides whether to confirm its order on the balance of probabilities.\textsuperscript{72} Under Section 3(2) of the 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; and (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.\textsuperscript{73}

Under Section 3(10), on a hearing in pursuance of directions under Section 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.\textsuperscript{74} 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.\textsuperscript{75} There have been a series of judicial challenges to control orders.\textsuperscript{76} These challenges will be considered in turn. 

IV. JUDICIAL CHALLENGES TO CONTROL ORDERS: PROCEDURES

In April 2006, 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.\textsuperscript{77} On an application by the Home Secretary, the court had made a non-derogating control order against MB.\textsuperscript{78} 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.\textsuperscript{79} The open statement asserted that MB was an Islamic extremist and that the Security Service considered that he was involved in terrorism-related activities.\textsuperscript{80} There was

\textsuperscript{72} See id. §§ 2(1), 4(7).
\textsuperscript{73} Id. § 3(2).
\textsuperscript{74} Id. § 3(10).
\textsuperscript{76} See infra Parts IV–V.
\textsuperscript{77} See [2006] EWHC (Admin) 1000.
\textsuperscript{78} See id. ¶ 17.
\textsuperscript{79} See id.
\textsuperscript{80} Id. ¶ 20.
no argument to the effect that the controls on MB were incompatible with Article 5 ECHR. The two special advocates who were appointed 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.” 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 6.1 of the” ECHR. Judge Sullivan thought he issued a declaration under Section 4 of the HRA (1998) that Section 3 of the PTA 2005 was incompatible with the right to fair hearing under Article 6. He was particularly damning in his overall criticism:

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.

In Secretary of State for the Home Department v. MB the Court of Appeal (CA) “unravelled” each strand of Judge Sullivan’s reasoning. In particular, the Act did not restrict “the court to a standard of review that fell short of that required to satisfy Article 6” ECHR. Moreover, the CA concluded “that proceedings under [S]ection 3 of the 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

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81 See id. ¶¶ 35–36.
82 Id. ¶ 23.
83 See id.
84 Id. ¶ 27.
85 See id. ¶ 104.
86 Id. ¶ 103 (emphasis added).
87 [2006] EWCA (Civ) 1140 ¶ 87 (composed of the Lord Chief Justice, the Master of the Rolls and the President of the Queen’s Bench Division).
88 Id. ¶ 48.
89 Id. ¶ 53.
The CA concluded that “[s]o far as the former is concerned, Article 6 may require the factual evaluation to be carried out by a judicial officer.” Moreover, “[s]o 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.” The aspect of the case that caused the CA the 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. For the CA “the issue [was] whether Article 6 require[d] an absolute standard of fairness to be applied, or whether, in a case such as [that before it], some derogation from that standard [was] permissible in the interests of national security.” The court considered that the Strasbourg jurisprudence accepted the latter approach. In conclusion, the CA found “[t]he [lower court] judge was in error in holding that the provisions for review by the court of the making of a non-derogating control order by the Secretary of State d[id] not comply with the requirements of Article 6.”

The House of Lords (HL) unanimously held that a review of a non-derogating control order was not a determination of a criminal charge. As for whether the procedures provided by Section 3 of the PTA 2005 and the relevant Rules of Court were compatible with Article 6 ECHR, the majority view in the HL was that “the relevant provisions should be read down under section 3 of the Human Rights Act 1998, so that they would take effect only when it was consistent with fairness for them to do so.” With strenuous efforts from all the personnel involved, it would usually be possible to accord the controlled person a substantial measure of procedural justice.

90 Id. ¶ 56.
91 Id.
92 Id.
94 [2006] EWCA (Civ) 1140, ¶ 79.
95 See id. ¶¶ 85–86.
96 Id. ¶ 87.
97 See Sec’y of State for Home Dep’t v. MB (FC) and AF (FC), [2007] UKHL 46, ¶ 26 (Lord Bingham).
98 Id. ¶ 44.
99 Id. ¶ 66 (Baroness Hale).
court concluded that “[t]he best judge of whether the proceedings ha[d] afforded a sufficient and substantial measure of procedural protection [was] likely to be the judge who conducted the hearing”\(^\text{100}\) and that “any appeal court should be slow to interfere” with his or her judgment.\(^\text{101}\) Baroness Hale supported this general approach with three arguments. First, the courts were required by Parliament to take this course if it was possible.\(^\text{102}\) Second, “there [was] good reason to think that Strasbourg would find proceedings conducted in accordance with the Act and rules compatible in the majority of cases.”\(^\text{103}\) Third, “there [were] powerful policy reasons in support of procedures which enable cases to be proven through the evidence of infiltrators and informers rather than upon evidence which may have been obtained through the use of torture.”\(^\text{104}\)

