UNITED KINGDOM:

FIVE YEARS ON: TIME TO END THE CONTROL ORDERS REGIME

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UNITED KINGDOM: FIVE YEARS ON: TIME TO END THE CONTROL ORDERS REGIME

A SHADOW JUSTICE SYSTEM

The criminal law of the UK provides for a number of offences by which involvement in terrorism-related activity can be prosecuted; those offences are very widely-drawn, indeed in many respects worryingly so. Since 11 September 2001, over 200 people have been convicted in the UK of terrorism-related offences.[1] However, there remain a number of people who are accused by the authorities of involvement in terrorism-related activity, but have not been charged with any offence. Instead of charging and trying them in accordance with UK criminal law, the authorities have been resorting to procedures permitting reliance on secret information in closed (i.e. secret) judicial hearings to keep those it deems a threat to national security under various forms of administrative control, including potentially through measures which amount to a deprivation of liberty.

The effect of these measures has been to create what is, to a large extent, a parallel and impoverished justice system for individuals who are suspected of involvement in terrorism-related activity—a system premised on a widespread and unfair resort to secrecy. The chief distinguishing characteristics of this alternative justice system include the wide scope for the state to deploy secret material against individuals which remains undisclosed to them and their lawyers of choice; to exclude those individuals, their lawyers of choice and the public from judicial hearings; and to keep key findings secret from the public. This shadow justice system permits a significantly lower standard of proof than that required in criminal trials. The Special Immigration Appeals Commission (the SIAC) has been the forum for the development of some of the most worrying practices of secrecy in the UK legal system over recent years.[2] Procedures first introduced in the SIAC have begun to spread to other parts of the legal system—for instance, notably, they have been transposed to control order hearings in the High Court[3]—and have undermined the principles of transparency and fairness which should be at the heart of a justice system which complies with international human rights standards.

THE CONTROL ORDER REGIME

"I actually don't think anyone in the Home Office really understands what a control order is and what it does. It's so hard to explain what impact these 10 conditions can have on your life [...] the way they merge together and interplay. Written down they don't seem like a big deal, but they become all-encompassing, all-pervasive in your life. I was becoming very distant from everyone; I felt like everything I touched died. I had this reverse Midas touch."

Cerie Bullivant, UK national formerly subject to a control order[4]

The system of control orders created by the Prevention of Terrorism Act 2005 (PTA) has been used by the UK government as an alternative to prosecution or deportation of individuals

suspected of involvement in terrorism-related activity[5], but who have not been charged with any criminal offence. The orders place severe restrictions on, and sometimes violate, individuals' rights to liberty, freedom of movement, expression, association, and privacy. They are imposed by the executive with only limited judicial scrutiny, and have a wide-ranging effect on the individuals and their families. In short, these restrictions form the contours of a parallel, shadow justice system for people suspected of, but not charged with or tried for, terrorism-related offences.

The judicial procedures by which the imposition of a control order can be challenged are gravely unfair. The court can consider secret material (i.e. material not disclosed to the person on whom the order is served or his lawyer of choice), which is reviewed in closed sessions, to support the claim that the individual is or has been involved in terrorism-related activity, and that the measures imposed are necessary "for purposes connected with protecting members of the public from a risk of terrorism".[6] Neither the individual subject to the control order nor their lawyer of choice is allowed to see that material. A court-appointed Special Advocate may do so, but cannot consult the individual or that person's lawyer of choice about the information in the secret material. The individuals subject to control orders are therefore denied the opportunity to mount an effective challenge to the allegations and material against them.

The effect of the control order regime has been to bypass the ordinary criminal justice system in order to impose severe restrictions on the rights of individuals suspected of involvement in terrorism-related activity, including both those who have never been charged with any terrorism-related offence and those who have been charged and acquitted at trial. International human rights law requires that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[7] It also prescribes a range of specific procedural rights that must be applied in the determination of any criminal charge.[8] A given legal proceeding in national law can constitute the determination of a criminal charge for the purposes of these provisions, even if it is not classified as such by national law.[9] The possibility for the imposition of deprivation of liberty as a punishment is a particularly strong indicator that a proceeding is criminal in nature.[10] However, this is not always required: proceedings concerning an offence may be "criminal" from the point of view of international human rights law either because of the nature of the offence itself, or because of the nature and degree of severity of the sanction imposed as a result of the proceeding, or because of a combination of the two factors.[11]

Amnesty International considers that the control order regime with the procedures and range of potential measures as currently legislated and applied in the UK fails to meet the requirements of international human rights law. The nature of the allegations upon which the proceedings are based involves essentially the same conduct as is covered by a range of criminal offence provisions elsewhere in UK law; the range of sanctions available include measures of a nature and degree of severity (whether applied alone or in combination) typical of criminal punishments. From the point of view of the subject of most if not all control order proceedings, the main substantive difference from a criminal trial on identical allegations is that the individual targeted by control order proceedings is deprived of a range of fundamental fair trial rights required of criminal trials, and the sanctions imposed are indefinite in duration rather than fixed by a sentence. Some measures in control orders may

further be inconsistent with other rights protected under international human rights law, held not only by the individual subject to the control order,[12] but also by their spouse, children and other family members cohabiting with them, including protection against arbitrary or unlawful interference with privacy, family, home or correspondence, and the rights to freedom of expression and association.[13]

The creation of this pale shadow of the ordinary criminal justice system essentially allows the executive to decide arbitrarily to accord differing levels of procedural fairness to individuals accused of identical conduct. This undermines the rule of law as well as the role of the fundamental procedural rights that are included in the ordinary criminal justice system precisely to protect the right to liberty and other human rights.

WHAT IS A CONTROL ORDER?

A control order is a combination of restrictions imposed by a government minister at the Home Office[14] (or in some cases, a court) on a named individual.[15] These restrictions vary from case to case, and can include virtually anything (the PTA provides a non-exhaustive list of possible measures in s. 1(4), but the main authority provided by s. 1(3) is open-ended). In so-called "non-derogating" cases, the orders typically include, among other things:

- a requirement to remain inside a specified residence for between eight and 16 hours a day, including in some cases, in a location different to where the individual's family resides;
- a requirement not to travel beyond a certain distance from the specified residence during the hours when the individual is permitted to leave it;
- wearing of an electronic tag;
- regular telephone calls to a private monitoring company;
- restrictions on visitors to the residence, who will typically need prior clearance from the Home Office before visiting;
- a ban on contacting certain named individuals or attending public events, without prior permission from the government;
- a requirement to allow entry, search, seizure, and photographing by the police, or others including a private monitoring company, in the residence at any time;
- partial or total restrictions on the use of mobile telephones and the internet;
- a requirement to notify and/or obtain permission from the Home Office in order to begin any employment or academic study;
- restrictions on types of employment; and
- limits on the usage of bank accounts.

A "non-derogating" control order[16] can be imposed by the Home Office on any individual, UK nationals and non-nationals alike, provided that two conditions are satisfied: 1) the minister has "reasonable grounds for suspecting the individual is or has been involved in terrorism-related activity"[17]; and 2) the minister has reasonable grounds to believe that the restrictions

contained in the order are necessary for the protection of the public. "[I]nvolvement in terrorism related activity" is a broad term in the PTA, defined in s. 1(9) and 15(1) of the PTA, by reference to the Terrorism Act 2000. The Terrorism Act definition in turn underpins a range of criminal offences contained in the Act, which largely if not entirely overlap with the definition of "involvement in terrorism related activity" under the PTA.

