



House of Lords
House of Commons
Joint Committee on
Human Rights

**Counter-Terrorism Policy
and Human Rights: Draft
Prevention of Terrorism Act
2005 (Continuance in force
of sections 1 to 9) Order
2006**

Twelfth Report of Session 2005–06



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*Report, together with formal minutes and
appendices*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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Summary

In this report, the Committee's second report in its ongoing inquiry into counter-terrorism policy and human rights, the Committee considers the human rights implications of the operation of the control orders regime under the Prevention of Terrorism Act 2005 (PoTA 2005), in the context of the Home Secretary's decision to lay before Parliament a draft Order which, if approved by both Houses, will continue the regime in force for a further year from 11 March 2006. The Committee's report is published primarily to inform both Houses of Parliament in time for the debates to be held on the draft Order on 15 February 2006. The Committee takes into account the report on the operation of the Act by the independent reviewer, Lord Carlile of Berriew QC, as well as written evidence it has received.

In the Introduction to the Report, the Committee states that the case for consolidating counter-terrorism legislation is potentially strong, and records its regret that the Government's decision to bring forward a renewal order, rather than a bill, has the effect of significantly reducing the opportunity for parliamentary scrutiny and debate of the control orders regime (paragraph 12). The Committee also expresses its regret that the laying of the draft Order on 2 February, with debates in both Houses scheduled for 15 February, severely restricts the possibility for it and other parliamentary committees to report in a fully considered way to both Houses (paragraph 14).

The five main human rights issues considered by the Committee in its report are as follows:

(1) Whether non-derogating control orders are being operated in practice in a way which amounts to a deprivation of liberty, and therefore require derogation from Article 5(1) ECHR. The Committee agrees with the view of its predecessor Committee that, in principle, civil restriction orders imposing preventive measures, after a proper judicial process, are capable of being human rights compatible (paragraph 36). It expresses its concern, however, as to whether the PoTA 2005 provides sufficient clarity about the distinction between derogating and non-derogating control orders to prevent the making in practice of control orders purporting to be non-derogating orders which in fact amount to a deprivation of liberty (paragraph 37). Noting from Lord Carlile's report that most of the control orders so far issued have contained the list of obligations set out in the proforma schedule annexed to his report, the Committee expresses its view that those obligations are so restrictive of liberty as to amount to a deprivation of liberty for the purposes of Article 5(1) ECHR, and that the control order legislation itself is such as to make it likely that the power to impose non-derogating control orders will be exercised in a way which is incompatible with Article 5(1) in the absence of a derogation from that Article (paragraph 38). The Committee seriously questions the proposal to renew the PoTA 2005 without Parliament's having had a proper opportunity to debate whether a derogation to permit such deprivations of liberty would be justified as being strictly required by the exigencies of the situation (paragraph 42).

(2) Whether the procedural protections are compatible with Article 5(4) ECHR (right of access to a court to determine the lawfulness of detention) and the right to a fair trial in determination of a criminal charge and to a fair hearing in the determination of civil rights and obligations under Article 6(1) ECHR, and with the common law right to a fair trial and a fair hearing. The Committee concludes that, in relation to derogating control orders, the full right to criminal due process under Article 6(1) ECHR applies (paragraph 49). The

Committee also concludes that, in relation to at least some cases of non-derogating control orders, including those identified by Lord Carlile as having been used in most cases to date, the full set of Article 6(1) guarantees are required because the control order proceedings amount to the determination of a criminal charge within the meaning of that Article (paragraph 52). Even if “civil” rather than “criminal” in nature, the Committee considers that proceedings concerning such orders will be regarded as sufficiently close in nature to criminal proceedings to warrant criminal procedural protections (paragraph 53). In this context the Committee considers the compatibility of the control orders regime with these standards of due process. On the question of the standard of proof, the Committee concludes that it is set at too low a level in relation to both types of control order. In the case of non-derogating control orders, the Committee concludes that the standard of proof should be the balance of probabilities, not “reasonable suspicion”, and in the case of derogating control orders it concludes that the standard of proof should be beyond reasonable doubt, not the balance of probabilities (paragraph 66). In respect of the degree of judicial control over the control orders process, the Committee concludes that both Article 6 ECHR and constitutional traditions of due process and separation of powers properly require that non-derogating control orders should initially be made not by the executive but by the judiciary (paragraph 68).

Under PoTA 2005, the Civil Procedure (Amendment No. 2) Rules 2005 have been made introducing rules of court governing control order proceedings. These rules provide that courts must ensure that information is not disclosed contrary to the public interest, and provide for hearings in private, excluding the person against whom a control order is being sought and his legal representative, and for the appointment of a special advocate to represent the interests of the excluded party. The Committee says it finds it difficult to see how a procedure in which a person can be deprived of their liberty without having any opportunity to rebut the basis of the allegations against them can be said to be compatible with the right to a fair trial in Article 6(1), the equality of arms inherent in that guarantee, the right of access to a court to contest the lawfulness of their detention in Article 5(4), the presumption of innocence in Article 6(2), the right to examine witnesses in Article 6(3), or the most basic principles of a fair hearing and due process long recognised as fundamental by English law (paragraph 76). The Committee also points out that the European Court of Human Rights has expressly left open the question of whether the UK’s special advocate system is compatible with the Convention’s guarantees of a fair hearing (paragraph 77).

The Committee’s overall conclusion on this matter is that it has significant concerns about whether, in the absence of sufficient safeguards, this regime of control orders is compatible with the rule of law and with well-established principles governing the separation of powers between the executive and the judiciary. It also expresses its doubt as to whether the continuation in force of the control orders regime is compatible with Articles 5(4) and 6(1) ECHR, and says that on this ground alone it seriously questions the renewal of the Act without Parliament’s first debating and deciding whether the special exigencies of the current security situation justify the extraordinary exceptions to traditional English principles of due process and what amounts to a de facto derogation from Articles 5(4) and 6(1) ECHR. The Committee also says it is not in a position to express a view at this stage on whether such exceptions and derogations are justified (paragraph 78).

(3) Whether individuals who are the subject of control orders are being subjected to inhuman and degrading treatment contrary to Article 3 ECHR: The Committee notes that a delegation of the Council of Europe's Committee for the Prevention of Torture (CPT) visited the UK in July 2005 and again in November 2005 and, as part of these visits, met persons served with control orders. The Committee says that it considers that the Government should inform Parliament whether the CPT delegation made any immediate observations at the end of their visits in July and November 2005, whether the Government has received any report or other communication from the CPT arising out of those visits, and if so whether it will make any such observations, reports or communications available to Parliament to inform the debate on renewal. In the Committee's view it ought to do so where it is asking parliament to renew a legislative regime the operation of which has attracted the interest of the Committee (paragraph 83). The Committee also says that in light of the findings of the CPT arising from its visit in March 2004 that some detainees under the Anti-Terrorism Crime and Security Act 2001 were suffering inhuman and degrading treatment, and the evidence the Committee has received about the impact of control orders on the mental health of those subject to them, that control orders carry a very high risk of subjecting those who are placed under them to inhuman and degrading treatment contrary to article 3 ECHR (paragraph 85).

(4) Whether the control orders regime has a disproportionate impact on the rights of family members under Articles 8, 10 and 11 ECHR: The Committee draws to the attention of both Houses the evidence it has received suggesting that in practice control orders are unjustifiably interfering with the human rights of other members of the family of controlled persons (paragraph 87).

(5) Whether the control orders regime is being applied disproportionately to foreign nationals, in breach of Article 14 ECHR in conjunction with Articles 8, 9, 10, 11 and Article 1 Protocol 1: Of the 18 control orders which have been issued so far, only one has been issued against a UK national. The Committee says that this raises a question of possible discrimination in the control orders regime, potentially in breach of Article 14 ECHR (prohibition of discrimination) in conjunction with Articles 5, 6, 8, 9, 10, 11 and Article 1 of Protocol 1. This could be justified if the material available to the Home Secretary showed that there were significantly more overseas than UK national suspects, or that the control order regime was even-handedly applied on the same level of proof against all suspects irrespective of nationality. The Committee states that it cannot express a view on this as it is not privy to the material before the Secretary of State (paragraph 88).

The Committee's overall conclusion is set out in paragraph 89 of its report, as follows:

“In light of the concerns expressed in this Report, we seriously question renewal without a proper opportunity for a parliamentary debate on whether a derogation from Articles 5(1), 5(4) and 6(1) ECHR is justifiable, that is, whether the extraordinary measures in the Prevention of Terrorism Act 2005, which the Government seeks to continue in force, are strictly required by the exigencies of the situation. It would be premature for us to express a view on that question. We merely conclude at this stage that we cannot endorse a renewal without a derogation and believe that Parliament should therefore be given an opportunity to debate and decide that question.”

Introduction

Background

1. On 2 February 2006 the Home Secretary laid before both Houses the draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006.
2. The draft Order provides for the continuation of the powers to make a control order against an individual where the Secretary of State has reasonable grounds for suspecting that individual is or has been involved in terrorism-related activity and it is necessary to impose obligations on that individual for purposes connected with protecting members of the public from a risk of terrorism, from 11 March 2006 (when they would otherwise expire) until the end of 10 March 2007.
3. The Home Secretary has made a statement of compatibility in respect of the draft Order: “In my view the provisions of the Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order are compatible with the Convention rights.”¹
4. The draft Order is scheduled to be debated in both Houses on 15 February 2006.

Parliamentary scrutiny of the human rights compatibility of control orders

5. The Prevention of Terrorism Act 2005 was passed at considerable speed by both Houses, passing through all of its parliamentary stages in just two weeks between 23 February 2005 and 10 March 2005. Our predecessor Committee published two short reports on the Bill, one a Preliminary Report identifying the main human rights issues raised by the Bill,² the other dealing with the human rights implications of some of the most significant Government amendments to the Bill.³ In the latter report the Committee recorded its “regret that the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament”.⁴
6. In response to anxiety strongly expressed in both Houses about the lack of opportunity for proper parliamentary scrutiny of a measure with such significant human rights implications, a number of safeguards were inserted into the Bill at a very late stage to ensure that Parliament would soon have another opportunity to scrutinise the measures in light of their operation and with more parliamentary time for reflection and deliberation.
7. The main safeguards inserted to ensure an early opportunity for further parliamentary scrutiny are contained in sections 13 and 14 of the 2005 Act. Section 13(1) provides that sections 1 to 9 of the Act, which provide for the making of control orders, expire one year after the Act comes into force, unless the Secretary of State exercises his power to extend

1 Explanatory Memorandum, para. 6

2 Ninth Report of Session 2004–05, *Prevention of Terrorism Bill: Preliminary Report*, HL Paper 61, HC 389

3 Tenth Report of Session 2004–05, *Prevention of Terrorism Bill*, HL Paper 68, HC 334

4 *ibid.*, para. 1

the life of the Act for a further year by order.⁵ Before the Secretary of State can make such an order, a draft of it must be laid before Parliament and approved by a resolution of each House.⁶

8. As additional safeguards, and in order to ensure that Parliament is kept properly informed, the Secretary of State is required by the Act to report to Parliament every 3 months about his exercise of the control order powers,⁷ and to appoint a person to review the operation of the Act.⁸ The reviewer must carry out that review as soon as reasonably practicable after the Act has been in force for 9 months and,⁹ as soon as reasonably practicable after completing the review, report to the Secretary of State¹⁰ who must lay a copy of it before Parliament.¹¹ The Home Secretary appointed Lord Carlile of Berriew Q.C. as the statutory reviewer of the operation of the Act. His report was laid before Parliament by the Secretary of State on 2 February 2006.¹²

9. During the final stages of the parliamentary debate on the Prevention of Terrorism Act 2005, the Home Secretary made a commitment to timetable further counter-terrorism legislation for spring 2006 so that Lord Carlile's report would be available to inform Parliament when it considered any amendments to the control order legislation. In July 2005, in the wake of the terrorist attacks in London, the Home Secretary announced that, with cross-party agreement, he would now be introducing the Government's counter-terrorism bill containing new terrorism offences in October, and returning to the issue of control orders in the spring after Lord Carlile had reported.