V. JUDICIAL CHALLENGES TO CONTROL ORDERS: SUBSTANCE—THE RIGHT TO LIBERTY

A. The JJ Case

In June 2006, in *Secretary of State for the Home Department v. JJ and Others* the court heard an application from six individuals subject to control orders.\(^\text{105}\) The obligations on them were far more restrictive than those imposed on *MB*. They related to: (1) electronic tagging (to be worn at all times); (2) residence (being required for eighteen hours per day, and for five of the controlees, in areas with which they had no previous connection); (3) reporting to a monitoring company; (4) visitors to the residence; (5) pre-arranged meeting outside the residence; (6) identified individuals with whom any association or communication prohibited; (7) police searches (in each case there had been a number of searches); (8) further prohibitions or restrictions; (9) communications equipment (only one fixed telephone line permitted); (10) mosque attendance; (11) restriction to geographical area; (12) notification of international departure and arrival bank account; (13) transfer of money/ sending of documents or goods; (14) passport/ identity card etc; and (15) prohibition from entering air or sea port etc.\(^\text{106}\) 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 res-

\(^{100}\) Id. ¶ 67.
\(^{101}\) Id.
\(^{102}\) See id. ¶ 73.
\(^{103}\) Id.
\(^{104}\) Id.
\(^{105}\) [2006] EWHC (Admin) 1623.
\(^{106}\) See id. at Annex I.
pondents’] 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). Judge Sullivan emphasized that the restrictions had not been imposed to protect the interests of the individuals, but instead had been imposed to protect the public. In the absence of 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 eighteen-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.” He considered that the proper course was to quash the control orders. Unsurprisingly, the decisions attracted wide publicity. They were attacked and appealed by then-new Home Secretary, John Reid.

In Secretary of State for the Home Department v. JJ and Others, the Court of Appeal (CA) upheld the decision of Judge Sullivan that the control orders amounted to a deprivation of liberty contrary to Article 5 ECHR. In the Court of Appeal’s view the orders, “clearly fell on the wrong side of the dividing line.” In Secretary of State for the Home Department v. JJ and Others (FC), a majority of the House of Lords (Lords Bingham, Brown and Baroness Hale) rejected the government’s appeal and held that the control orders imposed on six individuals concerned constituted a deprivation...

107 [2007] UKHL 45, ¶ 87 (appeal taken from Eng.).
108 See id. ¶ 104.
109 See id. ¶ 90.
110 See id. ¶ 103.
111 See id. ¶ 72.
112 See id.
113 Id. ¶¶ 73–74. The same conclusion was reached for the one individual, GG, who continued to reside at his home. Id. ¶ 60.
116 [2006] EWCA (Civ) 1141.
117 Id. ¶ 23.
of liberty contrary to Article 5 ECHR. Baroness Hale was hesitant to suggest, in the abstract, what length of curfew would fall on the other side of the line. Lord Brown agreed with Lord Bingham and Baroness Hale, but he sought to be more specific regarding the permissible time limits. For him, twelve or fourteen-hour curfews (those at issue in two of the related appeals before the House) were consistent with physical liberty. He “regard[ed] the acceptable limit to be sixteen hours, leaving the suspect with eight hours (admittedly in various respects controlled) liberty a day.” This should be regarded as the absolute limit. He added that any curfew regime exceeding sixteen hours really ought not to be imposed unless the court can be satisfied of the suspect’s actual involvement in terrorism, the higher threshold that would apply to the making of a derogating control order. The two dissenters, Lords Hoffman and Carswell, argued that deprivation of liberty had to be more narrowly interpreted.

B. The E Case

E v. Secretary of State for the Home Department was the first full hearing with evidence about the relevant factual issues. The issue was whether a less restrictive control order than in the JJ case amounted to a deprivation of liberty. The subject of the control order was a Tunisian national who had been in the U.K. since 1994 and had been convicted in his absence by a Tunisian military court for various terrorism offences under Tunisian law. He was married with four young children under the age of seven, and, at the time of the 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 the directions given in writing.” By a variation, the residence included the garden. He was required to “re-
port to [a specified] monitoring company by telephone [each day] on the first occasion [he left] the residence and on the last occasion [he] return[ed] 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 ten 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. However, [t]he prior agreement of the Home Office [was] not . . . required for subsequent visits by an agreed individual” unless the Home Office withdrew the agreement.