Any breach of the restrictions imposed under a control order "without reasonable excuse" is itself made a criminal offence, punishable by up to five years in prison, by section 9(1) of the PTA. In some instances, it would appear that UK authorities have sought to prosecute individuals for the breach of a control order (including where the control order in question has been revoked), as an alternative route to prosecuting them through the standard criminal justice system for terrorism-related offences.[18]

The Home Office must normally first apply to the High Court for permission to make the order (at that stage, without the participation or knowledge of the person who will be affected) which the court will give unless the decision is "obviously" flawed. The Home Office's decision to impose a control order is also subject to a subsequent more substantive review by the High Court, with some participation by the affected person. The High Court determines whether the Home Office's decision to impose the order was flawed on either of the two grounds set out above.

Control orders are limited to a year's duration. However, they can be renewed at the end of each 12-month period so that, effectively, they can be imposed indefinitely.

On the other hand a "derogating" control order, which is provided for by the PTA (s. 1(2) and (4) but has to date never been relied upon, can only be imposed by a court on the application of the Secretary of State. The distinction, according to PTA s. 1(2), rests on whether or not a particular order imposes "obligations that are incompatible with the individual's right to liberty under Article 5 of" the European Convention on Human Rights. However, the particular measures or combination of measures (short of 24-hour house arrest) that may reach this threshold are not specified in the PTA; the UK government and courts have offered various opinions on this question, but it has yet to be definitively addressed by the European Court of Human Rights.

A limited number of individuals are now subject to so-called "light touch" control orders, which do not have the more severe restrictions such as a curfew or specified residence, but which typically include telephone and in-person reporting and impose restrictions on travel and association.[19]

According to the most recent figures made available by the Independent Reviewer of Terrorism Legislation, between the inception of the control order regime and 10 December 2009, 45 individuals had at some point been subject to a control order.[20] In the most recent three-monthly report before Parliament on 21 June 2010, the Home Secretary confirmed that 12 control orders were in force, 10 against UK nationals and two against foreign nationals, after one control order had been revoked as a result of decisions by the High Court, two new control orders imposed with court permission, and three control orders renewed during the three-month period between 11 March and 10 June. [21] The figures released by the current Home Secretary, like those released by the previous government's Home Office minister

responsible for regular reports on control orders, did not make clear how many of these were so-called "light touch" control orders.[22]

THE DEVELOPMENT OF THE CONTROL ORDER REGIME

"The control orders were served with no accompanying warning or explanation as to how they should function and there was an apparent lack of any uniform interpretation of what was, and what was not, permitted by the orders. The result was confusion, uncertainty and even anguish on the part of those [previously] detained under the ATCSA and subsequently issued with a control order."

European Committee for the Prevention of Torture[23]

To fully understand the control order regime and the increased reliance on secret material and secret court hearings in the name of national security, the powers granted by Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) are an important starting-point. Under Part IV of the ATCSA, which has now lapsed and effectively been replaced by the PTA, a government minister had the power to order the indefinite detention without charge or trial of any foreign national believed to be an "international terrorist" and therefore a "threat to national security". Secret information, never disclosed to the individuals concerned, their lawyers of choice or the public, were at the heart of this regime of internment, which permitted their indefinite detention in high-security facilities in conditions that amounted to cruel, inhuman and degrading treatment.[24] In December 2004, the UK's then highest court, the Appellate Committee of the House of Lords (hereafter referred to as the Law Lords) ruled that the indefinite internment of non-UK nationals on suspicion of terrorism under the ATCSA was unjustifiably discriminatory and, therefore, disproportionate and incompatible with their right to liberty[25]. Following this ruling, the government allowed the emergency legislation of the ATCSA to lapse and effectively replaced it with the temporary legislation of the PTA, which requires annual renewal by Parliament. In Amnesty International's view, the government substituted one regime which violated human rights with another.

The system of control orders provided for by the PTA, like the ATCSA internment powers before it, provides a government minister with the ability to impose restrictions on an individual suspected of involvement in terrorism-related activity without formally charging that individual with a criminal offence, or as a way of imposing restrictions on a person who has been acquitted after a full criminal trial, but in respect of whom the government claims that measures are necessary "for purposes connected with protecting members of the public from a risk of terrorism". Like the ATCSA powers, the control order regime allows the authorities to keep much of the information on which the allegation of involvement in terrorism-related activity is based secret from the affected individuals and their lawyers. This information is considered by secret sessions of the court, from which the controlled individuals and their lawyers are excluded.

The PTA passed through Parliament within three weeks of its introduction, given the government's perceived urgent need to find an alternative to the powers of indefinite detention under Part IV of the ATCSA. Critics of the proposed legislation in Parliament raised concerns about the lack of sufficient time for debate, the lack of procedural safeguards and the limited scope of future reviews.[26] In some cases, as the European Committee for the Prevention of Torture (CPT) has noted, when the control orders were initially served on men formerly detained under Part IV of the ATCSA, neither the subjects of the control orders nor the authorities seemed clear about how to interpret them, creating real uncertainty about

what obligations they entailed and what constituted a breach of the order.[27]

THE EFFECT OF CONTROL ORDERS ON INDIVIDUALS AND THEIR FAMILIES

"When measures of the kind [required by a control order] are taken in respect of persons who had been undergoing psychiatric treatment, steps to assure their continued care should be taken. Treatment for psychiatric patients involves a care plan and usually is composed of both pharmacotherapy and a wide range of rehabilitative and therapeutic activities. Such treatment is not designed to be turned on or off at a moment's notice; removing mentally ill persons from one environment to another, with a new set of rules and ending the treatment brusquely, could well prejudice their well-being. Thus, it was not surprising that of three persons removed from Broadmoor High Secure Hospital, two of them had to be admitted shortly afterwards to psychiatric hospitals close to their places of residence, and that both of these individuals developed a real fear of the tagging devices."

European Committee for the Prevention of Torture[28]

The restrictions imposed by control orders, and the secrecy which surrounds their imposition, can have a profound effect on the mental health of those who are subject to orders, and on the wellbeing of their families.[29] This impact can be particularly severe where the orders are imposed on people with existing mental health problems, including those whose health has been damaged as a result of torture and ill-treatment in detention outside the UK. Amnesty International is aware of at least two cases where individuals subject to control orders have attempted to commit suicide, in part at least as a response to the onerous obligations imposed on them; one of those is Mahmoud Abu Rideh (see below). One legal representative for a number of individuals subject to control orders has given evidence before the parliamentary Joint Committee on Human Rights stating that at one point she represented three men imprisoned pending trial for alleged breaches of control orders, all of whom had attempted suicide.[30]

Cerie Bullivant, a 28-year-old UK national, was subject to the system of control orders between 6 July 2006, some five months after he attempted to travel from the UK to Syria, and 29 January 2008. Cerie Bullivant was charged with 43 counts of breaching restrictions imposed by the control order after leaving his specified residence and going to an undisclosed location in May 2007 with two other individuals subject to a control order. Cerie Bullivant subsequently turned himself in to authorities in June 2007, at which time he was arrested and detained in a high security prison. He was made subject to a second control order with more stringent curfew and reporting restrictions while on remand. Cerie Bullivant was subsequently acquitted in December 2007 of all charges of breaching his first control order, and the second control order was subsequently quashed on 29 January 2008 by the High Court.[31] Cerie Bullivant was diagnosed with depression while in the high security prison awaiting trial for the breach of his first control order, and told Amnesty International about the effect of the control order on his mental health, his ability to maintain his family relationships including with his mother—who herself, according to him, has a history of poor mental health and for whom Cerie Bullivant said he had to care during his period under a control order—and his increasing anxiety as he reported he remained unsure of the reason the control order had been made against him. Cerie Bullivant told Amnesty International:

