

**SECOND REPORT OF THE
INDEPENDENT REVIEWER
PURSUANT TO SECTION 14(3)
OF THE PREVENTION OF
TERRORISM ACT 2005**

BY

LORD CARLILE OF BERRIEW Q.C.

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BACKGROUND

1. For ease of reference this report will follow the broad format of my first report on this subject, published in February 2006¹.
2. Parliament repealed the powers of detention of terrorism suspects provided by the *Anti-Terrorism, Crime and Security Act 2001, Part 4*. The repeal followed the decision of the House of Lords in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*². The 2001 Act powers permitted the detention, subject to ensuing review and appeal, of foreign nationals who were suspected of being international terrorists. The provisions were introduced following the aircraft bombing of the World Trade Center in New York on the 11th September 2001.
3. The *Prevention of Terrorism Act 2005 [PTA2005]* replaced the 2001 Act detention powers with a system of control orders. *PTA2005* came into force on Royal Assent, on the 11th March 2005.
4. The enactment of *PTA2005* occurred before the London suicide bombings of the 7th July 2005 and the events of the 21st July 2005. Since those events the *Terrorism*

¹ For all my reports see www.homeoffice.gov.uk and follow the 'security' links

² [2004] UKHL 56

Act 2006 has been passed³. Its materiality to this report is that it introduces some new terrorism-related offences. Of particular note are *section 1* (encouragement of terrorism), *section 2* (dissemination of terrorist publications), *section 5* (preparation of terrorist acts), and *section 6* (training for terrorism).

5. It is accepted by all interested in this subject that it is desirable that the normal legal process, involving a charge and trial, be used wherever possible. The provision of lower level offences should enable more prosecutions.
6. A control order may be made against a person suspected of involvement in terrorism-related activity, whether a UK national or not, and whether the terrorist activity is domestic or international. For brevity, such a person is described in this report as a controlee.
7. Pursuant to *section 14(3)* and *(5)* of the *PTA2005* I have the duty of reviewing the operation of the Act, and certain other reviewing responsibilities. My conclusion from my review this year is as follows. I would prefer it if no control order system was necessary. However, in my view it remains necessary given the nature of the risk of terrorist attacks and the difficulty of dealing with a small number of cases. Control orders provide a proportional means of dealing with those cases, if administered correctly.
8. As with all my reports as independent reviewer of terrorism legislation, I hope that this one is comprehensible to the general reader as well as those with a special interest. I welcome representations and comments: contact details are provided in paragraph 76 below.

³The current version of all statutes is now available via www.statutelaw.gov.uk

SUMMARY OF THE POWERS

9. A good summary of the powers can be found on the Home Office website⁴. The remainder of this section reflects the information summarised there.

10. There are 2 distinct species of control order - *derogating* and *non-derogating*. Control orders are intended to provide a group of potential control measures. These should be matched to the particular case. There are 22 measures used or in contemplation up to now, as set out in *Table 1*.

TABLE 1

<ol style="list-style-type: none">1. Wear an electronic monitoring tag2. Reside at specified residence/curfew <i>Can include specified hours of curfew</i>3. Report each day to monitoring company4. Entry of visitors to residence restricted to those specified in the order and those to whom the Home Office have granted prior approval <i>Two have restrictions on visitors during curfew hours only. In some cases specified family members have unrestricted access to residence</i>5. No prearranged meetings outside the residence except with prior agreement of Home Office6. No association or communication with individuals specified in the order7. No association or communication with anyone notified as being on a control order by the Home Office8. Must permit entry to police officers and persons authorised by Secretary of State9. Comply with such other prohibitions or restrictions given in writing at the time of the service of the order for the first 24 hours10. Restriction on communications equipment in the residence
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⁴ E.g. see <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/prevention-of-terrorism/?view=Standard>

11. Shall attend only one mosque, subject to Home Office approval
12. May not leave permitted geographical area without consent of Home Office
13. Must notify Home Office of intended departure from UK
14. Shall not maintain or use more than one account and must provide statements of that account
15. Shall not transfer money or goods overseas without prior approval of Home Office
16. Must surrender travel documents
17. Must not leave the UK
18. Prohibited from entering any port or railway station that provides access to an international rail service
19. Must report in person each day to local police station
20. Shall provide Home Office with details of employment
One has restrictions on specific employment he can engage in
21. Shall not buy, sell or provide to others communications or computer equipment
22. Shall not lead group prayers at a mosque

11. I emphasised in my first report that the intention is that conditions imposed under a control order should be specific and tailored to the individual. The aim is to secure the safety of the State by the minimum measures needed to ensure effective disruption and prevention of terrorist activity. I have discussed this with officials on several occasions during the year. Significant variations now exist between control orders on various individuals. *Table 2*, read in conjunction with *Table 1*, sets out the controls on the eighteen persons subject to control orders in January 2007.

TABLE 2

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Case 1	X	R14	X			X	X	X	X	X	X	X	X	X	X	X		X		X		
Case 2	X	R14	X			X	X	X	X	X	X	X	X	X	X	X		X				
Case 3	X	R14	X			X	X	X	X	X	X	X	X	X	X	X		X		X		
Case 4	X	R14	X			X	X	X	X	X	X	X	X	X	X	X		X				
Case 5	X	R14	X			X	X	X	X	X	X	X	X	X	X	X		X		X		
Case 6	X	R14	X	A		X	X	X		X	X	X	X	X	X	X		X		X		X
Case 7	X	R14	X	A		X	X	X		X	X	X	X	X	X	X		X		X		X
Case 8	X	R14	X				X	X	X	X	X	X	X	X	X	X		X		X		
Case 9	X	R12	X	B	X			X	X	X			X	X	X							
Case 10		R12	X	B	X			X	X	X			X	X	X							
Case 11		R						X								X	X	X	X			
Case 12		R						X	X							X		X	X	X		
Case 13		R						X	X							X		X	X			
Case 14		R						X								X		X	X			
Case 15		R						X								X	X	X	X			
Case 16		R						X	X							X	X	X		X		
Case 17		R				X	X	X	X							X	X	X	X	X		
Case 18		R				X	X	X	X							X	X	X	X	X		

Obligation 2 - R indicates requirement to reside at a specified residence

- Numbers indicate number of hours of curfew (if applicable)

Obligation 4 - A indicates only named and approved visitors during curfew; any visitors allowed at other times

- B indicates only named and approved visitors at all times

12. The Home Secretary must normally apply to the courts to impose a control order based on an assessment of the available intelligence information. If the court allows the order to be made, the case is automatically referred to the court for a judicial review of the decision.
13. In emergency cases the Home Secretary may impose a provisional order, which must then be reviewed by the court within 7 days. This measure has not yet been used.
14. The court decides whether the person involved poses a threat to the safety and security of the general public.
15. The court may consider the case in open and/or closed session. Where national security requires a closed session in the absence of the controlee and his chosen legal advisers, a trained and security-cleared independent lawyer described as a Special Advocate represents the interests of the controlee in the closed sessions.
16. Control orders are limited to 12 months' duration. They can be renewed if it is desired that the person concerned should remain a controlee at the end of each 12 month period.
17. A control order and its conditions can be challenged. There has been a fundamental but unsuccessful challenge in 2006 to the compatibility of the legislation with the *European Convention on Human Rights*⁵. There have been successful challenges

⁵ See the judgment of the Court of Appeal, consisting of the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division in *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; on appeal from Sullivan J at [2006] EWHC 1000 (Admin)

to the extent of non-derogating control orders⁶. These decisions are currently subject to appeal to the House of Lords.