10. In his statement to the House on 2 February 2006, the Home Secretary announced that he has decided not to introduce further legislation on terrorism now, but to exercise his power to renew the Prevention of Terrorism Act 2005 for another year, pending the publication in the first half of 2007 of a draft bill, for pre-legislative scrutiny, consolidating all of the UK's counter-terrorism legislation.¹³

11. His reasons for this decision were that it would be premature to reach final conclusions on the operation of the control orders regime given that the legal challenges to the control orders that had so far been made had not yet been completed; that before bringing forward new counter-terrorism legislation he wanted to be able to take into account three pieces of work-in-progress (Lord Carlile's review of the definition of terrorism, his review of the operation of the new Terrorism Act once passed, and the work on the possible use of intercept in court); and that a new consolidating Act was required.

5 Section 13(2)(c)

6 Section 13(4)

7 Section 14(1). The Secretary of State has made three such reports: HC Deb., 16 June 2005, cols. 23–24WS (11 March–11 June 2005); HC Deb., 10 October 2005, cols. 9–10WS (11 June–10 September 2005); HC Deb., 12 December 2005, cols. 131–132WS (11 September–10 December 2005).

8 Section 14(2)

9 Section 14(3)

10 Section 14(4)

11 Section 14(6)

12 *First Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006)

13 HC Deb., 2 February 2006, cols. 478–9

12. **The case for a consolidating Act is potentially strong and we will consider it as a relevant possibility in our continuing inquiry into counter-terrorism policy. However, the effect of the Home Secretary exercising his power to renew the Prevention of Terrorism Act, rather than to bring forward a Bill, is significantly to reduce the opportunity for parliamentary scrutiny and debate of the control orders regime. In view of the very considerable human rights implications of the control orders regime and the very limited opportunity for proper scrutiny during passage of the 2005 Act, we regret this. As the European Commissioner of Human Rights recently observed, “it is essential ... that the legislation providing for such exceptional measures be subject to regular parliamentary review”.¹⁴ Instead of detailed debate and scrutiny of a Bill there will now be a single debate in each House with no opportunity to amend the legislation to reflect any concerns about its actual operation, including its compatibility with human rights standards. We draw this matter to the attention of each House.**

13. We also regret the limited time which has been made available for us and any other interested committees to report to Parliament in the light of Lord Carlile’s report to help inform parliamentary debate about renewal. Under the terms of the Act Lord Carlile was required to carry out his review of its operation as soon as reasonably practicable after 11 December 2005. We wrote to the Home Secretary on 21 December 2005 informing him that we intended to examine with care any conclusions reached by Lord Carlile in his forthcoming report and to report to both Houses our views on the human rights implications of any renewal orders he may lay before Parliament on the expiry in March of sections 1 to 9 of the Act.¹⁵ We asked the Home Secretary to give us, and Parliament as a whole, the earliest possible indication of his intentions once he had taken Lord Carlile’s report into account. The Home Secretary’s Private Secretary responded by letter dated 4 January 2006, saying that it was very helpful to have an advance indication of the Committee’s intentions, and that he would try to update the Committee on the Government’s intentions as soon as they were in a position to do so.¹⁶ Nothing further was heard by us from the Home Office until a letter dated 2 February 2006 indicating that the Home Secretary would that day be laying the draft order to renew the legislation, together with Lord Carlile’s report, and that the first renewal debate was likely to be scheduled for the week beginning 13 February.¹⁷

14. **Laying the renewal order and reviewer’s report on 2 February and scheduling the renewal debate in both Houses for 15 February severely restricts the possibility for committees such as ours to discharge our responsibility to scrutinise and report in a fully considered way to both Houses. Indeed Lord Carlile in his report notes our plans to report to Parliament on the human rights implications of any renewal order and sets out points which we might consider, so we find this limited opportunity particularly unfortunate in light of the very limited opportunity for proper scrutiny when the Act was first passed in 2005, and in light of the exchange of correspondence showing that the Home Secretary was aware of our intention to report. We draw this matter to the attention of each House.**

14 Report by Mr Alvaro Gil-Robles, European Commissioner for Human Rights, CommDH (2005) 6, 8 June 2005

15 Appendix 1

16 Appendix 2

17 Appendix 3

Evidence

15. On 17 January 2006, in anticipation of the expiry of the 2005 Act and the publication of Lord Carlile’s report, we issued a call for written evidence on the human rights implications of the control orders system since it came into effect, to be submitted by 3 February 2006, and indicated our intention to report to Parliament on the human rights implications of any proposal to renew the control orders regime.

16. We have received written evidence from a number of organisations and individuals: the Campaign Against Criminalising Communities (“CAMPACC”), Scotland Against Criminalising Communities (“SACC”), Peace and Justice in East London, the Law Society, JUSTICE, Liberty and Natalia Garcia of Tyndallwoods (solicitors). This evidence is published in the Appendices to this Report. We have also received evidence relevant to the renewal of the 2005 Act in response to our earlier call for evidence in connection with our wider inquiry into counter terrorism policy and human rights. That evidence was published as a separate volume as part of our earlier report on the Terrorism Bill and related matters.¹⁸ We are grateful to all those who have helped us in this aspect of our inquiry.

17. The Home Office indicated in its letter of 2 February 2006 that the Home Secretary does not plan to provide any further evidence to the Committee in connection with its inquiry into control orders at this stage, over and above the three monthly statements that he has already provided to Parliament on the operation of his powers under the 2005 Act.¹⁹

18. Some of the evidence we have received includes detailed and disturbing accounts of the impact of control orders on the lives of particular individuals who are the subject of such orders. Our remit excludes consideration of individual cases and we have therefore taken this evidence into account to the extent that it demonstrates systemic features of the control orders regime which are relevant to assessing the human rights compatibility of the legal framework as a whole.

Lord Carlile’s Report

19. Lord Carlile’s report indicates that by the end of 2005 18 control orders had been made, of which 9 were still subsisting. One of those related to a UK national. Of the former Belmarsh detainees, 9 had their control orders revoked in August 2005 when they were served with notice of intention to deport. Four of those 9 have been released on Immigration Act bail. Two of the original detainees remain on control orders.

20. Lord Carlile reports that “in practical terms control orders have been an effective protection for national security”.²⁰ He reports that he has considered all of the material available to the Home Secretary and would have reached the same decision as the Secretary of State in each case in which a control order has been made, and that the Secretary of State has acted appropriately in relation to the use of his power to make urgent non-derogating

¹⁸ Third Report of this Session, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, Vol. II, HL Paper 75-II, HC 561-II

¹⁹ Appendix 3

²⁰ Carlile Report, op. cit., para. 29

orders.²¹ He finds that the quality of preparation by officials and control authorities is extremely high.²² He concludes that “As a last resort (only), in my view 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.”²³

21. Lord Carlile makes two main recommendations. First, he urges that in each case the individual risks are examined closely, and the minimum obligations consistent with public safety imposed. To that end, he recommends 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 controlled person, so as to reduce them to the minimum consistent with public safety.²⁴ Second, he recommends that the letters provided by chief officers of police should give clear reasons for their conclusion that there is not evidence available that could realistically be used for the purposes of a terrorism prosecution, and that such letters should be in terms disclosable to the controlled person, with an additional closed version if necessary which should be disclosed to the court reviewing the control order.²⁵ **We endorse Lord Carlile’s recommendations.**

The Home Secretary’s response

22. The Home Secretary told the House of Commons that he believes that Lord Carlile’s report “endorses the current operation of the control order system.” He indicated that in principle he accepted Lord Carlile’s recommendations for improving the operation of the control order system.

Our report

23. We have considered carefully the quarterly reports and statement by the Home Secretary, the report by Lord Carlile, the evidence we have received about the operation of control orders in practice, the terms of the statutory provisions being continued in force by the draft Order, relevant reports from international supervisory bodies, and the relevant human rights standards. We now report our conclusions on the human rights implications of the draft Order to each House in the light of all these in the hope that it will help to inform the debates in the two Houses about the compatibility of the control orders regime with the UK’s human rights obligations.

21 *ibid.*, para. 38

22 *ibid.*, para. 39

23 *ibid.*, para. 61

24 *ibid.*, paras. 45–46

25 *ibid.*, para. 58

The human rights implications

The main human rights issues

24. We now turn to the main human rights issues raised by the draft order renewing the control orders regime in the Prevention of Terrorism Act 2005. We do not claim that this is an exhaustive account of the human rights issues raised by the renewal. In the short time available to prepare this Report following Lord Carlile’s report and the laying of the draft Order, it has only been possible to focus on the most significant issues which arise.²⁶

25. In our view the main human rights issues fall into the following broad categories:

- (1) whether non-derogating control orders are being operated in practice in a way which amounts to a deprivation of liberty, and therefore require derogation from Article 5(1) ECHR;
- (2) whether the procedural protections are compatible with Article 5(4) and Article 6(1) ECHR, and with the common law right to a fair trial and a fair hearing;
- (3) whether individuals who are the subject of control orders are being subjected to inhuman and degrading treatment contrary to Article 3 ECHR;
- (4) whether the control orders regime has a disproportionate impact on the rights of family members under Articles 8, 10 and 11 ECHR; and
- (5) whether the control orders regime is being applied disproportionately to foreign nationals, in breach of Article 14 ECHR in conjunction with Articles 8, 9, 10, 11 and Article 1 Protocol 1.

(1) Deprivation of liberty requiring derogation

The human rights issue

26. The first human rights issue which arises is whether the provisions being renewed give rise to a risk of incompatibility with the right to liberty in Article 5(1) ECHR, in the absence of a derogation from that Article, because they confer powers which are likely to be exercised in practice in a way which amounts to a “deprivation of liberty” within the meaning of Article 5 for a purpose not authorised under paragraphs (a) to (f) of that Article.