> *"I felt like everything I went near was withering and dying. At that time I couldn't differentiate between the control order and its effects and what was me […] Your mind runs circles around you. That's probably the worst part of it all, because you*

> *don't know the evidence or what you are accused of, you run through every single conversation you have had, everything you have done, again and again. You become almost paranoid, constantly trying to remember, to double guess. [...] I came close to losing my sense of who I was, especially in prison".* [32]

Mahmoud Abu Rideh is a stateless Palestinian and a torture survivor. The European Committee for the Prevention of Torture (CPT), which had visited him in Broadmoor high-security mental hospital in 2004, described him as suffering from a "most severe post-traumatic stress disorder"[33]. He was initially arrested in December 2001 under Part IV of the ATCSA, and was held without charge or trial—in high security prisons and mental health facilities—until March 2005. He was "released" on bail and subjected to a control order as soon as Part IV of the ATCSA had lapsed. During the years that he was first interned under ATCSA, and then subject to a control order under the PTA, Mahmoud Abu Rideh's mental and physical health suffered a severe decline. He had harmed himself, or attempted to harm himself, on numerous occasions.[34] The control order which remained in force until Mahmoud Abu Rideh left the UK, claiming that he could no longer tolerate the uncertainty and anxiety he and his family experienced as a result of his control order in the UK, was subsequently revoked. [35] In July 2009, following a threat of legal proceedings in the High Court, the government agreed to provide him with a certificate of travel that permitted him to leave and re-enter the UK for up to five years. As soon as Mahmoud Abu Rideh had left the country in August 2009, however, the government cancelled his certificate of travel and ordered his permanent exclusion from the UK.

The control orders regime, which may impose severe restrictions on individuals' liberty and movement, without trial or charge, can often exert a profound, broader impact on the life and well-being of family members of the person subject to the control order, including those forced to live with or apart from someone under a control order. For example, in addition to the impact on his own mental and physical health, the control orders served on Mahmoud Abu Rideh, have evidently taken a considerable toll on his wife and children, and have put his family relationships under intolerable strain.[36] Family members and the lawyer for Mahmoud Abu Rideh have stated publicly that the multiple, specific restrictions required by the control order—such as prior Home Office clearance for any visitors, restrictions on visits and phone calls from other family members, limitations on access to internet and computers for family members in education—have had a profoundly negative impact on their family life.[37] In July 2009, at the time that she and the family had left the UK and Mahmoud Abu Rideh was still seeking permission to leave, his wife wrote about that impact in a national newspaper:

> *"We, as a family, are dead. We are sick of the police and the Government's torture of our family that has gone on for eight years. [...] Psychiatrists from the Home Office advised me to divorce my husband, saying it would be better for me and my children. Scotland Yard on many occasions also told me this. What kind of twisted advice is this? Would this really be better for me and my children? Or are they looking for more reasons to drive my husband to suicide?"*[38]

The mental health—and the broader effect on the lives—of family members in the context of control orders have in some isolated instances been the subject of litigation by specific individuals subject to control orders and their family members before domestic courts; however, the rulings in those cases have either been specific to the circumstances of the case[39] or have upheld the restrictions which created difficulties for their spouses and

children, including social isolation, as a result of being required to reside with someone subject to a control order, on grounds of national security.[40]

Even if the control orders regime as currently enacted and applied in the UK were not objectionable as a whole, no combination of measures could be lawfully imposed on any given individual if its effects were inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment. Further, the rights held by members of the immediate family must also be respected and ensured, including their own rights to respect for their private and family life, home and correspondence, expression, and association.[41]

HOW THE CONTROL ORDERS REGIME UNDERMINES THE RIGHT TO A FAIR HEARING AND THE RIGHT TO LIBERTY

THE RIGHT TO A FAIR HEARING

"It is not rocket science [...] The evidence we get justifying the control order is limited, and for us to take instructions from a client to address the assertions is very difficult, and for that client to be able to respond in any meaningful way. In essence his evidence is given in a vacuum because he does not know quite a lot of the case that is being alleged against him."

Sean McLoughlin, lawyer, to the UK parliamentary Joint Committee on Human Rights[42]

Secret court hearings are the norm in the control orders system. Neither the individuals subject to a control order nor their lawyers of choice are allowed to see the secret material on which the government's allegations are based and which is considered by the court in closed sessions. Amnesty International regards the system of court-appointed Special Advocates—lawyers appointed to represent the interests of the individual subject to a control order, but not permitted to consult the individual or his lawyer about the secret material—to be insufficient to mitigate the unfairness of these proceedings.[43]

The consequences of the imposition of a control order under the PTA can be so severe for the individual concerned that only the protection which the right to a fair trial in criminal proceedings guarantees is sufficient. Judges in the highest domestic court, such as Lord Brown, have raised serious concerns about the government's efforts to compromise fair trial rights in the name of national security:

> *"I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control."*[44]

Since his retirement from the judiciary in 2008 Lord Bingham, formerly the Senior Lord of Appeal in the Ordinary (i.e. the most senior judge in the United Kingdom), has said, with regard to disclosure in control order proceedings:

> *"[T]he right to a fair trial is 'fundamental and absolute'; where a conflict arises between the use of material not disclosed to a party and the right of that party to a fair hearing his right to a fair hearing must prevail."*[45]

International bodies have expressed serious concern about the system of control orders; for

instance, in July 2008, the UN Human Rights Committee called on the UK to "ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made", and urged the UK, in cases where evidence exists, to "ensure that those subjected to control orders are promptly charged with a criminal offence"[46].

Since the inception of the PTA, persons subjected to control orders have been given little or no meaningful information regarding the reason for deeming a control order to be necessary; sometimes this information amounted to no more than "a bare, unsubstantiated assertion" [47] by the security services that the individual did not have enough information about to challenge.[48]

In June 2009, the Law Lords ruled in the case of *AF and others* that the "controlled person must be given sufficient information about the allegations against him to give effective instructions to the special advocate" and that this was the bottom line or core irreducible minimum that "could not be shifted".[49] While partially addressing some shortcomings of the control order regime, Amnesty International considers that the Law Lords' ruling in the case of *AF and others* fell short of fully restoring the right to a fair trial for individuals subject to control orders. The secret material disclosed in some cases could be a minimal gist of the allegations, still limiting the opportunity of the individual to mount an effective challenge against the allegations levelled at him.

The principle of the "core irreducible minimum" of disclosure has been applied in control order and other national security cases where secret material procedures are used. This has come about as a result of persistent litigation in domestic courts which has effectively forced UK authorities to acknowledge, even if incrementally, at the direction of the judiciary, that the principle of "core irreducible minimum" applies more broadly. For example, in July 2009, the High Court ruled in the case of BM, a 36-year-old British national, that the irreducible minimum of disclosure applied to cases relating to the modification of control orders. BM's control order was modified to require his relocation from near London, where he lived with his family, to Leicester a city some 120 miles away. In this case, the Court ruled that the change to the control order, based on nothing more than a bare assertion of "imminent risk of absconding", interfered with BM's civil right to occupy his home.[50] Lawyers acting for the UK government have also sought, unsuccessfully, to argue in domestic courts that the fair trial guarantees under Article 6 of the European Convention on Human Rights (ECHR) should not apply to the cases of two men, known only as BC and BB, who have been subject to so-called "light touch" control orders since February 2009.[51]