E could “not, outside of the residence: meet any person by prior arrangement, other than . . . [his wife and children, his legal representative], or for health and welfare purposes at an establishment on a list provided to and agreed by the Home Office before [his] first visit; or for educational purposes, at an establishment” similarly agreed to by the Home Office.

He could not attend any pre-arranged meetings or gatherings, other than attending group prayers at a mosque, “save 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, at any time to verify [his] presence at the residence and/or to ensure that [he] could comply and [was] complying with the obligations imposed by th[e] 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 or keep (whether in or outside the residence) any communications equipment or equipment capable of connecting to the Internet or components thereof . . . other than: (i) one fixed telephone line in the residence; and (ii) one or more computers in the residence.” The computer had to be disabled from con-
necting 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 UK” and report to the Home Office immediately upon arrival on return. He could not hold more than one bank account, nor could he “transfer any money or send any documents or goods to a destination outside the UK,” without the prior agreement of the Home Office. 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 d[id] deprive E of his liberty in breach of Article 5” ECHR. Specifically, “[i]t [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 ma[de] the requirements particularly intense.” Moreover, “[t]he restrictions that appl[ied] 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.”

The CA reversed the decision. By reference to the ECHR jurisprudence in Engel & Ors v. Netherlands (No.1), Guzzardi v. Italy, Ciancimino v. Italy, and Trijonis v. Lithuania, the CA 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

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140 Id.
141 Id.
142 Id.
143 Id.
144 See id. ¶ 95.
145 See id.
146 Id. ¶ 242.
147 Id. ¶ 240.
148 Id. On similar facts, the same judge reached the same conclusion. See Abu Rideh & J, [2007] EWHC (Admin) 804, ¶ 147.
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.” Additionally, “[t]he effect of the physical restraint [had to] be considered in the context of restrictions applied when the restraint [was] not operating.” Moreover, “[w]hether 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 factor in that “[t]he 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.” The court reasoned that “[t]he 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 however, “only very limited weight [could] be given to this factor.” The court agreed, that “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, might be relevant to whether the overall restrictions amount to a deprivation of liberty.” The restrictions were to be considered on the basis that they were likely to be renewed. The court rejected the argument that “because [the] restrictions engaged other articles in the Convention, such as article 8, they should be disregarded in an article 5 context,” and instead reasoned that 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.” The degree of physical restraint upon liberty was “far from a deprivation of liberty in article 5

154 [2007] EWCA (Civ) 459, ¶ 52.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id. ¶ 55.
161 Id.
162 Id. ¶ 56.
163 See id. ¶ 57.
164 Id. ¶ 58.
165 Id. ¶ 59.
terms.”\textsuperscript{166} Although “[t]he intrusion into E’s life at home and the restriction on his outside activities”\textsuperscript{167} also had to be considered, the CA concluded that, “[b]earing 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.\textsuperscript{168} Moreover, “[E]’s case [was] in material respects plainly distinguishable from the JJ cases” and the facts of E’s case fell “on the right side of the dividing line.”\textsuperscript{169} In Secretary of State for the Home Department v. E and Another, the House of Lords unanimously upheld the decision of the Court of Appeal.\textsuperscript{170} Similarly, in Secretary of State for the Home Department v. AF (FC), the House unanimously held that there had been no deprivation of liberty.\textsuperscript{171}

VI. JUDICIAL CHALLENGES TO CONTROL ORDERS: THE POSSIBILITY OF PROSECUTION

Even if the High Court had not found there to be a deprivation of liberty and a breach of Article 5 ECHR in E v. Secretary of State for the Home Department, 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.\textsuperscript{172} Under Section 8 of the PTA 2005, the Home Secretary is under “a continuing duty to keep the decision to impose and maintain a control order under review.”\textsuperscript{173} Moreover, the High Court held that this duty included keeping the matter of prosecution under review.\textsuperscript{174} 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.\textsuperscript{175} In those Belgian proceedings, intercept evidence from Spain and the Netherlands had been admitted, and that evidence would in principle be

