

## CONTROL ORDERS AND HUMAN RIGHTS PRINCIPLES

### Summary

- We accept that there is a considerable threat to the United Kingdom from terrorism. However the unending nature of the threat and the counterproductive effects on community relations and intelligence gathering of visible injustice, make any departure or 'derogation' from ancient and modern human rights standards undesirable.
- 'Control orders', as currently outlined, fail adequately to address the underlying human rights objections to detention without trial under Part 4 of the Anti-Terrorism, Crime and Security Act 2001. The ultimate objection is to the complete abrogation of the right to a fair trial and the presumption of innocence in particular<sup>1</sup>:
  - Unending restrictions on liberty (up to and including detention) based on suspicion rather than proof.
  - Reliance upon secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world)
  - The complete inability of the subject to test the case against him in any meaningful way.
- The House of Lords Appellate Committee found 'judicial supervision' of the 2001 Act (the Special Immigration Appeals Commission and the use of Special Advocates) inadequate remedy for the fundamental defects of detention without trial. Similar attempts to provide 'judicial supervision', appeal or review of control orders will also operate as political palliative rather than real cure for a process built on secret intelligence and suspicions which never solidify into charges or proof.
- However, judicially supervised restrictions upon a suspect's liberty and activities (up to and including detention) will be permissible in human rights terms if they are made with a view to criminal charge and trial within reasonable prospect. Pre-charge restrictions in particular must be tightly and firmly time limited. This sits within our

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<sup>1</sup> As reflected in Article 6.2 of the European Convention on Human Rights.

traditional concepts of remand and bail with conditions (already adapted and extended within the anti-terror context).

## **Background**

Control orders were initially proposed by the Home Secretary in his statement to the House of Commons on 26 January.

As control orders are broader in scope than detention under Part 4 Anti-Terrorism Crime and Security Act 2001 (ATCSA) the Government argues that they will not be considered unlawful by the courts on proportionality grounds. We do not accept this as the most serious control orders will still result in indefinite detention without due process. As control orders are not made in anticipation of criminal proceeding we do not think any of the current proposals will satisfy human rights requirements.

Our starting point is that any new legislation must not require further derogation. This is clearly envisaged as, in his statement to the House, the Home Secretary said 'The Government of course intends to ensure that any future powers we take in legislation are wholly compatible with the provisions of the ECHR<sup>2</sup>, if necessary employing a further derogation to that effect.'

It is not acceptable to view derogation as a convenient mechanism to ensure the legality of anti-terrorism proposals. The Home Secretary's phrasing indicates he intends to decide whether his plans are compatible with human rights standards and then derogate if not. A decision to derogate should be based on whether there is an 'exceptional situation or crisis that affects the whole population and constitutes a threat to the organised life of the community of which the state is comprised'. Britain remains the only Council of Europe member to have derogated from the ECHR in response to the current terrorist threat. The House of Lords Appellate Committee quashed this previous derogation in December 2004. Any new anti-terror package must be ECHR compliant without derogation.

## **Surveillance**

Control order plans do not specify the use of surveillance. However, it is worth drawing attention to how surveillance could be used in a manner that has the potential to comply with human rights requirements. The use of covert surveillance or the interception of communications by police or security services do not place any restriction on an

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individual's ability to carry on a normal life. While their use will engage privacy rights<sup>3</sup>, this can be justified if the intrusion is not excessive to the situation. So long as the surveillance continues to be justified, it is not time limited.

### **Restrictions on liberty and the 'badge of criminality'**

Current control order plans fail to address the human rights breaches identified by the House of Lords Appellate Committee arising from detention without trial under Part 4 ATCSA. They fail to address the fundamental concerns that arise from a process that is dependant on the use of secret intelligence (possibly involving evidence obtained through the use of torture) and which does not allow the subject the chance to test the evidence against them. As any criminal law practitioner knows, you cannot hope to effectively represent your client if you cannot discuss the evidence against them so that they are able to refute allegations.

Control orders are flawed as they undermine the central pillars of the British legal system, protection against unlawful detention, the right to a fair trial, and the presumption of innocence.

### **Protection against unlawful detention**

Several of the measures proposed will place restriction on liberty. They are curfews, tagging, and house arrest. It is tempting to place these into an order of seriousness and say that even if house arrest were not justified then tagging would be. Similarly, house arrest might be viewed as less of an infringement than custody in a high security prison (as occurred under Part 4 ATCSA).

However protections against unlawful detention<sup>4</sup> do not specify one place of restriction being preferable to another and do not allow for any indefinite restriction on liberty. Restrictions on liberty are permissible but only with a view to some form of criminal disposal otherwise restriction *must* eventually become unlawful.

There are a number of restrictions on liberty permitted relating to spreading of disease, deportation, mental health and so on but these are not relevant to the use of control orders. To be lawful they can only be used to detain or restrict someone with a view to bringing them to trial, to stop them committing an offence or from absconding after

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<sup>2</sup> European Convention on Human Rights

<sup>3</sup> Under Article 8 of the Human Rights Act

<sup>4</sup> Such as under Article 5 of the Human Rights Act

committing an offence<sup>5</sup>. Once detained they must be brought to trial within a reasonable time or released<sup>6</sup>

Restrictions such as tagging and curfew are established principles of criminal law. They are imposed as bail conditions by police or courts to ensure that, for example, a defendant attends court or does not commit further offences while awaiting disposal of his case. To be legitimately and effectively used as part of an anti terror package there must be a view to criminal disposal. Otherwise eventually, the restriction must be lifted.