18. Breach of any conditions without reasonable excuse is a criminal offence punishable on indictment by imprisonment of up to 5 years, or an unlimited fine. Breach proceedings have been started in several cases. On the 2nd January 2007 one controlee was convicted on his plea of guilty of offences of breach, founded on persistent late reporting and unauthorized change of residence. He was sentenced to 5 months' imprisonment.

19. Controlees and the Government both have the option of applying to the court for anonymity to apply to the identity of the controlee. Anonymity is probably of advantage to the controlee and to the government. In particular, for the controlee it avoids publicity that might lead to harassment in the community where he/she lives, or that might prejudice a fair trial if criminal charges are brought later.

⁶*Secretary of State for the Home Department v JJ & ors* [2006] EWCA Civ 1141, upholding the earlier decision of Sullivan J at [2006] EWHC 1623 (Admin)

CONTROL ORDERS TO DATE

20. Since the beginning of 2006 there have been a total of 19 controlees. In the cases of two, their control orders were renewed in March 2006. Another was renewed in September 2006. Those three persons remain subject to orders. Two control orders were revoked in September 2006 and new ones issued.
21. Six orders were quashed by the High Court and this was upheld by the Court of Appeal in August 2006⁷. All of those controlees were the subject of new orders. However, one absconded immediately prior to the Court of Appeal's judgment and the new order could not be served.
22. By the 16th January 2007 18 control orders were in existence. Three examples of those orders, with conditions, are contained in *Annex 1* to this report. As can be seen from *Table 1* and *Table 2* above, there is a degree of variation, significantly more than a year ago.
23. There have been three incidents during the past year involving the disappearance of persons who were or were about to be controlees. The viability of enforcement should always be considered when a control order is under consideration: it would not be appropriate for them to be regarded simply as a prophylactic.
24. In one case the person concerned was an inpatient in a locked ward in a psychiatric hospital. He disappeared via a ground floor window. I am not in a position to comment on any responsibility of the hospital, which was aware of his status. Given

⁷ See footnote 6 above

(i) the expense in manpower and money of round the clock physical surveillance, and (ii) the apparent medical condition, diagnosis and needs of the person concerned at the time, leaving him in the hands of the hospital was reasonable given the light conditions of the order (which primarily required him to report daily to the police). However, this and other cases do commend constant reconsideration of the surveillance and observation needs of each controlee, given the risk that each might present to national security if uncontrolled.

25. Another disappeared immediately prior to the decision of the Court of Appeal to uphold the quashing of his control order by the High Court, and before a new order could be served. When such circumstances may arise, in future there should be provision for this eventuality - in the sense that there should be the minimum delay between the quashing of the old and the service of the new order if that is the appropriate course in the case. The police were ready to serve the new order as soon as they were allowed to under the terms of the judgment.

26. The third absconded in early January 2007. Soon after being served with a control order, he was believed to have entered a mosque. At this point he had not breached his control order. There was no operational reason to enter the mosque and it would therefore have been inappropriate for police officers to do so. Unfortunately he disappeared, breaching his control obligations. Whilst in this case it would have been inappropriate for the police to enter the mosque, it raises questions about how generally to approach sensitive issues such as presence in a mosque, church or other place of worship. The straightforward approach would be to make it clear that if controlees are in breach of anything other than minor aspects of conditions,

the police will pursue them wherever they are situated after allowing them a short time to emerge voluntarily.

27. Although I am not aware of any evidence of inappropriate behaviour by anyone connected with the mosque in that case, it is worth saying the following for the future. Anyone knowingly giving shelter from legal obligations has a clear civic duty to facilitate compliance with the law. If they do not do so, they will have little cause for complaint if police enter their premises. In so entering the police must show full respect for the nature of the premises concerned, and do the minimum reasonably necessary to fulfil their duty. Every effort should be made to involve community leaders and avoid giving offence.

CONTROL ORDER POWERS AND OBLIGATIONS

28. By *PTA2005 Section 1* the power to make a non-derogating control order is vested in the Secretary of State; and to make a derogating order in the court on the application of the Secretary of State. The obligations placed on the controlee are those

“... necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.”

29. *Section 1(4)* contains a menu of potential obligations up to and including full-time house arrest. Such 24/7 house arrest would involve derogation.

30. *“Involvement in terrorism-related activity”* is defined by *section 1(9)* as

“any one or more of the following

- (a) the commission, preparation or instigation of acts of terrorism;*
- (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;*
- (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;*
- (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity;*

and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.”

31. *Section 2* sets out the basis upon which the Secretary of State may make a non-derogating control order. *Section 2(1)* requires that he

“(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.”

32. Non-derogating orders are made for 12 months, and are renewable pursuant to *section 2(6)* if

“necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity.”

33. As part of my function as independent reviewer, my task is to replicate exactly the position of the Home Secretary at the initiation of a control order. I call for and am given access to the same files as were placed before the Secretary of State when he was asked to determine whether a control order should be made.⁸ These files include detailed summaries of evidence and intelligence material, as well as the draft Order and obligations. The summaries describe not only the activities alleged against the individual and the sources of information, but also the context of those activities in a wider and very complex terrorism picture. I do this in every case.

34. Much of the information is derived from intelligence. The sources and content of such intelligence in most instances demand careful protection in the public

⁸ In September 2006, a Minister of State acting as Duty Minister in the Home Secretary's absence made two control orders

interest, given the current situation in which a concerted and strategic response to terrorism (and especially suicide bombings) is needed. The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk – not least, by any means, those who offer unsolicited information out of disapproval of conduct and events at which they may have been and might continue to be present.

35. That is not to say that there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the Law should be amended to a limited extent to achieve that.

36. I would have reached the same decision as the Secretary of State in each case in which a control order has been made, so far as the actual making of the order is concerned. In some cases the extent of obligations under the order was more cautious and extensive than absolutely necessary, as the court proceedings cited in footnote 6 above demonstrate, though those proceedings are subject to current appeal at the time of writing. Like his predecessor, the present Home Secretary asks questions and certainly does not act as a mere cipher when the papers are placed before him. The process is rigorous and structured in an appropriate way, so that the decisions are definitely those of the Home Secretary himself, not his officials. In accordance with my obligations under *section 14(5)(b)* I report that the Secretary of State has acted appropriately in relation to his powers under *section 3(1)(b)* of the Act, in relation to the use of the power to make urgent non-derogating orders, in that he has made none thus far.

37. In some cases control orders against UK citizens have been founded on solid intelligence of their intention to join insurgents in Iraq or Afghanistan, with resulting risks to British and other allied troops. Whilst such uses of the legislation are appropriate in the cases I have seen, they are at the lowest end of the potential range of use for control orders. The greatest care must be taken to ensure that the orders are used only in those cases where there is a clear intention to put the stated desire into effect, as opposed to extravagant expressions of support or wishes.
38. The quality of preparation of cases for the Secretary of State by officials and the control authorities concerned is extremely high, as one is entitled to expect when a Secretary of State has to make a decision diminishing the normal rights and expectations of the individual.
39. My conclusion in paragraph 36 does not mean that the Secretary of State is correct in every case. Court procedure for the review of the decisions made by the Minister has led to the quashing of orders, as described.
40. Last year I expressed concern about a combination of obligations including an eighteen hour curfew, limitation of visitors and meetings to those persons approved by the Home Office, submission to searches, no cellular communications or internet, and a geographical restriction on travel. I suggested that they fell not very far short of house arrest, and certainly inhibit normal life considerably. The case referred to in footnote 6 above confirmed that these were real concerns.
41. I have received some representations about and am alive to the potential psychological effects of control orders. In judicial review proceedings in the High

Court relating to controlee E, expert evidence has been given of adverse psychological reaction, directly related to the existence and terms of the control order. This is certainly a relevant consideration in relation to the obligations imposed by such an order. Those representing the controlees must (and surely have a professional and ethical duty to) ensure that any such evidence is drawn to the attention of the Home Office as early as possible. Subject to verification, such evidence should be acted upon whenever possible. There is support in case law for the proposition that, where the State takes coercive measures that could affect the physical or mental well-being of the individual, it is under a duty to monitor effectively the impact of those measures⁹.