\textsuperscript{166} Id. ¶ 63. The CA (and subsequently the HL) cited the decision in Trijonis v. Lithuania where the “home arrest” included an obligation to remain at home throughout weekends, and the complaint was held inadmissible. Id.
\textsuperscript{167} Id. ¶ 64.
\textsuperscript{168} Id. ¶ 69.
\textsuperscript{169} Id.
\textsuperscript{170} Sec’y of State for the Home Dep’t v. E and Another, [2007] UKHL 47 (appeal taken from Eng.).
\textsuperscript{171} Sec’y of State for the Home Dep’t v. AF (FC), [2007] UKHL 46 (appeal taken from Eng.).
\textsuperscript{172} [2007] EWHC 233 (Admin) (appeal taken from Eng.).
\textsuperscript{173} [2007] EWHC 233 (Admin), ¶ 284.
\textsuperscript{174} Id.
\textsuperscript{175} See id. ¶ 286.
admissible in England because it originated from abroad. 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 mean[t] that [the Home Secretary’s] continuing decision to maintain E’s control order was flawed,” and would have been quashed on this basis.

The CA agreed in part but saw the matter differently. The court reasoned that “[w]hen properly considered in its statutory context . . . the duty under section 8(2) [was] not a condition precedent.” Moreover, “[o]nce 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 c[ould] to ensure that the continuing review [was] meaningful.” The CA also concluded that “[t]here 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.

Additionally, “[t]here 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 re-consideration of prosecution.” This duty of the Secretary of State “extend[ed] to a duty to take reasonable steps to ensure that the prosecuting authorities are keeping the prospects of prosecution under review.” The duty, however, did not “extend to the Secretary of State becoming the prosecuting authority.” Instead, “[t]he decision whether to prosecute l[ay] elsewhere.”

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176 See id. ¶ 287. This is so under the Regulation of Investigatory Powers Act (2000). See R v. P (Telephone Intercepts: Admissibility of Evidence) [2002] 1 AC 146. The judgments were at the core of the Secretary of State’s open national security case against E.

177 [2007] EWHC 233 (Admin), ¶ 287.

178 Id.

179 Id. ¶ 293

180 [2007] EWCA (Civ) 459, ¶ 87.

181 Id. ¶ 97.

182 Id. The police had not been provided with the Belgian judgments by February and March of 2006. Id.

183 Id.

184 Id.

185 Id.

186 Id.
The CA differed, however, on the appropriate relief. The critical question was “whether a particular breach materially contributed to and vitiated the decision to make the control order.”\footnote{Id. ¶ 105.} In the \textit{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.”\footnote{Id.} Thus, “[i]t was an error of law to hold that the breach justified the remedy.”\footnote{Id.} Moreover, “[i]t was wrong to describe the Belgian judgments as ‘evidence’ giving rise to a realistic possibility of prosecution”\footnote{Id.} because “[f]urther analysis of the consequences of the breach was required.”\footnote{Id.} The court stated that, “[m]ore generally, the question, on an appeal under section 10(4), [was] to decide whether the decision of the appellant was flawed.”\footnote{Id. ¶ 106.} In deciding whether the decision of the appellant was flawed, “the duty to be considered [was] the duty to keep the prosecuting authorities informed and to take reasonable steps to ensure that they [were] keeping the controlled person’s conduct, with a view to his prosecution for an offence, under review.”\footnote{Id.} The duty was not, however, “to assume the role of prosecuting authority or to assume responsibility for every decision taken by that authority.”\footnote{Id.}

In \textit{Secretary of State for the Home Department v. E and Another}, the House of Lords unanimously upheld the decision of the Court of Appeal.\footnote{[2007] UKHL 47.} The duty to consult under Section 8(2) was not a condition precedent but was relevant to whether a control order was necessary.\footnote{Id. ¶¶ 15–16.} By the time of the hearing in the House of Lords, the Secretary of State had accepted that it was implicit in the duty of continuing review under Section 8(4) that the Secretary of State must do what he or she reasonably could do to ensure that the continuing review was meaningful and 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.\footnote{Id. ¶ 18.} All
of their Lordships endorsed that approach. They also agreed with the Court of Appeal’s approach to the appropriate remedy.\textsuperscript{198}