The relevant human rights law

27. A regime of preventive measures, designed to prevent crimes being committed in the future, is not in principle contrary to the Convention. In a number of cases concerning Italy’s laws providing for preventive measures to be taken against people suspected of being members of the Mafia, for example, the European Court of Human Rights has proceeded

²⁶ For example, another issue which arises, but which this Report does not address, is whether the width of the obligations contained in the standard control orders may be in breach of Articles 8, 9, 10 and 11 ECHR and Article 1 Protocol 1.

on the basis that such regimes are not per se incompatible with the Convention, provided the restrictions on Convention rights imposed pursuant to them are “in accordance with the law”, serve a legitimate aim, and are “necessary in a democratic society”.²⁷

28. Such preventive measures may even be justifiable where a person has been acquitted of a criminal offence: as the European Court of Human Rights held in one such case.²⁸

... the Court considers that it is legitimate for preventive measures, including special supervision, to be taken against persons suspected of being members of the Mafia, even prior to conviction, as they are intended to prevent crimes being committed. Furthermore, an acquittal does not necessarily deprive such measures of all foundation, as concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify reasonable fears that the person concerned may in the future commit criminal offences.

29. Moreover, such preventive measures can in principle include restrictions on a person’s freedom of movement. Mere restrictions on freedom of movement are governed by Article 2 of Protocol 4 ECHR, which the UK has not ratified. They do not engage the right to liberty in Article 5(1) ECHR. However, the Court of Human Rights has consistently held that the distinction between a deprivation of liberty, to which Article 5 applies, and a mere restriction on liberty of movement, to which it does not, is a matter of degree rather than one of nature or substance.²⁹ When determining whether someone has been deprived of their liberty within the meaning of Article 5 it is necessary to look closely at their specific situation and to consider a range of criteria such as the type, duration, effects and manner of implementation of the measure in question. In the words of the Court, “the difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity, and not one of nature or substance.”

30. In *Guzzardi* itself, for example, none of the restrictions imposed on the applicant amounted to a deprivation of liberty taken individually, but “cumulatively and in combination” the effect of confining him to a tiny fraction of an island to which access was difficult, that there were few opportunities for social contacts, that supervision was carried out almost constantly, that he could not go out between 10 pm and 7 am without giving prior notification, that he had to report to the authorities twice a day and inform them of the name and number of anyone he telephoned, was to amount to a deprivation of liberty.

31. This approach of the European Court of Human Rights to determining whether the level of restraint of an individual amounts to a deprivation of liberty within the meaning of Article 5 ECHR was recently followed and applied by the English Court of Appeal.³⁰

27 See *Guzzardi v Italy*, (1980) 3 EHRR 333; *Raimondo v Italy* (1994) 18 EHRR 237 at para. 39; *Labita v Italy*, App. No. 26772/95 (6 April 2000), paras. 193–197. The power to make such preventive orders in the Italian legislation is vested exclusively in the courts, however.

28 *Labita v Italy*, op. cit. at para. 195

29 *Engel v The Netherlands* (1976) 1 EHRR 647 at paras. 58–59; *Guzzardi v Italy*, op cit., at para. 92

30 *R (Gillan) v Commissioner of Police of the Metropolis* [2004] EWCA Civ 1067, [2005] QB 388 at paras. 37–40

The relevant provisions of the Act

32. The Act contains a lengthy list of prohibitions, restrictions and requirements which are said to be examples of the obligations that may be imposed by a control order.³¹ The catalogue of potential prohibition and restriction is very wide, both in terms of the range of controls available to the Secretary of State in a control order, and in terms of the way in which many of them are defined. They include restrictions on movement, activities, association and communication.

33. As such, the obligations which can be imposed under control orders potentially interfere with a wide range of rights: the right to respect for private and family life and home under Article 8, freedom of thought, conscience and religion under Article 9, freedom of expression under Article 10, freedom of association under Article 11, and the right to peaceful enjoyment of possessions under Article 1 Protocol 1.

The obligations imposed by non-derogating control orders

34. In theory a control order can select obligations from the extensive (and non-exhaustive) list of options set out in s. 1(4) of the Act. In practice, it appears from Lord Carlile’s report that a fairly standardised order has so far been imposed on “most but not quite all” of the 18 controlled individuals so far. They are set out in the proforma of the Schedule of Obligations annexed to Lord Carlile’s report. As Lord Carlile states, “on any view those obligations are extremely restrictive”.³² They include an 18 hour curfew, electronic tagging, a ban on use of the garden, requirements to report to a monitoring company twice a day, limitation of visitors and meetings to persons approved in advance by the Home Office, requirements to allow police to enter the house at any time and search and remove any item, and to allow the installation of monitoring equipment, prohibitions on phones, mobile phones and internet access, and restrictions on movement to within a defined area. Lord Carlile describes them as falling “not very far short of house arrest, and certainly inhibit normal life considerably.” Elsewhere in his report he states that “control orders involve deprivation of much of normal life”.³³ Anticipating our own interest in the matter, he said “it might be helpful to them if I highlight my concern expressed above about the severe nature of the obligations under most of the existing control orders, and the desirability that the orders should impose the minimum obligations compatible with national security”.³⁴ He also mentioned his concern about the duration of control orders in relation to individual controlled people.

35. Although this material was not available to Lord Carlile, the evidence we have received about the practical impact of control orders on those affected illustrates Lord Carlile’s concerns about the severely restrictive nature of the control orders that have so far been imposed.

31 Section 1(4)

32 *ibid.*, para. 42

33 *ibid.*, para. 49

34 *ibid.*, para. 71

Compatibility assessment

36. We agree with our predecessor Committee's view that, in principle, civil restriction orders imposing preventive measures, after a proper judicial process, are capable of being human rights compatible. A version of non-derogating control orders, with proper judicial involvement and a rigorous process to ensure proportionality to the threat, would not therefore necessarily be incompatible with our human rights obligations.

37. Our concern, however, is whether the Act provides sufficient clarity about the distinction between a derogating and a non-derogating control order to prevent the making in practice of control orders purporting to be non-derogating control orders which in fact amount to a deprivation of liberty. A number of the obligations enumerated in section 1(4) may not on their own be such a restriction on liberty as to amount to a deprivation of liberty within the meaning of Article 5 and therefore require derogation, but they are capable of constituting such a deprivation when combined with other obligations.

38. We accept that the question of whether a particular control order imposes obligations which cumulatively amount to a deprivation of liberty is a matter to be decided by a court on the facts of a particular case, because it depends on an appraisal of the concrete situation and the application of fact-specific criteria such as the type, duration, effects and manner of implementation of the measure in question. In our view, however, this does not mean that Parliament should renew the legislative framework and leave it to the courts to decide if non-derogating control orders amount to deprivations of liberty and are therefore unlawful. We know from Lord Carlile's report that "most but not quite all" of the control orders so far issued have contained the list of obligations set out in the proforma schedule annexed to his report. **In our view, those obligations are so restrictive of liberty as to amount to a deprivation of liberty for the purposes of Article 5(1) ECHR. It therefore seems to us that the control order legislation itself is such as to make it likely that the power to impose non-derogating control orders will be exercised in a way which is incompatible with Article 5(1) in the absence of a derogation from that Article.**

39. During the passage of the Act the Home Secretary acknowledged that a combination of the measures contained in section 1(4) of the Act is capable of amounting to a deprivation of liberty within the meaning of Article 5 ECHR, even though those obligations are not provided for in the derogation order. However, the Government argued that this does not give rise to any concern about compatibility because the Secretary of State is under an obligation under s. 6 of the Human Rights Act 1998 to act compatibly with Convention rights when exercising his new power to impose obligations in a control order, and any control order which contained such a combination of measures as to amount to a deprivation of liberty would therefore be unlawful under the Human Rights Act and quashed by the courts on appeal on that ground.

40. We are unable to be so sanguine. In our view the very structure of the Act does not reflect the fact that obligations which by themselves only amount to restrictions on liberty are capable of giving rise to deprivations of liberty in combination with other obligations. The Act draws a rigid distinction between non-derogating control orders and derogating control orders and presupposes that it is only obligations which amount to a deprivation of liberty in their own right (such as "full" house arrest) which will require derogation. Lord Carlile in his Report appears to assume that obligations only amount to a deprivation of

liberty for the purposes of Article 5, and therefore require derogation, if they impose house arrest “24/7”, that is, full house arrest.³⁵ That is not correct as a matter of Convention case-law, as explained above.

41. It does not seem to us to be an adequate answer to say that any control order which imposed obligations which in combination amounted to a deprivation of liberty would be unlawful under the Human Rights Act in the absence of a derogation. In our view when creating such an unprecedented power for the executive to interfere with a wide range of Convention rights, the legal framework which creates the power should seek to ensure on its face that the power will not be used in a way which amounts to a deprivation of liberty in the absence of a derogation. The power to impose obligations in control orders in section 1(4) of the Act is not only likely, on the face of the Act, to be exercised in breach of the right to liberty in Article 5(1), but appears to us, from the evidence in Lord Carlile’s report alone, confirmed by the evidence we have received, to have been so exercised in practice.

42. On this ground alone we seriously question the proposal to renew the provisions of the Prevention of Terrorism Act 2005 without Parliament’s having had a proper opportunity to debate whether a derogation to permit such deprivations of liberty would be justified as being strictly required by the exigencies of the situation.

House arrest under the Immigration Act 1971

43. We note in passing that it appears from the evidence we have received that bail conditions amounting to “full house arrest” have been imposed on some of those formerly subject to control orders but since rearrested and detained pending deportation pursuant to memoranda of understanding with the receiving country.

44. Although strictly speaking outside the scope of this report concerning the renewal of the control orders powers, we draw to the attention of both Houses the urgent need for this question to be investigated more thoroughly. Given the very clear case-law establishing that detention pending deportation can only be justified under Article 5(1)(f) of the Convention if there is a realistic prospect of deportation within a reasonable time, we doubt whether use of Immigration Act bail conditions amounting to full house arrest, which undoubtedly amounts to a deprivation of liberty, in cases where memoranda of understanding with the receiving country have yet to be concluded, can be lawful in the absence of a derogation from Article 5.

(2) Right to a fair trial/fair hearing before a court

The human rights issue

45. The second human rights issue raised by the draft Order is whether the control orders regime as a whole is incompatible with the right to a fair trial in the determination of a criminal charge in Article 6(1) ECHR or, alternatively, the right to a fair hearing in the determination of civil rights and obligations under the same Article, and, in the case of control orders amounting to a deprivation of liberty, with the right of access to a court to

³⁵ See e.g. para. 31: “Such 24/7 house arrest would involve derogation.”

determine the lawfulness of detention under Article 5(4) ECHR, as well as with the equivalent common law rights of access to a court and to a fair trial or fair hearing which have been judicially recognised as having a constitutional status. This is largely a question of both the adequacy and practical effectiveness of the judicial and other safeguards provided for by the Act.

The applicable human rights standards

46. Article 6(1) ECHR provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

47. Additional procedural protections apply where the proceedings count as the “determination of a criminal charge” within the meaning of Article 6(1). These include the presumption of innocence in Article 6(2), and the specific guarantees in Article 6(3) such as the right to examine witnesses. But even where proceedings determine civil rights and obligations rather than a criminal charge, Article 6 imposes a rigorous set of procedural guarantees, including the right of access to a “court” in the full sense of that word, and “equality of arms” between the parties (that is, a requirement that no party to the proceedings be at a procedural disadvantage compared to the other party).