42. The key to the obligations is proportionality. In each case they must be proportional to the risk to national security presented by the controlee. The minimum obligations consistent with public safety are the only acceptable basis for control orders.

43. Last year I recommended the establishment of a Home Office led procedure whereby officials and representatives of the control authorities meet regularly to monitor each case, with a view to advising on a continuing basis as to the necessity of the obligations imposed on each controlee. Included in those considerations must be the effect on their families, especially any children living with them. The kind of procedure I had in mind has now been put in place, with beneficial results. The Control Order Review Group is now a matter of public knowledge, and its activities have been scrutinized by the High Court in proceedings ongoing at the

⁹ Keenan v UK [2001] 33 EHRR; or link to <http://www.lawtel.com/~4f496462a9624799baefb4c190e50a04~/content/display.asp?ID=AG0001228.htm>

time of writing. However, there has to be an end of the order at some point, in every case. Some of the controlees have already been the subject of their orders for a considerable time. Their orders cannot be continued indefinitely - that was never intended and would not be permitted by the courts. As a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now whether on a case-by-case basis or by legislation (if appropriate) would be short-sighted.

COURT SUPERVISION

44. A system of law for the supervision by the court of non-derogating control orders is provided by *section 3*. In every case there must be an application to the court for permission, in non-urgent cases to make the control order, and in urgent cases for the confirmation of the order. The language of *section 3(3)* makes it clear early in the Act that the principles are those of judicial review - namely that the order will subsist unless the decision is "*obviously flawed*".
45. As stated above, the Court has the power pursuant to *section 3(12)* to quash the order, to quash one or more obligations imposed by the order, or to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations imposed by the order.
46. *Section 3* requires directions hearings to begin no more than 7 days from the making or confirmation of a control order. Last year I commented that this has caused some practical problems, in that there is very little that can happen meaningfully in court proceedings in the High Court at such an early stage. It was suggested to me that a more leisurely timetable might be more realistic, in that the 7 days should run from the service of the order rather than the making of it. I think that the system has bedded down, and that the Home Office and controlees' lawyers are able to deal with the directions procedure without undue difficulty.

47. *Section 4* provides the powers of the courts to make derogating control orders; *section 5* deals with issues of arrest and detention pending derogating control orders; and *section 6* provides for their duration. As no derogating control orders have been made to date, again I am unable to report at this stage on the operation of the derogating provisions. Given the restrictive nature of non-derogating orders, and the reverberations that derogation would cause, I hold to my previously expressed hope that no derogating orders will be required. Plainly, the moment one was made it would require intensive review of every step in the statutory procedure and of its effect on the controlee.
48. I have received no complaints from controlees or those representing them to the effect that the court procedures are not working satisfactorily. Nor, other than through court transcripts as mentioned in paragraph 41 above, have I been informed of any adverse effects of the system on controlees. As always, I am willing to hear any such complaints, and would consider them in detail.
49. I have received no complaints about the special advocate procedure in control order cases. The special advocates are skilled and conscientious, and certainly useful.
50. The impact of court decisions has been considerable in 2006. The following passages from the judgment of the Lord Chief Justice in *Secretary of State for the Home Department v MB*¹⁰ demonstrate this. I make no apology for such a large selection from the judgment, as (subject to further appeal) it provides essential

¹⁰ [2006] EWCA Civ 1140

guidance for the future. The passages selected below are required reading. Lord

Phillips CJ said:

It remains theoretically possible, where a control order does not interfere with any Convention right, that section 3(10) could be interpreted so as to restrict the court's review to the question of whether, when he took the decision to make the control order, the Secretary of State had reasonable grounds for doing so. That, indeed, is the natural meaning of the wording which speaks of determining whether any of the decisions of the Secretary of State was flawed. There are, however, cogent reasons for not giving section 3(10) such an interpretation.

It would be manifestly unsatisfactory that the court should have to apply a different approach to reviewing a control order depending upon whether or not it interfered with a Convention right. Furthermore if section 3(10) only permits the court to consider whether the Secretary of State's decision to make the control order was properly reached at the time that he made it, it will not, as Article 6 requires, enable the controlled person to have a fair review of his civil rights as they are at the time that the review is carried out.

It is implicit from the provisions of section 7 and would, we think be implicit even without those provisions, that it is the duty of the Secretary of State to keep the decision to impose a control order under review, so that the restrictions that it imposes, whether on civil rights or Convention rights, are no greater than necessary. A purposive approach to section 3(10) must enable the court to consider whether the continuing decision of the Secretary of State to keep the order in force is flawed.

For these reasons we consider that section 3(10) can and should be 'read down' so as to require the court to consider whether the decisions of the Secretary of State in relation to the control order are flawed as at the time of the court's determination.

The standard of review

Sullivan J considered that Article 6 required that the court should carry out a 'full merits review' of the justification for the control order and its terms. On his reading of section 3(10) this was not possible:

“74. Unlike SIAC’s functions on appeal under the 2001 Act, the court’s role in this hearing under section 3(10) of the Act is to review the lawfulness of the Secretary of State’s decisions on or about 1 September 2005 and to decide whether they were flawed on judicial review principles. Although Mr Burnett emphasised (perhaps unusually in submissions made on behalf of the Secretary of State) the breadth of judicial review principles today and the fact that they now required the court to consider issues of proportionality where Convention rights are engaged, the fact remains that, applying judicial review principles, the court is not able to engage in a merits review under section 3(10): see paragraph 28 of the speech of Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, [2001] UK HL 26.”

We do not consider that the terms of section 3(10), when read in the light of section 11(2), restrict the court to a standard of review that falls short of that required to satisfy Article 6. So far as procedure is concerned, a court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision maker, if that is what Article 6 requires. An example of the exercise of such powers is R (Wilkinson) v Broadmoor Special Hospital Authority & Ors [2001] EWCA Civ 1545; [2002] 1 WLR 419. Section 3 of the HRA requires that section 3(10) and section 11(2) of the PTA be interpreted, if possible, in a manner that enables the court to carry out a review of the Secretary of State’s decision that complies with the requirements of Article 6. So far as the standard of review is concerned, we can see no difficulty in so reading those sections as to produce this result, whatever those requirements may be.

In view of this conclusion it is not necessary, in order to determine this appeal, for this court to express a view as to the standard of review that is required when considering the decisions of the Secretary of State when making a non-derogating control order. This was, however, a matter which was debated before us at length and it would not be satisfactory to leave the question unresolved.