VII. THE FUTURE OF CONTROL ORDERS

The result of the series of judgments discussed in Parts IV–VI was a mixed success for the government. The regime was upheld and orders could continue to be issued largely as they had been. They did not involve the determination of a criminal charge. Eighteen hour curfews had to be reviewed, but the Home Office fastened onto the argument of Lord Brown that sixteen hours might be the acceptable limit.\textsuperscript{199} The role of the special advocates was approved but the disclosure regime had to be read and given effect except where to do so would be incompatible with the right of the controlled person to a fair trial.\textsuperscript{200} That was a bold and imaginative interpretation.\textsuperscript{201} It returns the matter to the judge in the Special Immigration Appeal Commission (SIAC) to make the determination on fairness. However, they have struggled to apply this approach and the issue has been appealed for further guidance.\textsuperscript{202} There may now be exceptional cases where the Secretary of State will have to choose between disclosing material or not obtaining a control order. Lord Carlile, the statutory reviewer of the PTA 2005, concluded that the control order system remained necessary, though in some cases the obligations imposed were more cautious and extensive than absolutely necessary.\textsuperscript{203} The Government accepts that control orders are less than one hundred percent effective in countering terrorism.\textsuperscript{204}

\textsuperscript{198} Id. ¶ 21.


\textsuperscript{200} See supra notes 97–104 and accompanying text.

\textsuperscript{201} Cf. Charkaoui v. Canada, [2007] 1 S.C.R. 350, 2007 SCC 9 (Can.) (holding that certification and detention review procedures violate the right to a fair trial). Canadian legislation did not make provisions for a special counsel to be appointed to test the secret evidence. Id. ¶ 69. The Court’s declaration was suspended for one year from the date of the judgment. Id. ¶ 6.

\textsuperscript{202} Four appeals were considered together in Sec’y of State for the Home Dep’t v. AF & Others, [2008] EWCA (Civ) 1148 (2008), but the Court of Appeal was divided. For the majority there was no irreducible minimum of disclosure without which a control order hearing would not be fair for the purposes of Article 6 ECHR. In a rare move the CA itself concluded that it would be in the public interest to give permission to appeal to the House of Lords in three of the four cases on all Article 6 ECHR related issues but not otherwise.

\textsuperscript{203} Carlile, supra note 52, ¶¶ 7, 37, 41.

ment’s view was that, in policy terms, “[c]ontrol orders [were] not even [its] second - or third - best option for dealing with suspected terrorists. But under our existing laws they are as far as [the government] c[ould] go.”\textsuperscript{205} The Government concluded that control orders were the best available means of addressing the continuing threat posed by suspected terrorists who could not currently be prosecuted or, in respect of foreign nationals, cannot be removed from the U.K.\textsuperscript{206} The Security Service view is that control orders have been successful in preventing or limiting individuals’ involvement in terrorism-related activity.\textsuperscript{207} The independent reviewer and the Joint Parliamentary Committee on Human Rights have referred to the need for an exit strategy from the control order regime.\textsuperscript{208}

VIII. ANTI-TERRORISM STRATEGY—THE POLICY OPTIONS

The U.K.’s anti-terrorism policies are complex and interrelated. As the challenge the U.K. faces continues to evolve, particular policies also have evolved in the face of political and legal challenges. In 2007, the U.K. Government announced proposals for new counter-terrorism legislation\textsuperscript{209} and in 2008 a Counter-Terrorism Bill (2008) introduced to Parliament.\textsuperscript{210} It is helpful to briefly outline the major policies and proposals and how they inter-relate. The government’s preferred strategy is more prosecutions. More lower-level terrorist related offences have been created and prosecuted.\textsuperscript{211} In 2007, the conviction rate in terrorist trials was ninety-two percent.\textsuperscript{212} In no less than twenty cases guilty pleas were offered, though some of those convictions have been overturned on appeal.\textsuperscript{213} In 2008, convictions for possessing terrorist material were quashed because possession was

\textsuperscript{205} McNulty, supra note 51.


\textsuperscript{207} Id.

\textsuperscript{208} See id.

\textsuperscript{209} 461 PARL. DEB., H.C. (6th Ser.) 421–23 (statement of John Reid, Sec’y of State for the Home Dep’t); 463 PARL. DEB., H.C. (6th Ser.) (2007) 841–45 (statement of Gordon Brown, Prime Minister); Queen Elizabeth II, Queen’s Speech 2007–08 (Nov. 6, 2007), http://www.parliament.uk/about/how/occasions/stateopening/speechtext.cfm.