48. Article 5(4) ECHR provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

49. In our view it is clear that the criminal limb of Article 6(1) ECHR applies to proceedings for a derogating control order. In such a case the full right to due process in Article 6(1) applies.

50. A more difficult question arises about the standards of due process applicable in relation to non-derogating control orders. Formally speaking, control order proceedings are not classified in domestic law as “criminal proceedings”. On the contrary, they are deliberately designed to appear to be civil orders which are intended to be alternatives to criminal prosecution in cases where prosecution is said not to be possible because the information which is the basis of the case against the individual cannot be used as “evidence” in a criminal trial. In substantive terms, however, we consider that non-derogating control orders of the kind which, according to Lord Carlile, have so far been used in most if not all cases, amount to the determination of a criminal charge against the individual who is the subject of the order, for three reasons.³⁶

51. First, the conduct which is alleged as the very basis for the application of a non-derogating control order (involvement in terrorism-related activity) is not only conduct of a criminal nature, but of a particularly serious criminal nature. The very act of making a control order therefore involves allegations of very serious criminal conduct on the part of

³⁶ Applying the well established criteria in *Engel v The Netherlands* for deciding whether proceedings are criminal or civil for the purposes of Article 6(1) ECHR.

the controlled person. Second, the nature of the restrictions imposed by the standard non-derogating control order are in our view of a nature and severity to be equivalent to a criminal penalty.³⁷ Third, they are also of a duration to make them tantamount to a criminal sanction, being, in effect, indefinitely renewable.

52. We therefore agree with the view of the European Commissioner for Human Rights that if not necessarily in all, then at least in some cases of non-derogating control orders, the full set of Article 6(1) guarantees are required because the control order proceedings amount to the determination of a criminal charge within the meaning of that Article.³⁸ In our view, the criminal limb of Article 6(1) applies to the non-derogating control orders identified by Lord Carlile as having been used in most cases to date, in view in particular of the severity of the restrictions they contain. We draw this matter to the attention of each House.

53. Even if the proceedings for the standard non-derogating control orders are “civil” rather than “criminal” in nature for the purposes of Article 6(1) ECHR, we consider it to be likely that they will be regarded as sufficiently close in nature to “criminal” proceedings as to warrant the application of criminal procedural protections commensurate with the importance of what is at stake for the individual. In the context of ASBOs, for example, the House of Lords has held that, although the orders are civil in character for the purposes of Article 6(1) ECHR, the standard of proof that ought to be applied to allegations that the defendant has acted in an anti-social manner is the criminal standard of beyond reasonable doubt.³⁹ **We draw this matter to the attention of each House.**

54. We now turn to consider in detail the compatibility of the control order regime with these standards of due process.

The standard of proof

55. We regard the standard of proof for the making of control orders to be an extremely important feature of the Act.

56. In the case of non-derogating control orders, which under the Act are made by the Secretary of State,⁴⁰ the standard which is set not only affects the ease with which, under the Act, the Secretary of State can make such a control order in the first place, but, crucially, it affects the adequacy and effectiveness of subsequent judicial control as a safeguard against arbitrary or unjustified interference with the Convention rights affected. The standard of proof defines the questions to be answered not only by the Secretary of State but also by the court charged with hearing challenges to non-derogating control orders which have been made by the Secretary of State.

57. The standard of proof to which the Secretary of State must be satisfied when deciding whether or not to make a control order against an individual is set very low in the Act: he

37 See above for an account of the restrictions imposed.

38 European Commissioner for Human Rights Report, *op. cit.*, para. 20

39 *R (McCann) v Manchester Crown Court* [2003] 1 AC 787 at paras. 37 (Lord Steyn) and 83 (Lord Hope)

40 Prevention of Terrorism Act (PoTA) 2005 s. 2

need only have “reasonable grounds for suspecting” that the individual is or has been involved in terrorism-related activity.⁴¹ He need not be “satisfied” or have a “belief”: mere suspicion will suffice. Nor need there be proof, even on a civil standard: reasonable grounds will suffice.

58. The Act provides for the standard to be higher in relation to a derogating control order, that is, an order imposing an obligation (or obligations) which amounts to a deprivation of liberty and is therefore incompatible with Article 5 ECHR. The Act provides for such derogating control orders to be made by the court, on application by the Secretary of State.⁴² In such cases, the court must be “satisfied, on the balance of probabilities” that the person concerned is or has been involved in terrorism-related activity.⁴³

59. “Reasonable suspicion” is an extremely low threshold, lower even than the “balance of probabilities” standard in civil proceedings, which is in turn lower than the “beyond reasonable doubt” standard which applies in the determination of a criminal charge.

60. During the passage of the Act, our predecessor Committee asked the Secretary of State whether there is any reason in principle for not requiring the standard of proof for control orders to be at least the civil standard of balance of probabilities.⁴⁴ He said that he did not think that there is a reason in principle but that there are “quite serious practical arguments” about which particular possible standard should apply.

61. We welcome the Secretary of State’s acceptance that there is no reason in principle for not requiring the standard of proof for control orders to be at least the civil standard of balance of probabilities. In our view there are strong reasons in principle for requiring the standard of proof to be at least that high in relation to non-derogating control orders, and higher still in relation to derogating control orders.

62. Under both types of control order the matter of which the Secretary of State or the court must have a reasonable suspicion or be satisfied on the balance of probabilities is the person’s involvement in “terrorism-related activity”.⁴⁵ This is an allegation of the utmost gravity. It is a well established legal principle that the gravity of the allegation is an important factor in determining the appropriate standard of proof in relation to that matter in legal proceedings.

63. As far as non-derogating control orders are concerned, reasonable suspicion is in our view too low a threshold to justify the potentially drastic interference with Convention rights which such orders contemplate. It is the same standard as applied under Part 4 ATCSA 2001, of which the Special Immigration Appeals Commission said “it is not a demanding standard for the Secretary of State to meet”.⁴⁶ Moreover, as we explain further below, the Act provides for only a supervisory judicial role in relation to such orders, applying the principles applicable in relation to judicial review. A merely supervisory jurisdiction over a decision based on “reasonable grounds for suspicion” is a very weak

41 PoTA 2005, Section 2(1)(a)

42 PoTA 2005, s. 4

43 PoTA 2005, section 4(7)(a)

44 Tenth Report of Session 2004–05, op. cit., Ev 13 at Q53

45 Defined in section 1(9) of the PoTA 2005

46 *Ajouaou v Secretary of State for the Home Department* (SIAC, 29 October 2003) at para. 71

form of judicial control over measures with a potentially drastic impact on Convention rights, particularly in combination with the use of closed procedures in which the controlled person never sees the material or is even told the substance of the allegations which may form the basis of the Secretary of State's suspicion. In our view such a low standard of proof, in such a context, carries a high risk of being insufficient in practice to ensure the proportionality of interferences with Convention rights authorised by the Act.

64. As far as derogating control orders are concerned, by definition these impose controls which amount to a deprivation of liberty. This is the most serious control which can be placed on an individual, and it can usually only be imposed following conviction of a criminal charge. Deprivation of liberty on a balance of probabilities is anathema both to the common law's traditional protection for the liberty of the individual and to the guarantees in modern human rights instruments which reflect those ancient guarantees. In our view the appropriate standard for such measures is the beyond reasonable doubt standard.

65. In his evidence to our predecessor Committee the Home Secretary did not elaborate on the "practical arguments" which drove him to select reasonable suspicion and balance of probabilities as the relevant standards of proof in relation to the two types of order. We have considered the argument put forward in the Home Office notes on control orders issued on 28 February 2005 addressing some of the issues raised in the Second Reading debate on the Bill. There it is said that "this is not an area where either the secretary of state, or the court, will be dealing with proof of issues of fact. It is essentially an exercise in risk assessment and evaluation of intelligence material in the national security context." However, the threshold question for the exercise of the power to make control orders is whether the individual is or has been involved in terrorism-related activity. In our view that is pre-eminently a factual question and it is entirely appropriate that there should be a debate about what should be the standard of proof in relation to that question.⁴⁷

66. We are not aware of any other practical arguments capable of outweighing the above reasons in principle for setting a higher standard of proof in both cases. **We therefore consider that the standard of proof in relation to both types of control order is set at too low a level in the Act. In our view, the standard of proof in relation to non-derogating control orders should be the balance of probabilities, and in relation to derogating control orders, which by definition amount to a deprivation of liberty, the standard of proof should be the criminal standard of beyond reasonable doubt. We draw this matter to the attention of each House.**

Limited judicial control of control orders

67. The Act provides that non-derogating control orders are made by the Secretary of State subject to a limited degree of judicial control: where he has decided that there are grounds to make such an order, he must apply to the court for permission to make the order, unless he certifies that the urgency of the case requires it to be made without permission, in which case he must refer it immediately to the court.⁴⁸ The court's function is to consider whether the Secretary of State's decision to make the order is "obviously flawed" and it can make

⁴⁷ Cf. *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, in which the House of Lords held that it was appropriate to consider what the standard of proof should be when determining whether the person concerned had engaged in the behaviour complained of.

⁴⁸ PoTA 2005, s. 3

that decision in the absence of the individual in question, without him having been notified or given an opportunity of making any representations to the court.⁴⁹ Arrangements must then be made for a full hearing, at which the court's function is to determine whether the Secretary of State's decision is flawed, applying the principles applicable on an application for judicial review.⁵⁰

68. We share the concerns expressed by both our predecessor Committee⁵¹ and the European Commissioner for Human Rights, Mr. Gil-Robles,⁵² that the limited degree of judicial supervision of the making of non-derogating control orders is insufficient.⁵³ Although we agree with the Government that the principles applicable on judicial review now include proper scrutiny for human rights compatibility, we consider that in order for there to be an independent safeguard against arbitrary deprivations of liberty by non-derogating control orders the decision should be made by the court, not the executive, and only after a full judicial hearing. **We agree with the view expressed by the European Commissioner of Human Rights, that Article 6 ECHR properly requires that non-derogating control orders should initially be made not by the executive but by the judiciary. We also consider that our own constitutional traditions of due process, and of the separation of powers between the executive and the judiciary, requires no less. We draw this matter to the attention of each House.**

Use of secret evidence and special advocate procedure

69. The Act makes provision for rules of court to be made regulating the practice and procedure to be followed by the court in control order proceedings.⁵⁴ The power to make such rules of court allows the introduction of special procedures for dealing with material that includes information the disclosure of which would be “contrary to the public interest.” The special powers to make rules of court expressly include the power to make provision enabling the relevant court to conduct proceedings in the absence of the person against whom a control order is sought and his legal representative,⁵⁵ and express provision is also made for the appointment of special advocates to represent the interests of a party to control order proceedings in any of those proceedings from which he or his legal representative are excluded.⁵⁶

70. The Civil Procedure (Amendment No. 2) Rules 2005 have been made pursuant to the powers in the Prevention of Terrorism Act 2005, introducing a new Part 76 into the Civil Procedures governing control order proceedings.⁵⁷ The Rules modify the “overriding objective” of the Civil Procedure Rules, which requires the court to deal with cases “justly”, so as to make it subject to a new duty: “The court must ensure that information is not

49 Sections 3(2)(a), 3(3)(b) and 3(5)

50 Section 3(11)

51 Tenth Report of 2004–05, *op. cit.*, at paras. 11–17

52 Report by the European Commissioner for Human Rights, *op. cit.*, at paras 11–12

53 Tenth Report of Session 2004–05, at paras. 11–17

54 Section 11(5) and Schedule

55 Schedule, para. 4

56 Schedule, para. 7

57 SI 2005 No. 656

disclosed contrary to the public interest”.⁵⁸ The overriding duty of the courts to do justice between the parties must henceforth be read and given effect in a way which is compatible with the duty not to disclose information contrary to the public interest. Disclosure is defined as being “contrary to the public interest” for these purposes “if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”⁵⁹

71. In addition to modifying the overriding objective of civil proceedings, the Rules provide for hearings in private,⁶⁰ from which the party against whom a control order is sought and his legal representative are excluded, and for the appointment of a special advocate to represent the interests of the excluded party. The special advocate cannot communicate about the proceedings with the party whose interests he is appointed to represent after he has received the closed material relied on by the Secretary of State.⁶¹ The Rules also make provision for closed material⁶² and for withholding any part of the court’s reasons in its judgment to the extent that it is not possible to give reasons without disclosing information contrary to the public interest.⁶³

72. The Explanatory Memorandum to the new Rules explains that they are designed to balance:

(a) the need to secure that the making and renewal of control orders and the imposition and modification of the obligations contained in such orders are properly reviewed by the court; and

(b) the need to secure that no disclosure of information is made where that would be contrary to the public interest.