Section 3(10)(a) of the PTA requires the court to consider whether the decision of the Secretary of State that there were reasonable grounds for suspecting that the subject of the order was involved in terrorism-related activity was flawed. Involvement in terrorist-related activity, as defined by section 1(9) of the PTA, is likely to constitute a serious criminal offence, although it will not necessarily do so. This, of itself, suggests that when reviewing a decision by the Secretary of State to make a control order, the court must make up its own mind as to whether there are reasonable grounds for the necessary suspicion. Indeed, as we put to Mr Starmer in argument, it is not easy to see what alternative approach the court could take.

The test of reasonable suspicion is one with which the Strasbourg court is familiar in the context of Article 5(1)(c) of the Convention.

“Having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence” – Fox, Campbell and Hartley v United Kingdom (1991) 13EHRR 157 at paragraph 38.

Whether there are reasonable grounds for suspicion is an objective question of fact. We cannot see how the court can review the decision of the Secretary of State without itself deciding whether the facts relied upon by the Secretary of State amount to reasonable grounds for suspecting that the subject of the control order is or has been involved in terrorism-related activity. Thus far we accept Mr Starmer’s submission as to the standard of the review that must be carried out by the court.

Somewhat different considerations apply in respect of the second element in the Secretary of State’s decision. Section 3(10) requires the court to review the decision of the Secretary of State that it was necessary, for purposes connected with protecting the public from a risk of terrorism, to make the control order. The court is further required to consider his decision on each one of the obligations.

Subsection 1(9) throws some further light on the object of the control order. As one might expect, it is to prevent or restrict the controlled person from involvement in terrorism-related activity.

Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.

The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for instance: Secretary of State for the Home Department v Rehman [2001]UKHL 47; [2003] AC 153; The Republic of Ireland v the United Kingdom (1978) 2 EHRR 25.

Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so. The exercise has something in common with the familiar one of fixing conditions of bail. Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the same result. The provision of section 7(2) for modification of a control order 'with the consent of the controlled person' envisages dialogue between those acting for the Secretary of State and the controlled person, and this is likely to be appropriate, with the assistance of the court, at the stage that the court is considering the necessity for the individual obligations.

The PTA authorises the imposition of obligations where there are reasonable grounds for suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof. It is the procedure for determining whether reasonable grounds for suspicion exist that has to be fair if Article 6 is to be satisfied.

MODIFICATION OF CONTROL ORDERS

51. *Section 7* provides for the modification, notification and proof of orders. By *section 7(1)* the controlee, on the basis of a change of circumstances affecting the order, may apply for revocation or modification of the obligations imposed by the order. If such an application is made, the Secretary of State has the statutory duty to consider it. By *section 7(2)* the Secretary of State has the power to revoke or modify the obligations of an order, save that he cannot up-rate it from a non-derogating to a derogating order.

52. *Section 7* allows too for applications to be made to the court for revocation or modification of derogating orders. I have received no representations to suggest that these provisions are defective or inefficient.

CRIMINAL INVESTIGATIONS AND CONTROL ORDERS

53. *Section 8* arises from the important concern that individuals suspected of terrorism offences should be prosecuted and convicted wherever possible, rather than made subject to executive action depriving them of a proportion of their liberty.

54. The section applies to a carefully drawn group of cases - those where the terrorism suspect may have committed an offence relating to terrorism, and the commission of that offence is being or would fall to be investigated by a police force. This is not as all embracing as it may seem at first glance, as it may exclude cases where on public interest grounds it had been pre-determined that there should be no investigation with a view to prosecution. However, as last year I am unaware of any cases where any such determination has been made.

55. *Section 8(2)* provides that, before a control order can be made or applied for, the Secretary of State must consult the chief officer of the police force for the material area

“about whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism.”

56. If a control order is made, the chief officer of police has the obligation under *section 8(4)* to keep under review the possibility of an investigation and criminal prosecution. *Section 8(5)* contains a strangely drawn obligation (“must”) to consult the relevant prosecuting authority (in England and Wales the Director of Public Prosecutions) but, in relation to *section 8(4)* *“to the extent that he considers it appropriate to do so”*.

57. I have seen letters from chief officers of police in relation to each controlee certifying that there was no realistic prospect of prosecution. Little is given by way of reasons. The letters remain very short, but do give slight reasons for the conclusion that there is not evidence available that could realistically be used for the purposes of a terrorism prosecution. I should still like to see more detail in those letters – for example, and if necessary in a closed version, an explanation of the sensitivity of material that could not be placed before a court of trial. If there is a thorough and continuing examination of whether a prosecution could be brought, the evidence of that examination remains unconvincing in some cases. It must never be regarded as a vestigial exercise. In my view the decision whether to prosecute should be taken following detailed and documented consultation in every case between the Crown Prosecution Service (CPS), the police, the Security Service and the Home Office, on the basis of full consideration of the evidence and intelligence. Given the small number of cases, this cannot be an excessive request. As independent reviewer, I would hope to be shown the minuted results of that process in every case, as a matter of routine.

58. I believe that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction. I encourage such investigation to continue. Information about international contacts, financial support for insurgents in Iraq or Afghanistan, and the use of guarded language to refer to potential terrorism targets might be progressed to evidence of significant terrorism crime. As I indicate above, it is a given that it would be far better for prosecutions to occur, of course provided they pass the usual threshold standards (evidential and public interest, respectively) for prosecution applied in all cases by the CPS. It has already been argued in the High

Court that the failure to bring a prosecution at the time of the control order being made, and possibly at later stages, could amount to an abuse of the judicial process: whilst this point remains imaginative and undetermined, it cannot be written off.

59. I remain of the view that, as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society. There are problems in the administration of the orders, not least the issue of constant surveillance. However, the disappearance of a small minority does not necessarily undermine the benefits of the orders in relation to the majority. It is plainly doubtful that any well-organised terrorism cell would wish to rely in a significant way on someone who is being sought by police internationally, so the absconders probably present little risk provided that they are sought diligently.

OFFENCES

60. *Section 9* sets out the offence of contravention of a control order.

61. There have now been numerous contraventions. As described above, one has been prosecuted successfully so far. Other prosecutions are pending. I am satisfied that the police and the prosecuting authorities use proper discretion before instituting proceedings.

APPEALS AND OTHER PROCEEDINGS

62. *Sections 10 and 11* provide the system of appeals against control orders, control order court decisions and derogation matters.
63. *Section 10(4)(5) and (6)* make it clear that the principles applicable in non-derogating control order appeals are those applicable on an application for judicial review.
64. This means that such appeals are not analogous to a criminal trial. They are administrative court hearings. In lay language, the decision of the Secretary of State will be upheld unless shown to be founded on a mistake of law, or on a disproportionate assessment of the facts in their legal context, or perverse. The limitations of judicial review in this context were litigated fully in the decisions in *MB v Secretary of State for the Home Department*¹¹ and *Secretary of State for the Home Department v JJ*¹².
65. In my view a controlee should be able to say to the court that the facts upon which the order was based can be shown to be seriously erroneous, or that subsequent events have caused a substantial change to the situation. For example, a very young person may be able to show, truly, their abandonment of an earlier expressed commitment to violent jihad. It seems to me a matter of common sense that the court should be able to take into account such a change of circumstances.