\textsuperscript{211} Offences include acts preparatory to terrorism, possessing material for a terrorist purpose, being a member of a terrorist organization, funding terrorism, attending a terror training camp, inciting terrorism. See Prevention of Terrorism Acts, 2005 and 2006, c. 2 & 11.

\textsuperscript{212} See Frances Gibb, Detaining Terror Suspects for Over Four Weeks Is Not Needed, Says DPP, TIMES (London), April 1, 2008, at 6.

not sufficient for the offence to have been committed.\textsuperscript{214} More damningly, one individual, Lofti Raissi, who had been detained for five months in 2001 for allegedly taking part in the 9/11 attacks on New York, was completely exonerated by the CA in 2008.\textsuperscript{215} The Police and Crown Prosecution Service were strongly criticized for abusing the court process, presenting false allegations and not disclosing evidence.\textsuperscript{216}

To obtain more convictions, one strategy would be to use intercepted intelligence information in courts, particularly information derived from the tapping of phones. To date the government has not been convinced. There have been a number of reviews. The most recent in 2008 favoured the possibility of use but with the security services having a veto.\textsuperscript{217} Any change will necessarily give rise to very difficult issues of disclosure. Another policy is longer pre-charge detention and post-charge questioning. The Counter-Terrorism Bill (2008) proposed a forty-two day limit for pre-charge detention and more scope for post-charge questioning.\textsuperscript{218} However, the government dropped the 42 day proposal after it was heavily defeated in the House of Lords. There was also more support for the use of intercept evidence in Parliament than in the government.\textsuperscript{219}

Another of the governments preferred policies is to deport foreign nationals who are a security risk.\textsuperscript{220} In some cases, ECHR jurisprudence prevents this.\textsuperscript{221} One U.K. strategy has been to support an attempt to revise rather than reverse the ECHR jurisprudence stemming from the Chahal

\textsuperscript{214} Zafar and Others v. R [2008] EWCA (Crim) 184.

\textsuperscript{215} Raissi, R (on the application of) v. Sec’y of State for the Home Dep’t, [2008] EWCA (Civ) 72.


\textsuperscript{217} SECRETARY OF STATE FOR THE HOME DEPARTMENT, PRIVY COUNCIL REVIEW OF INTERCEPT AS EVIDENCE 213 (2008).


\textsuperscript{219} In November 2008, opposition peers in the House of Lords passed an amendment calling on judges sitting as coroners to have access to sensitive evidence such as tapped phone calls. See New Labour Terror Defeat in Lords, BBC NEWS, Nov. 11, 2008, http://news.bbc.co.uk/1/hi/uk_politics/7723225.stm. There was uncertainty over whether the government would accept the amendment.

\textsuperscript{220} Though there have been allegations of irregular renditions, a Report of the U.K. Intelligence and Security Committee concluded that there was no evidence that U.S. rendition flights had used U.K. airspace (other than two “Rendition to Justice” cases in 1998 which were approved by the UK Government following U.S. requests) and no evidence of them having landed at U.K. military airfields. PAUL MURPHY, MP, INTELLIGENCE AND SEC. COMM., RENDITION 68 (2007).

\textsuperscript{221} Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1832.
case. However, in February 2008 this attempt was unanimously rejected by a Grand Chamber of the European Court of Human Rights in *Saadi v. Italy*.\(^{222}\) There could be no balancing of threats to national security against the risk of violations of Article 3 ECHR rights. The second strategy has been to seek to deport on bases of Memorandums of understanding or assurances from the foreign governments concerned, e.g. Libya and Algeria.\(^{223}\) The argument is that U.K. is that the assurances reduce the real risk of a violation of Article 3 ECHR. U.K. courts accept this argument in principle.\(^{224}\) The argument is now focused on the quality of the assurances.\(^{225}\) When all other aspects appeared to have been satisfied the Court of Appeal then blocked a deportation to Syria on the basis that the court ordering deportation had to be satisfied that evidence obtained by torture or by other conduct breach Article 3 ECHR would be excluded or not acted upon.\(^{226}\) Of course, the deportation strategy is not open to application with respect of U.K. nationals. Finally the “nuclear option”—the possibility of *derogation from Article 5 of the ECHR*—has been raised by the Government. In considering the policy options for an anti-terrorism strategy, it is always helpful always to keep in mind that none of them is cost-free in human rights terms.\(^{227}\)


\(^{226}\) *Othman v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 290 (Eng.).