73. The Memorandum explains that the procedure prescribed by the rules for hearings in private and the use of special advocates is modelled on that adopted for the Special Immigration Appeals Commission (“SIAC”) “and was approved by the European Court of Human Rights in the case of *Chahal v UK*”.⁶⁴

74. In our predecessor Committee’s Preliminary Report on the Prevention of Terrorism Bill, it expressed the view that it is unlikely that the use of a special advocate procedure, in which the individual does not get to see the material on the basis of which the order against him is made, would be compatible with the right to a fair trial in Article 6(1) ECHR in cases where the control order has the effect of depriving of liberty.⁶⁵ **We agree with that view.** We note that it is also the view of the European Commissioner for Human Rights, who describes the proceedings as “inherently one-sided, with the judge obliged to consider

58 Civil Procedure Rules, para. 76.2(2)

59 *ibid.*, para. 76.1(4)

60 *ibid.*, para. 76.22

61 *ibid.*, para. 76.25

62 *ibid.*, para. 76.28

63 *ibid.*, para. 76.32

64 Explanatory Memorandum, para. 7.2

65 Ninth Report of 2004–05, *op. cit.*, at para. 14

the reasonableness of suspicions based, at least in part, on secret evidence, the veracity or relevance of which he has no possibility of confirming in the light of the suspect's response to them".⁶⁶

75. We acknowledge that in the recent case of *Roberts* the House of Lords considered the compatibility of special advocate procedures in a particular deprivation of liberty context with the requirements of both common law procedural fairness and the equivalent provisions in Articles 5(4) and 6(1) ECHR.⁶⁷ It held, by a 3-2 majority,⁶⁸ that it was within the Parole Board's powers to give directions as to withholding of information and, if it would assist the prisoner, to the use of a special advocate, where the Board is satisfied that for public interest reasons there should be non-disclosure not only to the prisoner but also his representatives, and that the nature of the proceedings and the extent of the non-disclosure does not mean that the prisoner's right to a fair hearing will necessarily be abrogated.⁶⁹

76. However, in the context of the control order regime we find it difficult to see how a procedure in which a person can be deprived of their liberty without having any opportunity to rebut the basis of the allegations against them, can be said to be compatible with the right to a fair trial in Article 6(1), the equality of arms inherent in that guarantee, the right of access to a court to contest the lawfulness of their detention in Article 5(4), the presumption of innocence in Article 6(2), the right to examine witnesses in Article 6(3), or the most basic principles of a fair hearing and due process long recognised as fundamental by English law. We draw this matter to the attention of each House.

77. The Government's explanatory memorandum explaining the amendments to the Civil Procedure Rules introducing the special advocate procedure in control order proceedings asserted that the procedure prescribed by the rules "was approved by the European Court of Human Rights in the case of *Chahal v UK*." In fact, *Chahal* was a case concerning deportation rather than deprivation of liberty, and the European Court of Human Rights has expressly left open the question of whether the UK's special advocate system satisfies the requirements of Article 5(4) ECHR. In a recent case, it noted that there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice, without expressing in the present context an opinion on the conformity of the UK's special advocate system in cases involving national security.⁷⁰ **The question of the compatibility of the system of closed hearings and special advocates with the Convention's guarantees of a fair hearing, and in particular whether it accords "a substantial measure of procedural justice", therefore remains an open one in Strasbourg. We draw this to the attention of each House.**

66 European Commissioner for Human Rights Report, op. cit., at para. 21

67 *Roberts v Parole Board* [2005] UKHL 45 (7 July 2005)

68 Lords Woolf, Rodgers and Carswell in the majority, Lords Bingham and Steyn in the minority

69 Lord Woolf gave the leading judgment for the majority: see para. 83 for summary of his conclusions

70 *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 at para. 97

Conclusion

78. In light of the above, we have significant concerns about whether, in the absence of sufficient safeguards, this regime of control orders is compatible with the rule of law and with well established principles concerning the separation of powers between the executive and the judiciary.⁷¹ We also doubt whether the control orders regime contained in the provisions being continued in force is compatible with Articles 5(4) and 6(1) ECHR. On this ground alone we seriously question the renewal of the Act without Parliament's first debating and deciding whether the special exigencies of the current security situation justify the extraordinary exceptions to traditional English principles of due process and what in our view amounts to a *de facto* derogation from Articles 5(4) and 6(1) ECHR. We are not in a position to express a view at this stage on whether such exceptions and derogations are justified. We draw this matter to the attention of each House.

(3) Inhuman and degrading treatment

79. On 9 June 2005 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT")⁷² published, at the UK Government's request, its Report on its visit to the UK in March 2004.⁷³ The visit was not one of the Committee's periodic visits, but one which appeared to the Committee to be "required in the circumstances".⁷⁴ It focused on the treatment of persons detained under the ATCSA 2001, paying particular attention to the impact of the conditions of detention on the mental and physical well-being of the detainees.

80. The Report states that the CPT's delegation made an immediate observation at the end of their visit in March 2004 asking for immediate steps to be taken in relation to three of the detainees.⁷⁵ It found that the authorities were "at a loss at how to manage this type of detained person, imprisoned with no real prospect of release and without the necessary support to counter the damaging effects of this unique form of detention." The Report also states that many of the detainees were in a poor mental state as a result of their detention and some were also in poor physical condition. Detention had caused mental disorders in the majority detained, and the trauma of detention had become even more detrimental to their health since it was combined with an absence of control resulting from the indefinite character of their detention and the fact of not knowing what evidence was being used against them to certify and/or uphold their certification as persons suspected of

71 The European Commissioner for Human Rights, *op. cit.* at para. 16, observed "There cannot but be some concern over the introduction of orders obviating the need to prosecute and circumventing the essential guarantees that criminal proceedings provide." "Substituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive" (para. 22).

72 The Committee is established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987. Its task is to examine, by means of visits, the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment.

73 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*, CPT/Inf (2005) 10 (9 June 2005). The Government's response is set out in document CPT/Inf (2005) 11.

74 Under Article 7(1) of the Convention, in addition to periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances.

75 Under Article 8(5) of the Convention, if necessary the Committee may immediately communicate observations to the competent authorities of the Party concerned.

international terrorism. Significantly, the Committee found that “for some of them, their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment.”

81. The CPT issued its final report on the visit on 23 July 2004. The Government did not request publication of the Report until June 2005 following its formal response. The Government’s response acknowledges the delay in responding but does not provide any explanation for that delay. The Convention provides that the information gathered by the Committee, its report and its consultations with the Party concerned shall be confidential,⁷⁶ and that the Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party.⁷⁷ We note that the Government was in possession of the CPT Report both at the time of the hearing before the House of Lords into the challenge to the validity of its derogation and at the time of Parliament being asked to pass the Prevention of Terrorism Act 2005, but the existence of the Report was not disclosed by the Government either to the Judicial Committee of the House of Lords or to Parliament. We draw this matter to the attention of each House.

82. We further note that in July 2005 a delegation of the Council of Europe’s Committee for the Prevention of Torture, comprising a lawyer and a psychiatrist, carried out a further five day visit to the UK. Amongst other things, the delegation “examined the practical operation of the Prevention of Terrorism Act 2005 and met various persons served with control orders”.⁷⁸ The same delegation carried out a further six day visit in November 2005, when it examined the treatment and conditions of detention of certain persons recently detained under the Immigration Act 1971, with a view to being deported, giving particular attention to the mental health of the individuals concerned. It also interviewed two persons under house arrest and met persons served with control orders under the Prevention of Terrorism Act 2005. The CPT press release indicates that it also discussed these questions with Lord Carlile.

83. In view of the seriousness of the CPT’s findings in its Report of July 2004, and the potential significance of any more recent views it may have expressed to Parliament’s consideration of the renewal of the Prevention of Terrorism Act 2005, we consider that the Government should inform Parliament whether the CPT delegation made any immediate observations at the end of their visits in July and November 2005, whether the Government has received any report or other communication from the CPT arising out of those visits, and if so whether it will make any such observations, reports or communications available to Parliament to inform the debate on renewal. We recognise that the Convention provides for the confidentiality of such exchanges, and leaves it to the State Party to request publication, but in our view the Government would be entitled to waive its right to insist on confidentiality and, in circumstances where it is asking Parliament to renew a legislative regime the operation of which has attracted the interest of the Committee, it ought to do so. We draw this matter to the attention of each House.

76 Article 11(1)

77 Article 11(2)

78 CPT press release, 20 July 2005

84. **In light of the findings of the CPT in March 2004 that some of the detainees were suffering inhuman degrading treatment, and the evidence we have received about the impact of control orders on the mental health of those subject to them, we are concerned that the combination of the degree of restriction imposed by control orders, their indefinite duration, and the limited opportunity to challenge the basis on which they are made, carries a very high risk of subjecting those who are placed under control orders to inhuman and degrading treatment contrary to Article 3 ECHR. We draw this matter to the attention of each House.**

(5) Impact on human rights of family members

85. The evidence that we have received suggests that in practice control orders are also unjustifiably interfering with the human rights of other members of the family of the controlled person. The severe impact of the restrictions on their wives and children include:

- Interferences with their right to respect for private, family life and home as a result of the intrusive measures contained in the control orders, including frequent disturbance and access to their premises without notice, and including affronts to their religious and cultural sensitivities, in particular towards female members of the household
- Interferences with their right to freedom of expression and to receive information due to the restrictive nature of the measures concerning the use of telephones and access to the internet
- Interferences with their right to freedom of association as a result of the high degree of surveillance and the deterrent effect of the process for approving visitors to the house or other arranged social interaction
- Mental suffering and anguish due to the fear of their home being searched, the controlled person rearrested, or their own social interactions monitored

86. **We draw these matters to the attention of each House.**

(6) Discrimination

87. The control orders regime was introduced, in part, in response to the House of Lords criticism of the former regime in Part 4 ATCSA 2001 being unjustifiably discriminatory on grounds of nationality, bearing in mind that the Government accepted that the threat to national security also emanated from British nationals.⁷⁹ The terrible events of 7 July 2005 confirmed that the threat also comes from British nationals.