¹¹ [2006] EWCA Civ 1140; at first instance [2006] EWHC 1000 (Admin)

¹² [2006] EWCA Civ 1141; at first instance [2006] EWHC1623 (Admin)

66. Judicial Review, as an examination of its developing history shows, is a robust jurisdiction where it applies. It certainly stands any international comparison, both in terms of accessibility and results. However, it does not always work as intended, especially where it is a creature of statute. It is clear to me that it was intended by Parliament that the judicial review of control orders should encompass the correction of any serious mistakes, even factual, that could be established by evidence. I am strongly of the view that the High Court should be able to take into account any new evidence or error of fact of sufficient importance potentially to affect the appropriateness of a control order.
67. If the decision in *Secretary of State for the Home Department v MB* (quoted from extensively at paragraph 50 above) fails to achieve this with sufficient certainty, the possibility of amending the legislation should be considered. This is a matter for detailed advice to Ministers.
68. The Schedule to the Act sets out the rule making powers. These have been exercised by the enactment of the *Civil Procedure Rules 1998, Part 76 Proceedings under the Prevention of Terrorism Act 2005*¹³. These rules include the appointment and responsibilities of special advocates, and the difficult issue of hearings in the absence of the controlee and his own legal representatives; and disclosure. The rules of court are working reasonably well.
69. *Section 12* is a largely procedural provision dealing with appeals against convictions for breach of control orders before the quashing of the order or an obligation under it. Nothing has arisen as yet in relation to this section.

¹³ SI 2005/656: in force 11th March 2005

DURATION OF CONTROL ORDER PROVISIONS, AND REVIEW

70. *Section 13(1)* limits the duration of the control orders system to 12 months from the 11th March 2005, the date on which the Act was passed. Subject to certain consultation obligations set out in the section, it may be continued for a year at a time. An affirmative resolution of each House of Parliament is required before continuation can occur, save in restricted circumstances of emergency (when resolutions would be required within 40 days). This procedure was the subject of some only moderately informed discussion in argument in a case still before the Court. It should be remembered that the affirmative resolution procedure enables debate in both Houses of Parliament; and that the brevity of any such debate is usually a measure of the political temperature on the issue rather than negligence by parliamentarians.

71. As required by *section 14(1)* the Secretary of State has reported every three months to Parliament about the exercise of the control order powers. Contrary to my view expressed a year ago, in the light of the level of activity under the Act in 2006, this regularity of reporting is reasonable. During the course of the year I was invited to advise publicly on the form and content of the Secretary of State's quarterly statements to the House of Commons. I attach that advice as Annex 2. I am pleased to report now that considerably more information is now being provided in those quarterly statements; and that an additional Parliamentary Ministerial statement was made following the disappearance of one controlee.

72. This report is my response to my duties under *section 14(3)*, namely to report on "*the operation of this Act*". My next report under that obligation will appear in a year's time.

73. I have the duty under *section 14(5)(b)* to report on the extent (if any) to which the Secretary of State has made use of his powers to make non-derogating orders in urgent cases without the permission of the court. There were no such cases in 2006.

74. I have the additional duty, under *section 14(5)(a)*, to provide my opinion on the implications for the “*operation of this Act*” of any proposal made by the Secretary of State for the amendment of the law relating to terrorism. There are no proposals in existence at present that would have any impact on the operation of the *PTA2005*. Although some new terrorism legislation was trailed in the *2006 Queen’s Speech*¹⁴, at the time of writing I have seen no proposals on which I can give an opinion in this report.

75. *Sections 15 and 16* require no further comment.

¹⁴ www.number10.gov.uk/output/page10149.asp

ADDRESSES FOR COMMENTS AND REPRESENTATIONS

76. Any comments or representations about this report or the review process should be sent by email to carlilea@parliament.uk or in hard copy to Lord Carlile Q.C., House of Lords, London SW1A 0PW.

Alex Carlile

Lord Carlile of Berriew Q.C.

January 2007

ANNEX 1 EXAMPLE 1

Prevention of Terrorism Act 2005, section 2

SCHEDULE

This schedule sets out the obligations imposed on: XXX

OBLIGATIONS

The following obligations form part of the Control Order and are imposed on you by virtue of section 1(3) of the Prevention of Terrorism Act 2005:

Upon service of the control order and thereafter for the duration of this control order:-

- (1) In order to secure compliance with the obligations imposed by the control order, you shall comply with such other prohibitions or restrictions on your movement as may be required by directions given in writing at the time of service of the control order by a police officer or other person authorised by the Secretary of State. Such prohibitions or restrictions shall cease to be effective 24 hours after the giving of such directions, or on earlier direction.
- (2) You shall remain or permit yourself to be taken and thereafter reside at XXX, and shall give the Home Office at least 7 days prior notice of any change of residence.
- (3) You must report in person to the local police station (the location of which shall be notified to you at the imposition of this order) each day at a time to be agreed with your contact officer.
- (4) You must surrender your passport, identity card or any other travel document to a police officer or persons authorised by the Secretary of State within 24 hours. You shall not apply for or have in your possession any passport, identity card, travel documents(s) or travel ticket which would enable you to travel outside the UK.
- (5) You shall be prohibited from entering or being present at any of the following:-
 - (a) any airport or sea port; or
 - (b) such part of a railway station that provides access to an international rail servicewithout the prior agreement of the Home Office.
- (6) You must permit entry to police officers and persons authorised by the Secretary of State, on production of identification, at any time to verify your presence at the residences and/or to ensure that you can comply and/or are complying with the

obligations imposed by this control order. Such monitoring may include but is not limited to:-

- (a) a search of the residences;
- (b) removal of any item to ensure compliance with the remainder of the obligations in this order; and
- (c) the taking of your photograph.

ANNEX 1 EXAMPLE 2

Prevention of Terrorism Act 2005, section 2

SCHEDULE

This schedule sets out the obligations imposed on: XXX

OBLIGATIONS

The following obligations form part of the Control Order and are imposed on you by virtue of section 1(3) of the Prevention of Terrorism Act 2005:

Upon service of the control order and thereafter for the duration of this control order:-

- (1) You shall permit yourself to be fitted with and shall thereafter at all times wear an electronic monitoring tag (“the tag”).
- (2) You shall permit yourself to be taken to and thereafter reside at XXX and, shall remain in the residence at all times save for a period of 10 hours between 8am and 6pm or as specified in the directions given in writing referred to at (6) below. “Residence”, in the case of a flat, encompasses only that flat and, in particular, does not include any communal area either inside or outside to which any person not within the residence would have unrestricted access. “Residence”, in the case of a house, encompasses only the house and does not include any outside space associated with it.
- (3) Each day, you must report to the monitoring company (as identified in the Notes to the Order) by telephone on the first occasion you leave the residence after a curfew period has ended and on the last occasion you return to it before a curfew period begins.
- (4) You shall not associate or communicate, either directly or indirectly, at any time or in any way, with any person notified to you by the Home Office and being the subject of a control order imposed under the Prevention of Terrorism Act 2005.
- (5) You must permit entry to police officers and persons authorised by the Secretary of State or by the monitoring company, on production of identification, at any time to verify your presence at the residence and/or to ensure that you can comply and are complying with the obligations imposed by this control order. Such monitoring may include but is not limited to:-

- (a) a search of the residence;
 - (b) removal of any item;
 - (c) inspection/modification or removal for inspection/modification of any article to ensure that it does not breach the obligations imposed by this control order;
 - (d) permitting the installation of such equipment as may be considered necessary to ensure compliance with the obligations imposed by this control order; and
 - (e) the taking of your photograph.
- (6) In order to secure compliance with the obligations imposed by the control order, you shall comply with such other prohibitions or restrictions on your movement as may be required by directions given in writing at the time of service of the control order by a police officer or other person authorised by the Secretary of State. Such prohibitions or restrictions shall cease to be effective 24 hours after the giving of such directions, or on earlier direction.
- (7) You shall not:-
- (a) bring or permit into the residence, or
 - (b) use or keep (whether in or outside the residence, whether directly or indirectly)

any communications equipment or equipment capable of connecting to the Internet or components thereof (including but not limited to mobile phones, fax machines, pagers, computers, public telephones and/or internet facilities), other than one fixed telephone line in the residence (other than the dedicated line maintained by the monitoring company).