THE CONTINUED USE OF SPECIAL ADVOCATES

Amnesty International remains of the view that the court procedures that involve secret evidence against a person who faces the combinations of restrictive measures typically imposed in control order proceedings remain unfair in a manner that cannot be remedied by the use of Special Advocates. Though the European Court judgment in *A and others* and the Law Lords judgment in *AF & others* did not rule out the use of Special Advocates in some circumstances, and even endorsed their work under difficult circumstances,[52] some significant concerns remain. A number of Special Advocates have themselves raised concerns, including through individual and collective evidence before parliamentary committees[53] and individual statements in the public domain[54], about the fundamental unfairness of the system within which they operate. They have pointed to the considerable

obstacles—including but not limited to legal and resource-constraints, such as the lack of substantive expert assistance, the low number of trained special advocates, late disclosure of information by UK authorities, and the inability to take effective instructions from the person affected in order to test the closed material—affecting their ability to conduct their work with the thoroughness they believe the role requires. A number of Special Advocates have stated before parliamentary committees in oral or written evidence that although they act as Special Advocates, their participation in the system was not the same as approving of it. One Special Advocate gave evidence before the House of Commons Constitutional Affairs Committee at the time the special advocate procedures in SIAC were being transposed, almost without alteration, for use in control order proceedings in the High Court. He raised concerns about the way in which, given the practical constraints they faced in testing the closed material, Special Advocates often had "something of a feeling of being one man and his dog or perhaps two men and their dogs trying to analyse what is invariably voluminous material and often complex material".[55] The UK parliamentary Joint Committee on Human Rights, which has repeatedly examined the use of control orders, concluded in its 2007 report the following:

> *"After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening … has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them."*[56]

THE RIGHT TO LIBERTY

The obligations imposed on individuals subject to a control order—such as curfew restrictions, assigned residence in a small flat, restriction of movement to a geographic area, the requirement to wear electronic tags, restrictions on telecommunications use, and the requirement for any visitors to seek prior clearance from the Home Office—impact in significant ways on their right to liberty. Article 5 of the ECHR provides for the right to liberty and security of person, and establishes the conditions under which a person can be lawfully deprived of her/his liberty, including specifying a limited list of valid grounds, requiring that the procedure be prescribed by law, and requiring that the person affected have access to judicial proceedings to challenge the legality of the deprivation of liberty and be ordered released if the detention is not lawful.[57]

The Law Lords confirmed in an October 2007 judgment, by a majority of three to two, that the 18-hour curfew which the Home Secretary had attempted to impose on one group of individuals (those whose cases were considered under the name *JJ and others*[58]) amounted to a deprivation of liberty, and as such went beyond what the law authorized the Home Secretary to do[59]. In this case, the Court held that the conditions imposed on these individuals – who had not been charged with any criminal offence – were in some ways more severe than those under which a prisoner convicted of a criminal offence would be held in an open prison:

> *"The effect of the 18-hour curfew, coupled with the effective exclusion of social*

visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world […] Their lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy."[60]

The Law Lords, however, were unanimous in holding that a 12-hour curfew did not amount to a deprivation of liberty within the meaning of Article 5 of the ECHR[61]. Though several of the Lords expressed reluctance to suggest a specific length of time as representing the threshold for a "deprivation of liberty", Lord Brown suggested that 16 hours a day might mark a boundary between a restriction on "liberty of movement" (within the meaning of Article 2 of the ECHR) and a "deprivation of liberty" (within the meaning of Article 5 ECHR).[62]

The Law Lords, in these decisions, vindicated some of the concerns which critics of the control order system, including Amnesty International had raised. The decisions in the cases, however, still left open the door to the imposition of severe restrictions (e.g. a curfew of at least 12 and perhaps as many as 16 hours, together with other restrictions on social contact and daily life) which, taken together, could still have a devastating impact on the life of the individual subject to those restrictions and his family. Amnesty International did not share the apparent conclusion of the Law Lords that a curfew of less than 12 or 16 hours could not constitute a "deprivation of liberty" for the purposes of article 5 of the ECHR (or, for that matter, article 9 of the ICCPR). The organization remained concerned that some individuals subject to control orders would continue to suffer violations of their right to liberty and that their families would suffer the effects of the severe limitations on movement, association, and privacy required by the orders, under a system that continued to fail to provide the fair trial protections required for such sanctions.

Amnesty International's fears were in fact realized immediately by the government's response to the Law Lords' October 2007 decisions: four existing control orders[63] were immediately modified to increase curfew hours from 12 to 16, which Lord Brown had suggested might be the maximum permissible. The government claimed that the Law Lords' decisions were "a positive endorsement of the principles of control orders"[64]. Furthermore, rather than restating its policy on the use of curfew restrictions, the government adopted a simplistic reliance on the 16-hour yardstick as the maximum then permitted.

In June 2010, the UK Supreme Court (formerly the Appellate Committee of the House of Lords) issued its judgment in the case of an Ethiopian national known as AP, who had been subject to a control order between January 2008 and July 2009, and who is currently subject to deportation proceedings on national security grounds.[65] The Supreme Court found that the Home Office's modification of AP's control order between April 2008 and July 2009, which required him to reside in a city some 150 miles away from his family in London, when taken together with the 16-hour curfew restriction and the resultant social isolation, constituted a deprivation of AP's right to liberty. The effect of this judgment is two-fold.[66] Firstly, in delivering the leading judgment, Lord Brown clarified that the earlier suggested 16 hours curfew length was not the "sole criterion of the loss of liberty" and that other criteria such as "type, duration and effects" of control orders were of relevance.[67] Secondly, in his concurring

judgment Sir John Dyson SCJ stated that the onus now fell on the Home Office to consider and evaluate what the likely effects of the creation or modification of a control order would be, or the authorities would run the risk of a court finding that the various restrictions (including, but not limited to a curfew), when taken together, amounted to a deprivation of liberty.[68] It remains to be seen to what extent the Home Office will take such factors into consideration in making, maintaining and modifying control orders in the future.

NO EXIT STRATEGY: THE CONTINUOUS RENEWAL OF A TEMPORARY MEASURE

The PTA carries a provision requiring annual renewal through resolutions in both Houses of Parliament, which would by custom follow debate about the appropriateness of extending its period of application. One of the most striking features of the control order regime is the way in which these supposedly temporary powers, which effectively replaced previous emergency legislation, despite the requirement for annual renewal, are now well into their fifth year notwithstanding continued commitment from UK ministerial authorities to seek an exit strategy from their continued use.[69]

On reading the five annual reviews conducted by the Independent Reviewer of Terrorism Legislation, it appears that the search for a strategy to end to their use, which government authorities gave assurances was being sought in the early years of the PTA regime, was abandoned, both by the previous government and, apparently, by the Reviewer.[70]

During the most recent parliamentary renewal of the PTA in March 2010, the House of Lords approved the continuing in force of the PTA, but only with an amendment calling on the government, in light of important recent case law (see section above "The right to a fair hearing") and the continued failure to find a "just and effective" means of dealing with suspected terrorists, to "introduce primary legislation to limit the duration of control orders to a maximum of one year, without renewal".[71] The government at the time responded by robustly defending its policy and rejecting the House of Lords' call for primary legislation to limit the use of control orders to a fixed term.[72]

To date, the coalition government in place since May 2010 has not signalled any clear shift in policy away from the continued reliance on control orders, although the coalition has promised an urgent review of control orders "as part of a wider review of counter-terrorist legislation, measures and programmes".[73]

On 13 July 2010, the Home Secretary announced a "rapid review" by the Home Office of key counter-terrorism powers, to be overseen by Lord Ken Macdonald QC, formerly Director of Public Prosecutions.[74] The Home Secretary has proposed that the review examine six counter-terrorism powers: the use of control orders (including alternatives); the use of stop-and-search powers under Section 44 of the Terrorism Act 2000; pre-charge detention of persons suspected of terrorism offences; extending the use of deportations with assurances on national security grounds; measures to address organizations promoting hatred or violence; and the use of Regulation of Investigatory Powers Act 2000 by local authorities and use of communications data. The proposed "rapid review", led by the Office of Security and Counter-Terrorism in the Home Office, is scheduled to report to Parliament after the summer recess in 2010. The control order regime under the PTA remains in force while the review is conducted.