88. So far, of the 18 control orders which have been issued, only one has been issued against a UK national. This gives rise to a concern that, although the legal framework is now neutral in terms of its treatment of nationals and non-nationals, it is being applied in practice in a way which has a disproportionate impact on non-nationals. Such differential application of a neutral scheme can amount to discrimination within the meaning of

⁷⁹ *A(FC) v Secretary of State for the Home Department* [2004] UKHL 56

Article 14 of the Convention. If 95% of stop and searches were directed at non-nationals, for example, this would raise questions under Article 14 in conjunction with Article 8. **In our view, the fact that only one of the 18 control orders issued so far has been issued against a UK national raises a question of possible discrimination in the application of the control orders regime, potentially in breach of Article 14 ECHR in conjunction with Articles 5, 6, 8, 9, 10, 11 and Article 1 Protocol 1. This could be justified if the material available to the Home Secretary showed there were significantly more overseas than UK national suspects, or that the control order regime was even-handedly applied on the same level of proof against all suspects irrespective of nationality. We cannot express a view as we are not privy to the material before the Secretary of State. We draw this matter to the attention of each House.**

Conclusion

89. In light of the concerns expressed in this Report, we seriously question renewal without a proper opportunity for a parliamentary debate on whether a derogation from Articles 5(1), 5(4) and 6(1) ECHR is justifiable, that is, whether the extraordinary measures in the Prevention of Terrorism Act 2005, which the Government seeks to continue in force, are strictly required by the exigencies of the situation. It would be premature for us to express a view on that question. We merely conclude at this stage that we cannot endorse a renewal without a derogation and believe that Parliament should therefore be given an opportunity to debate and decide that question.

Formal Minutes

Monday 13 February 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mary Creagh MP
Lord Campbell of Alloway	Dr Evan Harris MP
Lord Judd	Dan Norris MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Stern	

Draft Report [Counter-terrorism policy and human rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 4 read and agreed to.

Paragraphs 5 and 6 read, amended and agreed to.

Paragraphs 7 to 11 read and agreed to.

Paragraph 12 read.

Amendment made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 7

Not Content, 2

Lord Bowness	Mary Creagh MP
Lord Campbell of Alloway	Mr Andrew Dismore MP
Dr Evan Harris MP	
Lord Judd	
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Stern	

Paragraph 13 read, amended and agreed to.

Paragraph 14 read.

Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 8

Not Content, 1

Lord Bowness
Lord Campbell of Alloway
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

Mr Andrew Dismore MP

Paragraphs 15 to 17 read and agreed to.

Paragraph 18 read, amended and agreed to.

Paragraphs 19 and 20 read and agreed to.

Paragraph 21 read, amended and agreed to.

Paragraphs 22 to 28 read and agreed to.

Paragraph 29 read, amended and agreed to.

Paragraphs 30 and 31 read and agreed to.

Paragraph 32 read, amended and agreed to.

Paragraph 33 read and agreed to.

Paragraphs 34 and 35 read, amended and agreed to.

Paragraphs 36 to 40 read and agreed to.

Paragraphs 41 and 42 read, amended and agreed to.

Paragraphs 43 to 48 read and agreed to.

Paragraph 49 read.

Amendments made.

Question put, That the paragraph as amended stand part of the Report.

The Committee divided.

Content, 7

Not Content, 2

Lord Bowness
Lord Campbell of Alloway
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

Mr Andrew Dismore MP
Dan Norris MP

Paragraphs 50 and 51 read and agreed to.

Paragraph 52 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 8

Not Content, 2

Lord Bowness
Lord Campbell of Alloway
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

Mr Andrew Dismore MP
Dan Norris MP

Paragraph 53 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 8

Lord Bowness
Lord Campbell of Alloway
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

Not Content, 2

Mr Andrew Dismore MP
Dan Norris MP

Paragraphs 54 to 60 read and agreed to.

Paragraph 61 read, as follows:

“ We welcome the Secretary of State’s acceptance that there is no reason in principle for not requiring the standard of proof for control orders to be at least the civil standard of balance of probabilities. In our view there are strong reasons in principle for requiring the standard of proof to be at least that high in relation to non-derogating control orders, and higher still in relation to derogating control orders.”

Amendment proposed, in line 4, to leave out from “orders” to end of line 5.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Not Content, 6

Lord Bowness
Lord Campbell of Alloway
Dr Evan Harris MP
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

Paragraph agreed to.

Paragraphs 62 and 63 read and agreed to.

Paragraphs 64 and 65 read, amended and agreed to.

Paragraph 66 read.

Amendment made.

Question put, That the paragraph as amended stand part of the Report.

The Committee divided.

Content, 7

Not Content, 3

Lord Bowness
 Lord Campbell of Alloway
 Dr Evan Harris MP
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Stern

Mary Creagh MP
 Mr Andrew Dismore MP
 Dan Norris MP

Paragraph 67 read and agreed to.

Paragraph 68 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 6

Not Content, 3

Lord Bowness
 Lord Campbell of Alloway
 Lord Judd
 Lord Lester of Herne Hill
 Lord Plant of Highfield
 Baroness Stern

Mary Creagh MP
 Mr Andrew Dismore MP
 Dan Norris MP

Paragraphs 69 to 71 read and agreed to.

Paragraph 72 read, amended and agreed to.

Paragraphs 73 to 75 read and agreed to.

Paragraph 76 read, as follows:

“. Lords Bingham and Steyn, however, delivered dissenting judgments in unusually trenchant terms. Lord Bingham said that in his view it was plain that the procedure which the Board proposed to adopt would infringe the principles governing the conduct of judicial inquiries, both as a matter of common law procedural fairness and of Strasbourg case-law. In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, he doubted whether a decision of the Board adverse to the

prisoner, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had heard and which neither he nor they had had any opportunity to challenge or rebut, could be held to meet the fundamental duty of procedural fairness required by Article 5(4). If the procedure proposed was fully adopted, the prisoner’s rights under Article 5(4) could be all but valueless. Lord Steyn’s dissent was even more forceful. In his view, taken as a whole, the special advocate procedure completely lacks the essential characteristics of a fair hearing. He said that it was “important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.” In his view, the outcome of the case was “contrary to the rule of law. It is not likely to survive scrutiny in Strasbourg.””

Paragraph disagreed to.

Paragraph 77 (now paragraph 76) read, amended and agreed to.

Paragraph 78 (now paragraph 77) read and agreed to.

Paragraph 79 (now paragraph 78) read.

Amendments made.

Question put, That the paragraph as amended stand part of the Report.

The Committee divided.

Content, 6

Not Content, 3

Lord Bowness

Mary Creagh MP

Lord Campbell of Alloway

Mr Andrew Dismore MP

Dr Evan Harris

Dan Norris MP

Lord Lester of Herne Hill

Lord Plant of Highfield

Baroness Stern

Paragraphs 80 to 85 (now paragraphs 79 to 84) read and agreed to.

Paragraph 86 (now paragraph 85) read, amended and agreed to.

Paragraphs 87 and 88 (now paragraphs 86 and 87) read and agreed to.

Paragraphs 89 and 90 (now paragraphs 88 and 89) read, amended and agreed to.

Summary read and agreed to.

Resolved, That the Report, as amended, be the Twelfth Report of the Committee to each House.

Several Papers were ordered to be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and Baroness Stern do make the Report to the House of Lords.

[Adjourned till Monday 27 February at 4pm.]

Appendices

Appendix 1: Letter from the Chair, to Rt Hon Charles Clarke MP, Secretary of State for the Home Department

You will have seen my Committee's Third Report of this Session, entitled *Counter-terrorism policy and human rights: Terrorism Bill and related matters*, published on 5 December. As you are probably aware, this is the first of what is likely to be a series of reports in an ongoing inquiry we are conducting into counter-terrorism policy and human rights: we are continuing to look, for example, at various options for reform to the criminal justice system to deal with terrorism in a manner which respects international human rights standards, including examining the systems in France, Spain and Canada for any lessons which could be applied here.

My Committee thought it would be helpful for you to know at this stage that one matter we are certain to wish to deal with in this inquiry will be any renewal of the provisions of the Prevention of Terrorism Act 2005 in relation to the control orders system. We have seen, of course, your three-monthly reports on the exercise of your control order powers, most recently on 12 December. We are also aware that Lord Carlile will be reporting shortly on the operation of the Act. We intend to examine with care any conclusions reached by Lord Carlile in his report, and to report to both Houses our views on the human rights implications of any renewal orders you may lay before Parliament on the expiry in March of sections 1 to 9 of the Act. We appreciate that you are probably awaiting Lord Carlile's report before deciding how to proceed in this respect, but would like to stress that it would be very helpful to us if you could give us, and Parliament as whole, the earliest possible indication of your intentions once you have taken Lord Carlile's report into account.

I am copying this letter to Lord Carlile.

21 December 2005

Appendix 2: Letter from the Home Office to the Chair

The Home Secretary has asked me to thank you for your letter of 21 December. It is very helpful to have an advance indication of your Committee's intentions. We will try to update you on our's as soon as we are in a position to do so.

4 January 2005

Appendix 3: Letter from the Crime Reduction and Community Safety Group, Home Office to the Chair, re: Control Orders: Annual Renewal of S1-9 of the Prevention of Terrorism Act 2002

As you will be aware sections 1-9 of the Terrorism Act 2001, which allow the Secretary of State to make control orders, have to be renewed annually. The process for renewal is set out in section 13 of the Act and requires affirmative resolution in both Houses of Parliament. The current powers will cease to have effect at midnight on 11 March unless renewed.

The Home Secretary will be laying the draft orders to renew the legislation before Parliament on 2 February, together with Lord Carlile's report which will help to inform the

renewal debates, the first of which is likely to be in the week commencing 13 February. I am enclosing a copy of Lord Carlile's report.

I know that your committee is conducting its own enquiry into control orders in the context of counter-terrorism policy and human rights. The Home Secretary does not plan to provide any further evidence to the Committee at this stage – over and above the three monthly statements that he has already provided to Parliament on the operation of his powers under the 2005 Act.

2 February 2006

Appendix 4: Submission from Campaign Against Criminalising Communities (CAMPACC)

We welcome your inquiry into powers to impose control orders.

By way of background to our submission, our campaign was set up in early 2001 to oppose the Terrorism Act 2000. We are a non-party organisation supported by a number of lawyers, advocates for refugee and migrant communities, and civil liberties campaigners. We opposed the 2000 Act and subsequent anti-terrorism legislation of 2001 and 2005 on several grounds, as argued in documents which can be seen on our website, www.campacc.org.uk. Of particular relevance to the current submission, we opposed internment powers under the Anti-Terrorism, Crime and Security Act, and later the power to impose control orders, as well as the current proposal for extending the maximum detention period without charge. Our campaign links human rights campaigners with people targeted by the anti-terror powers and provides practical support for them, e.g. protest events, letters, bail surety and home visits to persons under control orders. From that experience we have special expertise in the human effects of anti-terror powers, as well as insights into how they are used.