The telephone must, on request, be delivered up to a person authorised by the Secretary of State for inspection and approval prior to it being permitted into or to remain in the residence.

It shall not be a breach to permit any person to bring into the residence a mobile phone belonging to them, provided that any such phone remains switched off at all times whilst in the residence.

For the avoidance of doubt:

- (i) you may not have or use any mobile phone;
- (ii) you may not permit whilst you are in the residence any other person to use a mobile phone in the residence, and

- (iii) you may not connect to or use by any means, directly or indirectly, the internet at any time.
- (8) You shall only attend one mosque of your choosing, subject to prior approval from the Home Office before your first visit.
- (9) You may not at any time leave the area marked on the attached map at Annex A (the width of the line itself is within the permitted area) without the consent of the Home Office. This area is bordered by xxx
- (10) You must notify the Home Office of any intended departure from the UK and notify it of the port of embarkation. You must also notify the Home Office if and when you intend to return to the UK and to report to the Home Office immediately upon arrival that you are or were subject to this control order. The requirement to report on arrival shall continue to apply whether or not this control order remains in force at the time of your return to the UK.
- (11) You shall not maintain or use more than one account. Such account must be held with a bank or other approved financial institution within the UK. The following information must be provided to a person authorised by the Secretary of State:
 - (a) details of all accounts held at the time of service of this control order, including any bank account in which you have an interest, or over which you have any element of control, within 2 days of such service;
 - (b) closing statements relating to any accounts additional to the one permitted account, within 14 days of service of this control order;
 - (c) details of a permitted account opened subsequent to the service of this control order, within 2 days of its opening;
 - (d) statements of the permitted account on a monthly basis, to be provided within 7 days of their receipt.
- (12) You shall not transfer any money, or send any documents or goods to a destination outside the UK (whether yourself or through an intermediary) without the prior agreement of the Home Office. For the purposes of this obligation, documents should not be taken to include personal letters written by you.
- (13) Within 24 hours of service of this order, you must:
 - (a) surrender any passport, identity card or any other travel document (other than any genuine passport issued by the [other nationality] authorities) to a police officer or person authorised by the Secretary of State, and

- (b) notify the Home Office of any [other nationality] passport you have in your possession or which is available for your use.

Furthermore, prior notification must be given to the Home Office before you may apply for or have in your possession any passport, identity card, travel document(s) or travel ticket which would enable you to travel outside the UK.

(14) You are prohibited from entering or being present at any of the following:

- (a) any airport or sea port; or
- (b) any part of a railway station that provides access to an international rail service

without prior permission from the Home Office.

(16) You shall provide the Home Office with details of any employment (including the name and address of the employer, the nature of the work, and the date when the employment began) within seven days of commencing such employment. You must also inform the Home Office within seven days of any change in employer.

ANNEX 1 EXAMPLE 3

Prevention of Terrorism Act 2005, section 2

SCHEDULE

This schedule sets out the obligations imposed on: xxxx

OBLIGATIONS

The following obligations form part of the Control Order and are imposed on you by virtue of section 1(3) of the Prevention of Terrorism Act 2005:

Upon service of the control order and thereafter for the duration of this control order:-

- (1) You shall permit yourself to be fitted with and shall thereafter at all times wear an electronic monitoring tag (“the tag”).
- (2) You shall reside at xxxx (“the residence”) and, shall remain in the residence at all times save for a period of 10 hours between 8am and 6pm, or as specified in the directions given in writing referred to at (7) below. “Residence” in the case of a flat encompasses only that flat and, in particular, does not include any communal area either inside or outside to which any person not within the residence would have unrestricted access. “Residence”, in the case of a house, encompasses only the house and does not include any outside space associated with it.
- (3) Each day, you must report to the monitoring company (as identified in the Notes to the Order) by telephone on the first occasion you leave the residence after a curfew period has ended and on the last occasion you return to it before a curfew period begins.
- (4) You shall not associate or communicate, directly or indirectly, at any time or in any way with the following individuals:

xxxx
- (5) You shall not associate or communicate, either directly or indirectly, at any time or in any way, with any person notified to you by the Home Office and being the subject of a control order imposed under the Prevention of Terrorism Act 2005.
- (6) You must permit entry to police officers and persons authorised by the Secretary of State or by the monitoring company, on production of identification, at any time to verify your presence at the residence and/or to ensure that you can comply

and/or is complying with the obligations imposed by this control order. Such monitoring may include but is not limited to: -

- (a) a search of the residence;
 - (b) removal of any item;
 - (c) inspection/modification or removal for inspection/modification of any article to ensure that it does not breach the obligations imposed by this control order;
 - (d) permitting the installation of such equipment as may be considered necessary to ensure compliance with the obligations imposed by this control order; and
 - (e) the taking of your photograph.
- (7) In order to secure compliance with the obligations imposed by the control order, you shall comply with such other prohibitions or restrictions on your movement as may be required by directions given in writing at the time of service of the control order by a police officer or other person authorised by the Secretary of State. Such prohibitions or restrictions shall cease to be effective 24 hours after the giving of such directions, or on earlier direction.
- (8) You shall not: -
- (a) bring or permit into the residence, or
 - (b) use or keep (whether in or outside the residence, whether directly or indirectly)

any communications equipment or equipment capable of connecting to the Internet or components thereof (including but not limited to mobile phones, fax machines, pagers, computers, public telephones and/or internet facilities), other than one fixed telephone line in the residence (other than the dedicated line maintained by the monitoring company).

The telephone must, on request, be delivered up to a person authorised by the Secretary of State for inspection and approval prior to it being permitted into or to remain in the residence.

It shall not be a breach to permit any person to bring into the residence a mobile phone belonging to them, provided that any such phone remains switched off at all times whilst in the residence.

For the avoidance of doubt

- (aa) you may not have or use any mobile phone;
 - (bb) you may not permit whilst you are in the residence any other person to use a mobile phone in the residence, and
 - (cc) you may not connect to or use by any means, directly or indirectly, the internet at any time.
- (9) You may only attend one mosque of your choosing, subject to prior approval from the Home Office before your first visit.
- (10) You may not at any time leave the permitted area marked on the attached map at Annex A (the width of the line itself is within the permitted area) without the consent of the Home Office. This area is bordered by xxx
- (11) You must notify the Home Office of any intended departure from the UK and notify it of the port of embarkation and disembarkation. You must also notify the Home Office if and when you intend to return to the UK and to report to the Home Office immediately upon arrival that you are or were subject to this control order. The requirement to report on arrival shall continue to apply whether or not this control order remains in force at the time of your return to the UK.
- (12) You shall not maintain or use more than one account. Such account must be held with a bank or other approved financial institution within the UK. The following information must be provided to a person authorised by the Secretary of State:
- (a) details of all accounts held at the time of service of this control order, including any bank account in which you have an interest, or over which you have any element of control, within 2 days of such service;
 - (b) closing statements relating to any accounts additional to the one permitted account, within 14 days of service of this control order;
 - (c) details of a permitted account opened subsequent to the service of this control order, within 2 days of its opening;
 - (d) statements of the permitted account on a monthly basis, to be provided within 7 days of their receipt.
- (13) You shall not transfer any money, or send any documents or goods to a destination outside the UK (whether yourself or through an intermediary) without prior agreement of the Home Office. For the purposes of this obligation, documents should not be taken to include personal letters written by you.