On 22 July 2010, the Independent Reviewer of Terrorism Legislation published his annual review of terrorism legislation, in which he noted that "no viable alternative" to control orders had been suggested in the period following the general election, in the context of "declared or likely changes of policy as a result of the change of government."[75]

The control order powers, purportedly intended for use in exceptional cases for a limited period of time and subject to annual parliamentary review of time-limited legislation, appear to pose a risk of acquiring a permanence in UK authorities' counter-terrorism policy and practice.

CONCLUSION AND RECOMMENDATIONS

The legislative framework establishing the current control order regime in the UK fails to meet the fair trial requirements of international human rights law, as it allows for the imposition of essentially criminal sanctions on the basis of allegations of what are in essence criminal offences, without providing the fair trial guarantees required in criminal cases.[76]

The PTA allows a government minister, subject to limited judicial scrutiny, to impose severe restrictions on the liberty of an individual who is suspected of involvement in terrorism-related activity but has not been charged with any criminal offence. These restrictions, in turn, can have a significant and often negative impact on the lives of the family members of those individuals subject to control orders, implicating a range of rights including: the right to respect for privacy and family life, home and correspondence; freedom of expression; freedom of association; and the right to freedom from cruel, inhuman or degrading treatment or punishment. The proceedings whereby a control order can be challenged in the courts are deeply unfair, including because of their heavy reliance on secret material considered in closed sessions of the court, and not disclosed to the individual concerned or to their lawyers of choice, while the Special Advocates who are able to see and address the evidence before the court are prevented from taking any effective instructions from the affected individual.

The control order regime essentially allows the executive to bypass the ordinary criminal justice system and thereby to deprive individuals of the fundamental fair trial safeguards that are a hallmark of the ordinary criminal justice system and serve as a fundamental bulwark for the protection of the right to liberty and other human rights. The control order regime has undermined the rule of law and eroded human rights protections since it came into force in March 2005. More than five years on, Amnesty International continues to call for the repeal of the PTA.

Recommendations to the UK government:

- repeal the Prevention of Terrorism Act 2005 immediately;
- ensure that the human rights implications of current and proposed counter-terrorism legislation are fully evaluated in the planned "rapid review" of counter-terrorism legislation;
- commit to rely on the ordinary criminal justice system with its procedures for charge, detention, and prompt and fair trial, as the means for protecting the public from threats of violent attack, rather than substituting procedures which lack its characteristics;
- ensure access to an effective remedy for anyone who alleges to have been subjected to human rights violations as a result of a control order, and ensure that anyone established as having been subject to such violations receives full reparation.

ENDNOTES

[1] Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2010, Tables 1.2 & 1.4, pp. 75-77.

[2] In 1997, following the judgment by the European Court of Human Rights in the case of *Chahal v United Kingdom*, the UK authorities established the SIAC. The SIAC is an immigration tribunal, empowered to hear appeals by foreign nationals against being issued with deportation orders on grounds that they pose a threat to the "national security" of the UK, and that their presence in the UK is not conducive to the public good. The SIAC was also empowered to conduct closed hearings—from which the deportee and their counsel of choice would be excluded, and at which the Home Secretary is allowed to present secret intelligence information—so as to ensure the protection of "national security". The SIAC currently also hears appeals against the refusal of entry clearance (i.e. permission to enter the United Kingdom) and the deprivation of UK citizenship for reasons of national security. Amnesty International's concerns about the operation of the SIAC are outlined at length in *United Kingdom: Human Rights: A Broken Promise*, AI Index EUR 45/004/2006 (February 2006), Sections 2.5-2.10.3.

[3] Control order hearings are heard not by the SIAC, but by the High Court; however, the procedures governing those hearings are closely modelled on SIAC proceedings. For a discussion of the transposition of the SIAC procedures to the High Court, at the time that the control orders legislation was being drafted, see House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* (Seventh report of session 2004-5), 3 April 2005.
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf.

[4] Interview on 3 March 2010 with Cerie Bullivant, a 27-year-old UK national, subject to the control order regime, between June 2006 and January 2008. Cerie Bullivant was subject to control orders, an initial one made on 19 June 2006, and a second one imposed on him in December 2007, at the time of his acquittal on charges of having breached the first control order. His case is discussed in greater length below in this document.

[5] Control orders have been used against some non-UK nationals who are suspected of terrorism-related activity but cannot be deported owing to the principle of non-refoulement, which obliges states not return anyone to a country where he or she would risk serious human rights abuses. The current statistics on how many UK nationals and non-UK nationals are subject to control orders are discussed further below.

[6] Section 1 (1), Prevention of Terrorism Act 2005.

[7] International Covenant on Civil and Political Rights (ICCPR), article 14(1). European Convention on Human Rights (ECHR), article 6(1). Procedural guarantees also apply with respect to any deprivation of liberty: see, e.g., article 9 of the ICCPR; article 5 ECHR.

[8] ICCPR, articles 14(2) and (3); ECHR, article 6(2) and (3).

[9] European Court of Human Rights (Plenary), *Engel and others v Netherlands* (App no 5100/71 and others), 8 June 1976, paras 82-85.

[10] European Court of Human Rights (Plenary), *Engel and others v Netherlands* (App no 5100/71 and others), 8 June 1976, paras 82-85.

[11] European Court of Human Rights (Grand Chamber), *Ezeh and Connors v the United Kingdom* (Apps nos. 39665/98 and 40086/98), 9 October 2003, para 86.

[12] In the text that follows, the masculine pronouns "he", "him" and "his" are used in reference to individuals subject to control orders. This reflects the fact that in over five years in which the control orders regime has existed under the PTA, no woman has been directly subject to a control order.

[13] For example, ICCPR articles 17, 19, 22; ECHR, articles 8, 10 and 11. Restrictions to these rights are

permitted by the relevant treaties, subject to certain requirements.

[14] The PTA states that the power to make or modify control orders rests with the Secretary of State for the Home Department (referred to, in common speech, as the Home Secretary). In the UK, the Home Secretary is the government minister responsible for the Home Department (or Home Office, as it is more commonly known), which is the ministry responsible for crime, policing, counter-terrorism, and immigration. For ease of reference, in this document, we use the phrases Home Office, unless referring to a specific statement by a specific government minister.

[15] The full terms of one particular control order can be found set out in the Appendix to a judgment of the High Court in a recent control order case, *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin), 20 March 2008, available online at http://www.bailii.org/ew/cases/EWHC/Admin/2008/585.html#APPENDIX. More recent examples of three of the 12 control orders in force as of 10 December 2009 are available in Annexes 5-7 to the *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, at pp. 69-94.

[16] It should be noted that the description of the process for issuing a control order given here refers to a so-called 'non-derogating control order'; the PTA also makes provision for the making of 'derogating control orders', in the event that the UK were once again to derogate from Article 5 of the European Convention on Human Rights.