By a coincidence of timing, your deadline comes a day after publication of Lord Carlile's report on control orders. His report warrants at least a brief comment, as a contrast to our submission. Overall his report reinforces the emergency mentality by which the government warns about further suicide bombings, labels individuals as 'terror suspects' and so justifies the use of control orders—with no need for evidence in court. He asks that police chiefs should explain why there is not enough evidence for prosecutions—rather than ask the government to demonstrate why control orders are necessary to protect the public from violence. Lord Carlile acknowledges concerns about 'potential psychological effects of control orders', and about 'family and other arrangements' for the suspects. He suggests the restrictions have been 'extremely restrictive' and close to what would need an opt-out from European human rights laws. As we will argue, his euphemisms sanitise gross abuses of human rights—indeed, punishment without trial—and downplays a great inconsistency with the ECHR.

When the government's proposal for control orders was going through Parliament about a year ago, CAMPACC denounced this new power to 'impose punishment on those not proven guilty'. As we further said:

Under the Home Secretary's proposals, people could be subject to a civil control order without any criminal charge. They would not necessarily be told of the evidence against them. Like the internment power which the Law Lords have rejected, such orders impose punishment without conviction through a proper jury trial. This would violate a fundamental principle of justice; the right to be presumed innocent until proven guilty. Such powers would impose a criminal-type sentence without trial, in the name of preventing hypothetical crimes (CAMPACC statement, 7 February 2005).

Our ominous prediction has been more than vindicated in practice, for the following reasons:

1. Control orders have been used to isolate individuals and their families, including children, from the wider society, even from friends or relatives. In some cases, detainees' relatives have not been given permission to visit even several months after applying. The punishment without trial extends to wives and children, and even to those providing accommodation, since visitors to the whole household are restricted by Home Office vetting arrangements. This is a form of collective punishment which violates natural justice and international law.
2. Considerable mental distress has been caused by the requirement that the detainee's accommodation can be searched by the police, or by a monitoring company checking tagging apparatus, at any time. Distress to the entire family is apparent in the testimony of Mahmoud Abu Rideh to journalists. For example, 'My kids worry that when they get back from school I will be gone and they might not find me again. My wife can't sleep. She is asking me not to go out again' ('Control order flaws exposed', *The Guardian*, 24 March 2005). A month later he visited a police station, asking for a return to prison custody rather than having an electronic tag re-fitted ('Tagged terror suspect sent back to jail, *The Guardian*, 29 April 2005; copies to be included with our letter).¹ Similar distress is documented in a statement from the bail-accommodation provider for Mr S (Appendix A). Likewise the distress and social isolation of an entire family as well as the person put under restrictions (Appendix B).
3. Anyone applying for permission to host or visit individuals under control orders—as well as some persons detained and bailed under the 1971 Immigration Act—is officially classified as 'a known associate of a terror suspect' (*Independent*, 15 December 2005, pp. 1-2, copy to be posted with our letter).² As volunteers to visit and support people who are victims of a law we oppose, we proudly defy that ridiculous stigma. But many other people are intimidated, especially friends or relatives who do not hold UK citizenship and so rightly feel more vulnerable to persecution. All this illustrates the more general role of anti-terror laws in terrorising Muslim and migrant communities.

Although your committee's investigation presently concerns only control orders, the 1971 Immigration Act has been used for similar purposes. That is, certain Immigration Act detainees have been bailed under conditions similar to control orders or even under greater restrictions. As we detail below, in effect it has been used to create a parallel regime to that of control orders. Under their bail conditions, for example, they must speak to no one who has not been authorised by the Home Office. Some even undergo full house arrest, which should require a 'derogation' from Article 5 of the ECHR unless it can be shown that deportation will take place within a reasonable period. Bail has been granted precisely because it seems doubtful that this is the case. Whatever changes may be made to the control orders regime, those changes (hopefully, improvements) will not touch the parallel regime under the 1971 Immigration Act, which remains.

Regardless of which law is used to impose special conditions, they may amount to virtual house arrest. In this way the government in effect re-creates internment, pending a judicial process which could last for many years.

Moreover, they create a domestic prison for anyone who acts as a host, e.g. the person's family, friend or volunteer (e.g. supporters of our campaign). All such people are subject to impromptu searches and removal of property including computers. The household is

1 Not printed here

2 Not printed here

prohibited from having visitors not approved by the Home Office. All this amounts to punishment without trial for the host, as well as for the person directly under restrictions. Thus the government extends punishment to the detainee's associates. In this way, the system deters people from acting as host and so makes bail more difficult to obtain.

Those patterns illustrate how the government is using a variety of powers to circumvent normal judicial procedures, even to circumvent the Law Lords' ruling that internment violated the ECHR. According to the government's own account of the Prevention of Terrorism Act 2005, no derogation from the ECHR would be necessary unless control orders impose house arrest. Yet in practice it has imposed virtual house arrest without the overt shame or burden of such derogation (see Appendix C).

IMPRACTICABILITY OF CONTROL ORDER REGIMES FOR SINGLE MEN USING RENTED ACCOMMODATION

Lastly, the viability of control orders as an alternative to the (completely unacceptable) practice of internment depends on it being practical for persons subject to these orders to live in the community outside of prison. This is not the case for control orders, nor for the parallel regime under the Immigration Act 1971 (see Appendix C). These regimes have been operated in such a way as to make it impractical to expect detainees without families and family homes to be released from prison or detention centres to live under control orders, even where their house arrest is only partial. If detainees' friends, supporters and lawyers try to rent them a self-contained flat which can be proposed as bail accommodation, the need for access and equipment installations by the tagging company makes landlords unwilling to let, especially if informed by the police of the nature of their proposed tenant. If accommodation with a resident landlord is proposed, then the conditions of life for the host are made impossible. The host may not receive his or her friends as visitors, since they are not vetted to visit the detainee, and must accept searches and inspections by the tagging company and police at any time. These issues mean that finding accommodation where the conditions of a control order can be met is extraordinarily difficult for single detainees, so that there is nowhere they can stay outside of a prison. For this reason alone, the regime of both control orders and the 'parallel regime' of bail under the 1971 Act needs to be made less strict, even if it were not for the overwhelming concerns about the injustice and inhumanity of any system of punishment without trial.

CONCLUSION

Drawing on our direct experience, this letter has outlined gross abuses of human rights under both the PTA 2005 and the Immigration Act 1971. Do these practices conform to the intention of Parliament when enacting those laws? Do these practices comply with human rights law, especially the ECHR? We urge your committee to investigate those abuses.

Our supporters would be pleased to send further information or to present oral evidence at any hearings.

3 February 2006

APPENDIX A: MR QAVI'S PERSONAL ACCOUNT AS A BAIL-ACCOMMODATION PROVIDER

I came in contact with Mr S for the first time, on 19th April, 2005, when, before Asylum and Immigration Tribunal, I undertook to provide a bail address for him. He stayed with me in my flat for about 4 weeks, after which he moved to a NASS-provided accommodation elsewhere.

On the morning of 15th September 2005 he was, in a highly publicised raid, arrested and taken to Long Lartin. He was ordered released by SIAC [Special Immigration Appeals

Commission] on 17th January, 2006 on bail conditions which are more restrictive than the control orders system. The bail conditions of his release oblige Mr S to wear a tag at all times, to report to the police station every day between 12 noon to 2 pm, not to leave the bail address at all times save for the period from 10.00 am to 4.00 pm etc. His movements are restricted to a marked area which he is required not to leave. He is forbidden to receive any visitor other than his solicitor while staying at my place. The police and Immigration personnel and others working on behalf of Home Secretary can call at any time and without prior notice to enter the bail residence to check on him.

I offered to stand surety and provide him a bail address early in December 2005. On this occasion, the Home Office chose to impose "surety conditions" in drips, seemingly designed to prolong the process and to dissuade me from providing a bail address by sheer unreasonableness of the conditions they initially sought to impose. The result being that Mr S's release on bail was delayed for weeks.

The "surety conditions" require me not to permit my friends, neighbours and acquaintances to enter my residence unless I provide the visitor's name, address, date of birth and a photograph at least 3 days beforehand to the Home Office and seek its approval as to the time and date and the expected duration of the visit. My lap top can be inspected and taken away for up to 48 hours. My residence can be entered by police and immigration officials at any time without prior notice, etc. The "surety conditions" are grossly restrictive and infringe on my civil liberties as a British citizen. I have been obliged to place myself and my residence under quarantine in order to seek the release of a friendless, young asylum seeker from unjust and unlawful imprisonment.

Since 17th January 2006 my home has been visited by various police and immigration people on three different occasions—all without notice and at abrupt hours of their choosing. The last visit took place on Saturday 28th January 2006 when 3 officials called at 6.30 pm, just as I had sat down with my newspaper. They wanted to check the tagging equipment. For the next 50 minutes they wandered around all over my place in their unclean shoes, checking each and every corner over and over again. They tacked a lead of wire to one of the door frames and fixed a portable antenna for their equipment to the top of the door. A hideous sight which none of the "surety conditions" say they are allowed to do.

At odd hours and for no discernable reason, the tagging company telephones to enquire of Mr S where he was 3 minutes or 7 minutes ago. At other times, the tagging company rings and when Mr S picks up the telephone, there is no one on the line. When he calls back to ask why the telephone rang, he is told we did not call you. All this is happening in my presence and within my hearing.

During 4 months of incarceration, Mr S has lost some 20 kg in weight and looks a shadow of himself. He is psychologically traumatised by the circumstances of his arrest on 15th September, 2005 when his front door was smashed and he was severely beaten up by immigration and police personnel. He carries injuries to his knee and leg which require medical attention.

APPENDIX B: LES LEVIDOW'S ACCOUNT AS A VISITOR

When the solicitors Birnberg Peirce requested volunteers to visit individuals put under control orders in spring 2005, I responded as a supporter of CAMPACC. Previously I had no personal contact with such individuals, though I had actively campaigned for their release from unjust detention. On my behalf, Birnberg Peirce applied to the Home Office for permission for me to visit such individuals. By the time I was assigned to one, Mr G, he had been re-arrested for deportation to Algeria and then placed under house arrest under the Immigration Act 1971.

Mr G was released from prison on the basis that he had a family here who could host him. His house has been effectively turned into a domestic prison, in many ways. Guests are prohibited unless approved by the Home Office. It still had not given approval to some friends and relatives, many months after they submitted a request. Great distress results from the family's isolation, as well as from the constant apprehension about police raids, about security companies checking the electronic tag, etc. The latter seems all the more absurd, given that Mr G remains bound to a wheelchair, physically unable to move around without it.