(14) Within 24 hours of service of this order, you must:

- (a) surrender any passport, identity card or any other travel document (other than any genuine passport issued by the [other nationality] authorities) to a police officer or person authorised by the Secretary of State, and
- (b) notify the Home Office of any [other nationality] passport you have in your possession or which is available for your use.

Furthermore, prior notification must be given to the Home Office before you may apply for or have in your possession any passport, identity card, travel document(s) or travel ticket which would enable you to travel outside the UK.

(15) You are prohibited from entering or being present at any of the following:

- (a) any airport or sea port; or
- (b) such part of a railway station as provides access to an international rail service

without the prior agreement of the Home Office.

(16) You shall provide the Home Office with details of any employment (including the name and address of the employer, the nature of the work, and the date when the employment began) within seven days of commencing such employment. You must also inform the Home Office within seven days of any change in employer.

ANNEX 2

Report in connection with the Home Secretary's quarterly reports to parliament on control orders

prepared by

Lord Carlile of Berriew Q.C., Independent Reviewer of Terrorism Legislation

1. The *Prevention of Terrorism Act 2005*, section 14, provides -

14 Reporting and review

(1) *As soon as reasonably practicable after the end of every relevant 3 month period, the Secretary of State must-*

(a) *prepare a report about his exercise of the control order powers during that period; and*

(b) *lay a copy of that report before Parliament.*

(2) *The Secretary of State must also appoint a person to review the operation of this Act.*

(3) *As soon as reasonably practicable after the end of-*

(a) *the period of 9 months beginning with the day on which this Act is passed, and*

(b) *every 12 month period which ends with the first or a subsequent anniversary of the end of the period mentioned in the preceding paragraph and is a period during the whole or a part of which sections 1 to 9 of this Act were in force,*

the person so appointed must carry out a review of the operation of this Act during that period.

(4) *The person who conducts a review under this section must send the Secretary of State a report on its outcome as soon as reasonably practicable after completing the review.*

(5) *That report must also contain the opinion of the person making it on-*

(a) *the implications for the operation of this Act of any proposal made by*

the Secretary of State for the amendment of the law relating to terrorism; and

(b) the extent (if any) to which the Secretary of State has made use of his power by virtue of section 3(1)(b) to make non-derogating control orders in urgent cases without the permission of the court.

(6) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.

(7) The Secretary of State may pay the expenses of a person appointed to carry out a review and may also pay him such allowances as the Secretary of State determines.

(8) In this section-

“control order powers” means-

(a) the powers of the Secretary of State under this Act to make, renew, modify and revoke control orders; and

(b) his powers to apply to the court for the making, renewal, revocation or modification of derogating control orders;

“relevant 3 month period” means-

(a) the period of 3 months beginning with the passing of this Act;

(b) a period of 3 months beginning with a time which-

(i) is the beginning of a period for which sections 1 to 9 are revived by an order under section 13; and

(ii) falls more than 3 months after the time when those sections were last in force before being revived;

(c) a 3 month period which begins with the end of a previous relevant 3 month period and is a period during the whole or a part of which those sections are in force.

2. Currently I am the person appointed to carry out the statutory reviews referred to in that provision.

3. On the 18th October 2006 the Home Secretary wrote to me to ask if, in my annual review for the year 2006, I would pay particular attention to the way in which he meets his obligations under *section 14(1)* to produce a report for Parliament each quarter on the exercise of the powers under the Act. Copies of the Home Secretary's letter and of my reply are attached as Annex A to this report.

4. The Home Secretary's last quarterly report to parliament was laid during Recess on the 11th September. A copy is attached as Annex B. It contained accurate statistics on the number of control orders made and in force. It was in the same format as previous quarterly reports.
5. Given that the next quarterly report is due in early December, I have decided that it would be more helpful if I were to produce this early document in full response to the issues raised with me, rather than wait for the later production of my complete *section 14* report in early 2007. This document should be read as a part of my review of the operation of the control orders system in 2006.
6. All the control orders made so far are non-derogating orders. What follows should be read as only applicable to orders not involving derogation from international treaty obligations, particularly the *European Convention on Human Rights*.
7. On the 31st October 2006 there were 15 control orders in force. On an ongoing basis, I have been reviewing the making and operation of every control order. I have had access to all relevant documents, including closed material. I have reviewed the making and operation of the orders, including their progress through the High Court, and the nature and consequences of alleged breaches.
8. On the 31st October 2006, 8 of the controlled persons resided in the Metropolitan Police area. The remaining 7 lived in 5 different police areas in England, i.e. 2 within a single police force and each of the others in a separate police area. Thus there were 6 police forces in England with controlled persons living within their force areas. Some live in places where they might be identified relatively easily if their names or appearances were known publicly.
9. Each controlled person's case comes before the High Court once the Secretary of State determines that a control order should be made. In almost every case the Court makes an order for the controlled person's anonymity. This is consistent with the practice in immigration cases, in which all appeals are anonymised. Until relatively recently almost all those subject to control orders were not UK nationals, and therefore were subject to immigration controls.
10. Anonymity is a proper protection for those placed under orders for reasons including -
 - (a) they are not accused of any criminal offence as a result of the order being made: publicity of names and any other details might create the contrary impression and cause further disadvantage in their daily lives;

- (b) identification of them as suspected terrorists might lead particularly to difficulties in relation to their homes and families, if the local community could identify their whereabouts;
 - (c) the potential for prejudice if any future criminal proceedings were brought against the controlled person.
11. Anonymity can be of assistance to the authorities for reasons including -
- (a) local policing resources can be used with less disruption (e.g. for protection of the controlled persons and their homes) if details including addresses are not known publicly;
 - (b) the detection of terrorists not subject to control orders may in some cases be assisted if others are unaware of the existence in relation to a particular person of a control order;
 - (c) other operational reasons.
12. I have received direct representations concerning anonymity. All have been in favour of its retention. However, I am well aware that publicized breaches have frustrated the media, who wished to publish names of which they were aware. They could not do so, as publication would have been in breach of court orders. As a general principle, the press should be free to publish absent a clear determination that it is in the public interest that they should not.
13. I have reviewed each alleged breach of control orders, using information from the police and the Home Office. These have been numerous, though in scale most have been minor. They have included lateness in reporting to police stations, minor tampering with tags, unauthorized meetings and visitors. There have been instances of unauthorized possession of SIM cards and, occasionally, mobile telephones.
14. Adjustments have been made on the individual merits to control order obligations, to reflect special requests and individual circumstances. These have included changes to facilitate religious observation.
15. Where there have been more significant alleged breaches of conditions, charges have been brought under the breach provisions of the 2005 Act.
16. In one instance the charge was not proceeded with on an assessment of the merits following an alteration in control order conditions as a result of High Court proceedings.
17. Another controlled person was charged with 7 breach offences. After a period in custody he was granted bail. His control order was quashed following proceedings

in the High Court and Court of Appeal. A new control order was to be served, but before service he disappeared and remains at large. As it has not been served, he is not one of the 15 men currently subject to control orders. If apprehended, there cannot be a prosecution for any breaches at the present time since the previous control order was quashed by the Court of Appeal.