[17] Amnesty International has had longstanding serious concerns about the definition of terrorism in UK domestic law, particularly as set out in the Terrorism Act 2000. The definition of "terrorism" and "terrorism-related activity", for instance categories of "giving encouragement" or "support and assistance", are so broad and vague that it infringes the principle of legal certainty, exposing people to harsh sanctions such as the imposition of a control order, for a potentially wide variety of activity and conduct. Amnesty International has expressed concern about the definition of "terrorism" in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, *UK: Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000, published in April 2000. For examples from other organisations see: Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, London, April 2006; and Human Rights Watch, *Universal Periodic Review of the United Kingdom: Human Rights Watch's Submission to the Human Rights Council*, April 7, 2008.

[18] See *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 (28 July 2010) http://www.bailii.org/ew/cases/EWCA/Civ/2010/869.html. On 28 July 2010, the Court of Appeal quashed the control order against an individual referred to as 'AN', overruling the July 2009 decision by the High Court to revoke rather than quash the order, which had earlier left open the possibility of prosecution for breach of the control order (*Secretary of State for the Home Department v AN* [2009] EWHC 1966 (Admin) (31 July 2009), http://www.bailii.org/ew/cases/EWHC/Admin/2009/1966.html, para. 5).

[19] See *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2927 (Admin), 11 November 2009, http://www.bailii.org/ew/cases/EWHC/Admin/2009/2927.html, for recent litigation on these "light obligations" or "lighter set of obligations".

[20] *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 1 February 2010, para 17. This figure of 45 individuals must be understood within the context of the UK authorities' aggressive attempts to deport those foreign nationals it considers a threat to national security, including in some cases with 'diplomatic assurances'; control orders were initially applied overwhelmingly to foreign nationals formerly detained under ATCSA Part IV powers (see section 2 of this document, "The development of the control order regime"), but many of these men were subsequently re-detained under immigration powers pending deportation, of whom a handful are now under

immigration bail restrictions, which in many instances also impose stringent restrictions on liberty and movement pending deportation. For further information on the UK government's aggressive pursuit of deportations on national security grounds, including deportations relying on 'diplomatic assurances', see Amnesty International reports: *Dangerous Deals: Europe's reliance on 'diplomatic Assurances' against torture*, AI Index EUR 01/012/2010 (April 2010); *United Kingdom: Deportation to Algeria at all costs*, AI Index EUR 45/001/2007 (February 2007); and *United Kingdom: Human Rights: A Broken Promise*, AI Index EUR 45/004/2006 (February 2006), Sections 2.9-2.10 and 3.1-3.2.

[21] Theresa May MP, *Control Order Powers Report*, House of Commons, Written Ministerial Statement, 21 June 2010, Column 6WS-8WS. Note, however, that publicly available, but un-dated, information via the website for the UK's Security Service (commonly referred to as MI5), offers a different figure, stating that 15 control orders are currently in force, nine against UK nationals and six against foreign nationals (https://www.mi5.gov.uk/output/control-orders.html, accessed 5 July 2010). The Home Secretary issued a further written statement on 27 July 2010 to correct an inaccuracy in the earlier ministerial statement, and clarified that of the 12 individuals subject to a control order as of10 June 2010, nine rather than 10 were UK nationals. See Theresa May MP, *Control Orders*, House of Commons, Written Ministerial Statement, 27 Jul 2010, Column 88WS.

[22] Theresa May MP, *Control Order Powers Report*, House of Commons, Written Ministerial Statement, 21 June 2010, Column 6WS-8WS and David Hanson MP, *Control Order Powers (Three-month report)* House of Commons, Written Ministerial Statement, 16 Mar 2010, Column 54WS-55WS.

[23] *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 20 to 25 November 2005*, CPT/Inf(2006) 29, 10 August 2006, para. 42.

[24] See *United Kingdom: Human Rights: A Broken Promise*, AI Index EUR 45/004/2006 (February 2006), Section 2.6 "Treatment of alleged terrorist suspects." See also reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by CPT from 17 to 21 February 2002*, CPT/Inf (2003) 18, 12 February 2003; and *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 14 to 19 March 2004*, CPT/Inf(2005) 10, 9 June 2005.

[25] *A & others v. Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004, http://www.bailii.org/uk/cases/UKHL/2004/56.html. See also *A and others v. the United Kingdom* (application no. 3455/05), European Court of Human Rights (Grand Chamber),19 February 2009, http://www.bailii.org/eu/cases/ECHR/2009/301.html.

[26] See Hansard HC volume 431, columns 644-788, 28 February 2005, for the debate at the time that the control orders legislation passed through the House of Commons, the UK's lower house of parliament. For Amnesty International's statement of concerns about the then proposed legislation, see *The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK*, AI Index: EUR 45/005/2005, 28 February 2005, http://www.amnesty.org/en/library/info/EUR45/005/2005.

[27] *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 20 to 25 November 2005*, CPT/Inf(2006) 28, 10 August 2006, para. 42.

[28] *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 20 to 25 November 2005*, CPT/Inf(2006) 28, 10 August 2006, para. 48.

[29] On 27 July 2010 Amnesty International spoke in confidence with a healthcare professional who has assessed a family living under control order restrictions; the healthcare professional's view confirmed Amnesty International's longstanding concerns about the detrimental impact on family members (including children) of the often severe obligations required by the control order, and in some instances, the degree of isolation experienced by family members.

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[30] Oral evidence from Gareth Peirce, Solicitor, Birnberg Peirce and Partners before the UK Parliament's Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010.*

[31] *Secretary of State, R (on the application of) v Bullivant* [2008] EWHC B2 (Admin) (29 January 2008), http://www.bailii.org/ew/cases/EWHC/Admin/2008/B2.html.

[32] Interview on 3 March 2010 with Cerie Bullivant, a 27-year-old UK national, subject the control order regime, between June 2006 and January 2008.

[33] *Report to the Government of the UK on the visit to the UK carried out by the CPT from 14 to 19 March 2004*, CPT/Inf (2005) 10, para. 7.

[34] In May 2008 he attempted suicide in a London police station, to which he was required, by the terms of his control order, to report daily. As a result he was hospitalized; for a time he was refusing all food, and was on occasion refusing liquids too. In July 2008 he was discharged from hospital, and was able to attend part of the latest High Court hearing of his challenge to his control order, a large part of which was conducted in closed hearings, requiring the consideration of 'evidence' in his absence, and the absence of his lawyers; for those parts of the hearings, Mahmoud Abu Rideh's lawyers were required to carry him, in his wheelchair, out of the court room. The door to the courtroom was then locked and Mahmoud Abu Rideh had to wait outside whilst the lawyers for the Secretary of State, and the special advocates, discussed in front of the judge the 'evidence' which could lead to the continuation in force of the order against him. See *United Kingdom: Health concern: Mahmoud Abu Rideh (m)* (AI Index: EUR 45/008/2008, 19 June 2008) http://www.amnesty.org/en/library/info/EUR45/008/2008/en and *United Kingdom: Further information on health concern: Mahmoud Abu Rideh (m)* (AI Index: EUR 45/014/2008, 13 August 2008) http://www.amnesty.org/en/library/info/EUR45/014/2008/en.

[35] Representatives of Amnesty International met with Mahmoud Abu Rideh on a number of occasions, including notably, in June and July 2009 when he repeated attempts to harm himself in light of the UK authorities' continued reluctance to issue him with travel documents to leave the UK. Mahmoud Abu Rideh was seeking to leave the UK following the departure of his wife and six children, all UK nationals, due to the difficulties they experienced as a result of the obligations of the control order. See *United Kingdom: Health concern: Mahmoud Abu Rideh (m)* (AI Index: EUR 45/006/2009, 5 June 2009) http://www.amnesty.org/en/library/info/EUR45/006/2009/en and *United Kingdom: Travel hope for Palestinian refugee: Mahmoud Abu Rideh (m)* (AI Index: EUR 45/008/2009, 6 July 2009) http://www.amnesty.org/en/library/info/EUR45/008/2009/en. Mahmoud Abu Rideh's public plea for documentation to be permitted to leave the UK received significant media attention. See, for instance, the interview with him in "A day in the life of a terror suspect", *The Guardian* (online), 13 June 2009, http://www.guardian.co.uk/politics/2009/jun/13/life-terror-suspect-control-order.