In December 2004 The House of Lords Appellate Committee found that the use of SIAC and Special Advocates was insufficient remedy for detention without trial under Part 4 ATCSA. Similarly, applying judicial authorisation to the use of control orders cannot provide sufficient remedy for the restrictions they will impose. The only judicial involvement capable of justifying prolonged restriction on liberty is when criminal trial is anticipated.

### **The right to a fair trial and the presumption of innocence**

Every aspect of control orders, whether a restriction on movement, association and communication or tagging, curfew or house arrest is punitive. European caselaw makes it clear that it does not matter how something is described, if it punishes and has serious consequences it is part of the criminal process.

Therefore those subjected to control orders will suffer the badge of criminality without the benefit of a trial. They will be denied the presumption of innocence, the 'golden thread' that runs back through centuries of criminal process to the Magna Carta. As with restrictions on liberty, to satisfy requirements of fair trial and presumed innocence, control orders must anticipate criminal proceedings.

### **Restrictions on liberty allowed under the current law**

A combination of statutory time limits and human rights requirements set out the current time frame for limiting liberty.

The general rule limits detention without charge cannot last beyond 24 hours (or 36 if authorised by a superintendent). Beyond 36 hours further extension must be by a magistrate up to a total of 96 hours.

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<sup>5</sup> Article 5 (1) (c) Human Rights Act

Anyone suspected of a terrorist offence can be detained for up to 48 hours. The Secretary of State can extend this up to seven days. Detention must be kept under regular review.

Once charged a suspect must be bailed by the police (who can attach conditions) to court. The police can ask the court to remand in custody, in which case they can hold the suspect until the next local magistrate's court sitting. They will be granted bail unless the court believes they might fail to attend court, commit further offences while on bail or interfere with witnesses. Conditions can be attached to bail to ensure that none of these things happen. If bail conditions are breached the prosecution can seek remand in custody.

Once criminal proceedings are underway there are no specified time limits. As mentioned above article 5 (3) ECHR requires this to be within 'reasonable time'. There is no absolute limit to permissible period of pre trial detention. It depends on the facts of the case.

Detentions have lasted for years without breaching Article 5. However, this does not mean that control orders limiting liberty can last for years without breaching Article 5. It is crucial to distinguish between detention after charge while awaiting trial and detention prior to charge. The latter can last for years, the former merely for days. Lesser restrictions such as tagging or curfew might allow days to stretch into weeks or even months but, without the anticipation of criminal disposal, breach of Article 5 is inevitable.

### **Current criminal law**

As we have discussed the application of Article 5 in anticipation of criminal process we should emphasise just how broad the current criminal law is. The Terrorism Act 2000 (TA) creates a raft of offences and creates a list of 'proscribed' or banned organisations. There are currently 25 organisations currently subject to proscription. The list includes al-Qaeda, Hamas and many other groups associated with international terrorism. Being a member of or belonging to a proscribed organisation is an offence under section 11(1) TA, and carries a maximum penalty of ten years imprisonment. Under section 12 it is enough to support or "further the activities of" an organisation by literally any method. The TA stresses the fact that support is not restricted to money or property terms. Organising or addressing a meeting with full knowledge of its aims to support or further the activities of

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<sup>6</sup> Article 5 (3) Human Rights Act

a proscribed organisation is an offence under section 12. All the offences under section 12 can be punished by 10 years imprisonment. It is even an offence to wear an item of clothing, or wearing or display any article which can give rise to reasonable suspicion indicating membership or support of a proscribed group (section 13)

The TA also creates a category of offences which are available even when the option of proscribing an organisation cannot be exercised, and, therefore, the proscription-related offences do not apply. It makes an offence of directing the activities of a terrorist organisation “at any level” (section 56). This offence carries a penalty of life imprisonment.

It is also an offence, punishable by ten years imprisonment, to possess something “in circumstances which give rise to reasonable suspicion that (the) possession is for a purpose connected with terrorism” (section 57). There is a penalty of ten years imprisonment for the offence of collecting “information of a kind likely to be useful to a person committing or preparing an act of terrorism” (section 58) or to keep any form of documentation or record (including photographic or electronic) which contains such information. The TA 2000 also creates an offence of “inciting terrorist activity overseas” (Section 59). Further offences include fundraising for terrorist activity and using money for terrorist activity.

There are offences that come within the ‘normal’ criminal law which could also be relevant to the prosecution of terrorist offences. An act involving terrorist violence will invariably involve an offence under the criminal law such as murder or criminal damage as well as being an offence under Part 1 of the TA 2000. Those preparatory acts that involve planning but stop short of any violence are likely to be criminalised under offences of conspiracy, incitement or attempt. When two or more people agree to carry a criminal scheme into effect, the plot itself becomes a criminal act. Less serious offences of incitement and attempted incitement cover situations where there is insufficient common enterprise to establish conspiracy. Under the Criminal Attempts Act 1981 is an offence to attempt to commit an offence. While the act must be ‘more than preparatory’, the offence would be appropriate to attempted terrorist attacks where presumably it is necessary to gather together materials prior to commission.

It has been suggested that a new offence of ‘acts preparatory to terrorism’ be created. Given the breadth of the TA coupled with other criminal law we are not sure where the gap in the current law is. However we hope the creation of a new offence would ensure control orders engaging Article 5 are only imposed preparatory to criminal trial.