18. In another case failures to report to the police (as required by the Order) led to 3 breach charges. Some time after charge, the person concerned was sectioned under the *Mental Health Act 1983*. After an altercation with another patient he absconded through a window from a semi-secure hospital ward. He remains at large.
19. In another case the controlled person was arrested for breach offences after numerous alleged infractions including failures to report. The CPS will advise shortly whether he should be prosecuted.
20. There may be charges brought for breaches in other cases. These matters are considered on a continuing basis.
21. Having considered the facts in each case, I am satisfied that the two disappearances referred to above present little direct risk to public safety in the UK at the present time. The circumstances of the two cases are different, but in each case it is unlikely on the facts that active terrorists would wish their presence or involvement at the present time in any activity or planning, despite the knowledge and connections which had led to the control orders made against them.
22. In my view the grounds for continuing anonymity in the case of the two disappearances remain as good as when made, possibly better. Again on the facts of the cases, it seems to me that the authorities may well be more likely to ascertain the whereabouts of the two men without publicity. This may change, and may have to be determined eventually by the Courts. As independent reviewer I agree with the Home Secretary's decision, based on the operational advice of the National Co-ordinator of Terrorist Investigations, that anonymity should remain for the present at least.
23. However, cases might arise in the future in which the public interest might require the open circulation of the name, description and details of a controlled person – whether it be because they were suspected of dangerousness whilst at large, or for their own protection. That should be for operational judgment in each case. If the legislation needs to be amended so that these matters are clear, it might usefully be included in a forthcoming Bill.

24. As a connected observation, though strictly outside the Home Secretary's letter to me of the 18th October 2006, it may well be that *section 3* and *section 15(3)* of the 2005 Act would benefit from amendment to enable the Court to make relevant amendments to non-derogating control orders so that an obviously flawed obligation (e.g. an over-long curfew) need not be quashed but may be altered. If there remains any doubt about this, a clarifying legislative amendment would be a matter of common sense and should be made.
25. Where litigation is continuing in the High Court and on appeal in connection with control orders, judgments will almost always be given in open court. These too are currently publicized without identification of the controlled person. I can see no difference in principle between these and breach cases. In giving this view, I have taken into account recent representations by the media before the Courts.
26. The above comments are all germane to the issue of the content of the Home Secretary's quarterly reports to Parliament. In my view there would be benefit if they were somewhat more informative than the statistical but otherwise minimal formula currently in use. Indeed, a formulaic approach is undesirable. As much information as is sensible given the nature of control orders, and national security, should be given.
27. Without prescribing a formula, I suggest that the quarterly reports should include -
- (i) the number of control orders in existence at the time of the report;
 - (ii) how many of the controlled persons are UK/non-UK nationals;
 - (iii) the number of control orders that have ceased to have effect since the last report;
 - (iv) the number of new orders since the last report;
 - (v) how many apply to males and females respectively;
 - (vi) how many are resident in the Metropolitan Police area and other police areas (taken as a whole) respectively;
 - (vii) how many have been charged for breach of control order obligations;
 - (viii) a general description of the level of compliance with conditions, including some description of the nature of breaches, perhaps along the lines of the information given in paragraphs 13 and 16-20 above;
 - (ix) any material decisions about anonymity;
 - (x) a short assessment of the continuing value or otherwise of control orders;

- (xi) reassurance that each control order is reviewed on a continuous and routine basis by officials and (when appropriate) Ministers, to ensure that their continuance and conditions remain necessary in the public interest.

28. I trust that the above answers the questions raised with me.

Alex Carlile

Lord Carlile of Berriew Q.C.

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November 2006

ANNEX A:

**TEXT OF THE EXCHANGE OF CORRESPONDENCE BETWEEN THE
HOME SECRETARY AND LORD CARLILE**

HOME SECRETARY
2 Marsham Street, London SW1P 4DF
www.homeoffice.gov.uk



Lord Carlile of Berriew Q.C.
9-12 Bell Yard
London
WC2A 2JR

18 October 2006

**PREVENTION OF TERRORISM ACT 2005: OBLIGATIONS FOR
THE QUARTERLY REPORT TO PARLIAMENT UNDER SECTION
14(1)**

I am writing to ask if, in your annual review of the operation of the Prevention of Terrorism Act 2005, you could pay particular attention to the way in which I meet my obligations under Section 14(1) of the 2005 Act to produce a report for Parliament each quarter on the exercise of the powers under the Act.

We have so far produced a short Ministerial Statement every quarter in a standard format to meet this requirement. This contains statistics on the number of control orders made, modified, renewed and in operation. The most recent Ministerial Statement was laid during Recess on 11 September and was in the same format as previously. This contained accurate statistics on the number of orders made and in force.

However, as you will be aware, there has been some concern that the Ministerial Statement did not highlight sufficiently the situation as regards one of the individuals whose case was dealt with in the Court of Appeal judgement on 1 August. The second case referred to in the media today occurred after the Ministerial Statement on 11 September and therefore falls outside the period covered by the report in question.

I attach great importance to making sure that we strike the right balance between being transparent with Parliament and police operational priorities.

I would therefore be grateful if you could consider whether the current approach is appropriate or could be improved.

Your annual report also addresses the issue of breaches of control orders. I assume therefore that you will be reporting on both cases currently in the media as well as other breaches.

In view of the interest in Parliament about this issue I am copying this letter to the Speaker and placing a copy in the libraries of both Houses.

Finally, I look forward to meeting you soon to discuss your role as the Independent Reviewer of counter terrorism legislation, including the 2005 Act.

JOHN REID

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19th October 2006.

The Rt Hon Dr John Reid M.P.
Home Secretary
2 Marsham Street
London SW1P 4DF

Dear Home Secretary

Thank you for your letter of the 18th October.

I shall be happy to pay particular attention, in my forthcoming review of the operation of the Prevention of Terrorism Act 2005, to the way in which you meet your obligations under section 14(1) of that Act in relation to reports to Parliament.

It might be helpful if I were to provide a preliminary view separate from the report well before the next section 14(1) report is due in mid December. I shall endeavour to do this by letter.

My next report will address the issue of breaches of control orders, and I shall deal with both of the cases publicised recently. Of course, I was already aware of the earlier case prior to that publicity.

Yours ever

Alex Carlile

ANNEX B

Written Ministerial Statement of 11 September 2006

HOME DEPARTMENT

Control Order Powers

The Minister for Policing, Security and Community Safety (Mr. Tony McNulty):

Section 14(1) of the Prevention of Terrorism Act 2005 (the 2005 Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of the control order powers during that period.

During the period 11 June to 10 September 2006, nine orders were made with the permission of the court under section 3(1)(a) of the 2005 Act—one in respect of a British citizen on 19 June 2006, one in respect of a foreign national on 31 July 2006, six in respect of foreign nationals on 1 August 2006 and one in respect of a British citizen on 5 September 2006.

The Secretary of State has also renewed one control order in accordance with Section 2 (4) (b) of the 2005 Act on 30 August 2006.

There are 15 control orders currently in force, six of which are in respect of British citizens.

During the period two requests to modify a control order obligation were agreed, and seven requests to modify a control order obligation were refused. A right of appeal exists in section 10(3) of the 2005 Act against a decision by the Secretary of State not to modify an obligation contained in a control order.