[36] See, for example, "Life with a control order: a wife's story", *The Independent*, 3 July 2009, http://www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html for a public statement from Mahmoud Abu Rideh's wife on the impact on his family of his initial internment and subsequent subjection to a control order.

[37] See, for instance, Oral evidence from Gareth Peirce, Solicitor, Birnberg Peirce and Partners before the UK Parliament's Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010*; "Life with a control order: a wife's story", *The Independent*, 3 July 2009, http://www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html; and *Secretary of State for the Home Department v Rideh* [2007] EWHC 804 (Admin) (04 April 2007). http://www.bailii.org/ew/cases/EWHC/Admin/2007/804.html.

[38] "Life with a control order: a wife's story", *The Independent*, 3 July 2009, http://www.independent.co.uk/news/uk/home-news/life-with-a-control-order-a-wifes-story-1729620.html

[39] *Secretary of State for the Home Department v Rideh* [2007] EWHC 804 (Admin) (04 April 2007) http://www.bailii.org/ew/cases/EWHC/Admin/2007/804.html.

[40] *Secretary of State for the Home Department v E & S* [2007] EWCA Civ 459 (17 May 2007) http://www.bailii.org/ew/cases/EWCA/Civ/2007/459.html and *Secretary of State for the Home Department v Rideh* [2007] EWHC 804 (Admin) (04 April 2007) http://www.bailii.org/ew/cases/EWHC/Admin/2007/804.html. The effect that control orders exert on the lives of family members of individuals subject to them, where the family members were not parties to the litigation (i.e. unlike the above cases), has also been considered by the High Court. See, for instance, *Secretary of State for the Home Department v Saadi* [2009] EWHC 3390 (Admin) (21 December 2009), http://www.bailii.org/ew/cases/EWHC/Admin/2009/3390.html; Mr Justice Wilkie, the judge in this case, considered the "onerous interference" and "onerous intrusion" into the lives of Faraj Faraj Hassan al-Saadi (referred to as 'AS'), a Libyan national, and his family as a result of the obligations imposed by the control order, among other factors, and revoked the control order against AS for the reason that, on the evidence, it was "no longer necessary for AS to be the subject of a control order" (paras. 184 & 186).

[41] For example, ICCPR articles 17, 19, 22; ECHR, articles 8, 10 and 11. Restrictions to these rights are permitted by the relevant treaties, subject to certain requirements.

[42] Oral evidence from Sean McLoughlin, Solicitor, The Rights Partnership, before the UK Parliament's Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010.*

[43] The special advocate is allowed to attend the closed hearings from which the controlled person and his lawyers are excluded; is allowed to see the secret evidence relied on by the Secretary of State; and is allowed to cross-examine witnesses who give evidence for the Secretary of State in the course of closed hearings. However, the special advocate is not allowed to take instructions from the controlled person after he has seen the closed evidence (subject to a limited exception which is, to the best of Amnesty International's knowledge, rarely if ever used in practice). The ability of the special advocate to ensure that the controlled person is able to effectively defend him or herself against the allegations on which the control order is based, necessary for a fair hearing, is therefore severely limited. Amnesty International considers, therefore, that the special advocate procedure is not, and cannot be, an effective substitute for a legal counsel of choice in proceedings such as the control order proceedings. The presence of even the best-intentioned, highly skilled, and most diligent special advocate cannot mitigate the fundamental unfairness of the use of secret hearings and secret evidence, which are fundamentally invidious to the rule of law and the fairness and transparency that human rights law requires when the individual faces the real risk of what are essentially penal sanctions.

[44] Lord Brown of Eaton-under-Heywood in *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 91.

[45] Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, p. 108.

[46] *Concluding Observations of the Human Rights Committee: UK*, CCPR/C/GBR/CO/6, 21 July 2008, para. 17.

[47] See the judgment of Lord Bingham in the case of *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 41.

[48] In the case of a man referred to as MB the judge who heard the challenge to the control order found that "the only basis on which anyone could reasonably suspect [MB] of being involved in [terrorism-related] activity is the following sentence in [the Home Secretary's open statement]: 'The Security

Service is confident that prior to the authorities preventing his travel [MB] intended to go to Iraq to fight against coalition forces' (emphasis added). The basis for the Security Service's confidence is wholly contained within the closed material". See *Re MB* [2006] EWHC 1000 (Admin), paras. 66-67. Similarly in the case of a man referred to as AF, the Secretary of State's case against him "depends entirely on the closed material"; see *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin), para. 41

[49] Lord Hope of Craighead in *Secretary of State v AF & another & one other action* [2009] UKHL 28, para 81. The Law Lords based their decision in part on reasons given by the European Court of Human Rights in *A. and Others v. the United Kingdom* (application no. 3455/05), 19 February 2009, regarding fair trial rights implicated by the earlier ATCSA internment regime. For further information on the significance of the case of *A and Others* for the proceedings before the Law Lords in *AF*, see *Secretary of State v AF & another & one other action* [2009] UKHL 28, paras 44-47.

[50] *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin), 3 July 2009, http://www.bailii.org/ew/cases/EWHC/Admin/2009/1572.html.

[51] See *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2927 (Admin), 11 November 2009, http://www.bailii.org/ew/cases/EWHC/Admin/2009/2927.html. In his decision Mr Justice Collins rejected the UK government's argument stating: "It seems to me that the imposition of what are described as light obligations in order to seek to avoid the application of Article 6 does not achieve that result, nor does it avoid the need for the controlled person to know sufficiently the important allegations against him to make a defence to them" (para. 58). See also the remarks of Andrew Dismore MP, then chair of the Joint Committee on Human Rights, before parliament on 1 March 2010, Hansard Vol 506 Part no 47 at column 737:
http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100301/debtext/100301-0016.htm.

[52] See, for instance, *A and others v. the United Kingdom* (application no. 3455/05), European Court of Human Rights (Grand Chamber), 19 February 2009,
http://www.bailii.org/eu/cases/ECHR/2009/301.html, paras. 209 & 220; Lord Phillips in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009), para. 6,
http://www.bailii.org/uk/cases/UKHL/2009/28.html; Ouseley J in *Secretary of State for the Home Department v AF* (Rev 1) [2007] EWHC 651 (Admin) (30 March 2007), para. 167
http://www.bailii.org/ew/cases/EWHC/Admin/2007/651.html; Lord Hoffmann in *Secretary of State for the Home Department v MB* [2007] UKHL 46 (31 October 2007), para. 54,
http://www.bailii.org/uk/cases/UKHL/2007/46.html; and Lord Carswell in Roberts v Parole Board [2005] UKHL 45 (07 July 2005), para. 144, http://www.bailii.org/uk/cases/UKHL/2005/45.html.

[53] See, for example, House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* (Seventh report of session 2004-5), 3 April 2005,
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf; Joint Committee on Human Rights, *Nineteenth Report*, 16 July 2007,
http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm; and Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010*

[54] See, for example, the 1 November 2004 statement by Ian Macdonald QC, who served as a Special Advocate between 1997 and 2004, available at:
http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268 and the 17 January 2005 statement by Rick Scannell, who served as a Special Advocate between 1998 and 2005, available at:

http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=260. Note that although these statements were written towards the latter days of the ATCSA internment regime and related to their experience as special advocates before the SIAC, discussions about transposing SIAC procedures to the High Court for control orders was already underway.

[55] See answer of Neil Garnham QC, cited in House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* (Seventh report of session 2004-5), 3 April 2005, para 76 http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf.

[56] Joint Committee on Human Rights, *Nineteenth Report*, 16 July 2007, para 210, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm.

[57] In its 2006 assessment of the system of control orders, the CPT, expressed its view that "it cannot be ruled out that the cumulative effect of the obligations imposed by [...] a control order on a given individual might in certain circumstances be considered as a deprivation of liberty," and resultantly, that it was appropriate for the CPT to offer its comments on the issue. See *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 20 to 25 November 2005*, CPT/Inf(2006) 28, 10 August 2006, para. 41. See also the earlier *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 11 to 15 July 2005*, CPT/Inf(2006) 26, 10 August 2006, paras. 3-9.

[58] In *JJ and others* the High Court of England and Wales, in June 2006, concluded that the obligations imposed on six foreign nationals, including a daily curfew confining each man to a small flat for 18 hours a day, amounted to deprivation of liberty contrary to Article 5 (enshrining the right to liberty) of the European Convention on Human Rights (ECHR); and that, in the circumstances, the Home Secretary had made these orders unlawfully. In August 2006 the Court of Appeal confirmed this ruling. See *Secretary of State for the Home Department v JJ & Ors* [2006] EWHC 1623 (Admin) (28 June 2006) http://www.bailii.org/ew/cases/EWHC/Admin/2006/1623.html and *Secretary of State for the Home Department v JJ & Ors* [2006] EWCA Civ 1141 (01 August 2006) http://www.bailii.org/ew/cases/EWCA/Civ/2006/1141.html respectively.

[59] The orders in *JJ and others* were 'non-derogating control orders'; it was not within the power of the Secretary of State to impose restrictions which amounted to a deprivation of liberty, and were therefore incompatible with Article 5 ECHR. Such orders could only be imposed, if ever, if preceded by a derogation from Article 5, and if the procedure set out in the PTA for 'derogating control orders' were followed.

[60] Lord Bingham in *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45 (31 October 2007) *http://www.bailii.org/uk/cases/UKHL/2007/45.html*, para 24.

[61] *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45 (31 October 2007) http://www.bailii.org/uk/cases/UKHL/2007/45.html.

[62] Lord Brown in *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45 (31 October 2007) http://www.bailii.org/uk/cases/UKHL/2007/45.html paras 103-109.

[63] On the basis of the Law Lords' decision in *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45 (31 October 2007) the Home Secretary argued that control orders imposing curfews of up to 16 hours a day did not amount to deprivations of liberty and consequently increased the curfews in four cases from 12 to 16 hours. This was despite having previously reduced them from 18 to 14 and then to 12 hours following previous lower court judgments. See for example, the case of 'AF', which was among those cases considered by the Law Lords, *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin), 10 March 2008, paras. 3-8. See also Joint Committee on Human Rights, *Tenth Report,* 19 February 2008, para. 39 and letter dated 18 February 2008 from the then Home

Secretary to the Chairman of the Joint Committee on Human Rights, Appendix Two.
[64] *Replies to the list of issues (Ccpr/C/Gbr/Q/6) to be taken up in connection with the consideration of the Sixth Periodic Report of the Government of the United Kingdom of Great Britain and Northern Ireland* (Ccpr/C/Gbr/6), 13 June 2008, para. 124; http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.GBB.Q.6.Add.1.doc.
[65] See *Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010) http://www.bailii.org/uk/cases/UKSC/2010/24.html. The Supreme Court judgment overturned the 2-1 majority decision in the Court of Appeal (*AP v Secretary of State for the Home Department* [2009] EWCA Civ 731, 15 July 2009) and upheld the earlier decision in the High Court (*Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin), 12 August 2008), http://www.bailii.org/ew/cases/EWHC/Admin/2008/2001.html. The High Court judge Keith J referred to the function of the court as being "to look at the package of measures as a whole", including the individual's sense of social isolation resulting from his control order, in deciding whether there had been a deprivation of liberty (para 95).
[66] The judgment had little practical effect for AP, who reportedly remained in the same city 150 miles away under immigration bail conditions pending deportation proceedings which were more restrictive than the curfew imposed by the control order. See *Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010) http://www.bailii.org/uk/cases/UKSC/2010/24.html, para 8.
[67] Lord Brown in *Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010) http://www.bailii.org/uk/cases/UKSC/2010/24.html, para 3.
[68] Sir John Dyson SCJ in *Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010) http://www.bailii.org/uk/cases/UKSC/2010/24.html, para 31.
[69] See, for instance, the statement of the Home Office minister in the 2010 debate regarding the renewal of the PTA in the House of Lords, the upper house of UK Parliament: Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, Prevention of Terrorism Act 2005 (Continuance in force of Sections 1 to 9) Order 2009), House of Lords, Written Statement, 10 March 2010, Column WS20-21.
[70] In 2006, in his first annual review of the PTA, the Independent Reviewer of Terrorism Legislation (Independent Reviewer) recommended a Home Office led procedure to monitor the use of a control order in each case through regular meetings between ministry, security service and police officials with the aim of reducing their use to the minimum required for public safety. In his second annual review of 2007, the Independent Reviewer confirmed that such a procedure had been put in place, but called urgently for a strategy to deal with the ending of the control orders on each individual controlee. By 2008, in his third annual review, the Independent Reviewer raised serious concerns about the seemingly indefinite use of control orders against certain individuals, stating that this was not how the powers were intended to be used, and reiterated the need for an exit strategy. In his fourth annual review of 2009, the Independent Reviewer stated that he was "in no doubt that Ministers and officials have a genuine interest in seeing control orders brought to an end as long as the national interests remains protected" and that he was satisfied that an exit strategy was being sought in each case. However in a significant turnaround in 2010, in his fifth annual review, the Independent Reviewer concluded that control orders were here to stay, advising that "abandoning the control orders system entirely would have a damaging effect on national security",[70] accepting the then government's position that control orders were the "best available disruptive tool" for terror suspects that it was unable to prosecute or deport. See *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 2 February 2006, para 46; *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 19 February 2007, para 43; *Third Report of the Independent*

Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 18 February 2008, para 48-51; *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 3 February 2009, para 57; and *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 1 February 2010, para 85, respectively.

[71] Amendment to the Motion moved by Lord Lloyd of Berwick and Division on Lord Lloyd of Berwick's amendment, House of Lords, 3 March 2010, Vol. 717, Part 49, Columns 1544-1546.

[72] Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office*, Prevention of Terrorism Act 2005 (Continuance in force of Sections 1 to 9) Order 2009)*, House of Lords, Written Statement, 10 March 2010, Column WS18-WS21.

[73] See *The Coalition: our programme for government*, Section 21: National security, 21 May 2010, http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

[74] Home Office Press Release, "Rapid review of counter-terrorism powers", 13 July 2010,http://homeoffice.gov.uk/media-centre/press-releases/counter-powers. The review's terms of reference were subsequently published on 29 July 2010, and can be accessed at http://www.homeoffice.gov.uk/publications/counter-terrorism/ct-terms-of-ref/counter-terrorism-terms-of-ref?view=Html.

[75] *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, 22 July 2010, para. 10.

[76] As explained above, European Court of Human Rights jurisprudence clearly establishes that the classification of proceedings under national law as non-criminal is not dispositive; what matters are substantive characteristics of the proceeding (the nature of the charges, the nature and severity of the sanctions imposed).

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