When I have visited Mr G, he and his family were very appreciative because human rights campaigners have become an important contact with the outside world. He explained to me the difficulty of his bail conditions, which prohibit any conversation with anyone not approved by the Home Office. Eventually the judge allowed him to go out to his back garden for a couple of hours per day, but Mr G decided not to take up this opportunity. Why? Probably neighbours in his housing co-operative would say hello. As a human being, Mr G would find it unbearable to ignore them. If he simply says 'hello', then he could be returned to prison for breaking his bail conditions. The dilemma well illustrates how these conditions abuse human rights, as well as serving a political agenda of social isolation.

As I eventually learned from a newspaper article, when someone applies to the Home Office for permission to visit such a person, s/he classified as 'a known associate of a terror suspect' (Independent, 15 December 2005, pp.1-2). Such a stigma is a primary political purpose of the 'anti-terror' laws. It effectively deters many people from such 'association'.

APPENDIX C: THE 'PARALLEL REGIME' OF CONTROL-ORDER STYLE BAIL CONDITIONS UNDER THE IMMIGRATION ACT 1971

This issue has emerged in relation to some immigration detainees whom the government wants to deport to Algeria, Libya and Jordan. These are countries notorious for torture, with which the government has been seeking 'no-torture' agreements for some time. Some individuals released from ACTSA internment to a control orders regime under the PTA 2005 were re-detained in prison under the Immigration Act 1971 in August 2005, apparently because it was thought that such agreements would soon be concluded and the government then intended to deport them. Other individuals who had been accused, but not convicted of terrorism, in the well-known 'ricin' trial and released as innocent men in Spring 2005 were also re-detained in August-September under the Immigration Act 1971.

When it became apparent that deportation would not be imminent because the agreements with other governments had not yet been concluded, bail was granted to a few such people. This immigration bail has been under conditions even stricter than those previously used or envisaged under control orders. Four such cases were featured in an excellent article in The Independent (15 December, pages 1-2). In one of these cases, which may not be the only one, the detainee is not permitted to leave his accommodation at all, yet no derogation from Article 5 of the ECHR has been sought from Parliament as laid down as necessary for those control orders under the PTA 2005 which constitute full house arrest. Our supporters have direct experience of hosting or visiting some of these individuals (see Appendix B).

When responding to the Law Lords' ruling on internment under the ATCSA 2001, Parliament sought an alternative which did not breach the ECHR. The spirit of their judgement, which should surely be reflected in all subsequent treatment of 'terror suspects', was that imprisonment without trial or charge is simply unacceptable. However, the scope of their judgement related to people with a right to reside in the UK or those who could not be deported due to a risk that they would be tortured if returned to their country of origin. Since the summer of 2005, we have seen the emergence of a parallel

regime of internment under the Immigration Act 1971, using the excuse that those affected are being detained pending deportation. At least one person (Detainee G) who was first interned under ATCSA 2001, then released under a control order, then re-arrested and detained in prison under the Immigration Act 1971, has now been bailed under complete house arrest under that Act.

Full house arrest under the Prevention of Terrorism Act 2005 requires a decision to derogate from the ECHR, justified by a 'national emergency', yet this parallel regime somehow escapes that requirement; no such derogation has been made or sought. The justification for house arrest or detention without trial or charge under the Immigration Act 1971 is apparently that deportation is imminent. Yet when G was placed under a control order, it was precisely because he could not be deported due to the risk of torture. Nothing had changed with regard to that question by the time he was re-arrested in August 2005 (with others in somewhat similar circumstances, of whom more shortly). The UK government had merely decided to negotiate with the Algerian government with a view to obtaining assurances that returned persons would not be tortured. Here lies an important legal issue: whether someone can be regarded as 'detained pending deportation' when the agreement that is supposed to make that deportation acceptable under Article 3 of the ECHR as a procedure for a whole category of persons has not yet been tried and tested in the UK courts. It is illogical to maintain that G's situation changed because a 'no torture' agreement was under negotiation. This argument is quite separate from our considerable scepticism that the Algerian government's undertakings can be trusted.

A similar but slightly different argument can be applied to those who were re-arrested in August under the Immigration Act 1971 having been acquitted (or had charges against them dropped) in the so-called 'ricin trial'. These men are still in Immigration Act detention or have been bailed under partial house arrest. These are innocent men; to deny this would be to reject the outcome of the normal and proper judicial procedure which they went through. Nor was any new evidence put forward against them, nor were they subjected to control orders under the procedure that Parliament (in our view unjustly) approved in 2005 for 'terror suspects' who 'cannot be prosecuted'. Instead they have been subjected first to imprisonment without trial or charge, virtually indistinguishable from ATCSA internment but for the excuse that it is 'pending deportation'. Following that ordeal, some have been bailed under conditions which amount to a control orders regime—partial house arrest. Yet they are all either persons who in law cannot be deported because of the risk of torture, until and unless that risk is deemed to have been eliminated, and/or persons whose asylum claim process was unfinished according to normal procedures.

The label 'pending deportation' which has been used to justify their internment and then house arrest thus appears to have no justification. It is in fact being used to create a parallel or alternative route to punishment without trial, without even the safeguards which Parliament laid down in the PTA 2005. Whilst we opposed that Act as unjust, our point here is that the intentions of Parliament in 2005 are being flouted by this dangerous, illogical parallel regime. Even the detention regime for other asylum seekers, which we also oppose, is much less harsh than the conditions to which these men have been subjected.

We would, moreover, question whether the bail conditions which have actually been imposed in the case of Mr S (see Appendix A) are justified by the Immigration Act 1971. It does permit the Secretary of State to impose conditions with regard to residence and reporting to the police, and (as later amended) permits tagging of detainees. As far as we know, however, this Act has not previously been interpreted to justify restrictions on visitors or constant searches of the accommodation. As reported above, the searches experienced by one host (Appendix A) extend to the whole premises, not just to checking

the tagging apparatus. Moreover his computer ‘may be removed for up to 48 hours for inspection’, according to the conditions which have been set – a gross imposition on an innocent volunteer who has offered to help a person already judged innocent in a British court. Again, from the example of this case, the arrangements for detention and bail under the 1971 Act are being transformed into a control order regime.

Appendix 5: Submission from JUSTICE

SUMMARY

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE continues to oppose the use of control orders, introduced under the Prevention of Terrorism Act 2005 (‘the Act’). Contrary to the view expressed by the statutory reviewer of the control order scheme,³ we consider them an unwarranted departure from established standards of due process and a disproportionate response to the threat of terrorism.

3. It is a basic principle of English law that no person shall be deprived of their liberty without due process of law,⁴ and chief among the guarantees of due process is the right to a fair trial. These guarantees are reiterated in the terms of articles 5(4) and 6(1) of the European Convention on Human Rights (‘ECHR’) respectively. Article 5(4) provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

4. Article 6(1) provides materially as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

5. By contrast, the system of control orders introduced by the Act allows for an individual to be made subject to an array of serious and potentially open-ended restrictions upon his home life, employment, movement and communications without ever having the opportunity to answer any criminal charge against him. In this submission, we identify particular problems with:

- the nature and extent of the restrictions imposed;
- the lack of sufficient judicial safeguards; and
- the use of closed proceedings and special advocates.

3 See Lord Carlile of Berriew QC, *First report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006), para 61: ‘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’.

4 See e.g. Magna Carta 1215, art 39: ‘No free man shall be seized or imprisoned ... or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land’.

NATURE AND EXTENT OF RESTRICTIONS

6. Although all the control orders made since the Act came into force have been non-derogating orders,⁵ it is clear that the restrictions imposed by way of those orders have nonetheless been sweeping. As Lord Carlile notes of the conditions ‘imposed on most but not quite all of the controlees so far’:⁶

On any view [the] obligations are extremely restrictive. They have not been found to amount to the triggering of derogation, indeed there has been no challenge so far on that basis—but the cusp is narrow.

The obligations include 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. *They fall not very far short of house arrest, and certainly inhibit normal life considerably* [emphasis added].

7. Later, Lord Carlile notes that ‘control orders involve *deprivation of much of normal life*’ [emphasis added].⁷

8. In our view, nothing can be drawn from the fact that the restrictions have not yet been successfully challenged—as Lord Carlile notes elsewhere in his report, ‘[t]he effectiveness of the court procedures for non-derogating orders is almost impossible to report upon at this stage’.⁸ Instead, the nature of the restrictions imposed in the majority of non-derogating orders demonstrate a central flaw in the scheme of the Act: restrictions short of house arrest may nonetheless amount, in their collective effect, to a deprivation of liberty contrary to article 5 ECHR. (We note that the individual restrictions set out in Annex 2 of Lord Carlile’s report may also amount to a disproportionate interference with the right to respect for one’s home (article 8), freedom of religion (article 9), freedom of expression (article 10) and freedom of association (article 11) among others). As the Court of Appeal noted in *R (Gillan) v Commissioner of Police for the Metropolis*,⁹ discussing the judgment of the European Court of Human Rights in *Guzzardi v Italy*:¹⁰ the ‘distinction between ‘deprivation of liberty’ and ‘deprivation of liberty of movement’ can prove very difficult to make’.¹¹ As the Strasbourg Court stated in *Guzzardi*:¹²

The difference between deprivation of and restriction upon liberty is none the less merely one of *degree or intensity*, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends.

9. ‘The starting point’, according to the Strasbourg Court, ‘must be [the] concrete situation and account must be taken of a whole range of criteria such as the *type, duration, effects and manner of implementation* of the measure in question’.¹³ Having regard to the broad-

5 See n1 above, para 18: a total of 18 control orders have been made since March 2005, of which 9 subsist.

6 *ibid*, para 42

7 *ibid*, para 49

8 *ibid*, para 51

9 [2004] EWCA (Civ) 1067

10 (1980) 3 EHRR 333

11 *Gillan*, n6, para 38

12 Para 93

13 *ibid*, para 92

ranging and intrusive quality of the restrictions set out in Annex 2 of Lord Carlile's report and their long-term nature, we consider that the collective effect of the conditions imposed in the majority of control orders thus far are likely to amount to a deprivation of liberty contrary to article 5 ECHR. Nor, as we submit in the following sections, do the safeguards of the Act comply with those required by article 5(4) ECHR.

10. More generally, though, we consider that the use of control orders is also incompatible with the requirements of article 6 ECHR because—predicated upon an individual's suspected involvement in terrorist (and hence criminal) activity—they are, in substantive terms, criminal charges¹⁴ but without any of the specific guarantees of fair criminal proceedings under articles 6(2) or 6(3). Even if non-derogating orders are found to be essentially civil rather than criminal, however, we consider that it is likely that they would still breach the requirements of article 6(1) due to the limited judicial control exercised over executive decision-making in this area. We detail these concerns in the next section.

LACK OF SUFFICIENT JUDICIAL SAFEGUARDS

11. Given the extent of restrictions that have been imposed even under the non-derogating orders, the low level of safeguards provided by the Act is striking.

12. A non-derogating control order may be made against a person where the Secretary of State *'has reasonable grounds for suspecting* that the individual is or has been involved in terrorism-related activity' (emphasis added).¹⁵

13. Although the default position under the Act is that the Secretary of State requires the permission of the court to make a non-derogating order,¹⁶ permission is not required where it is thought urgent¹⁷ or where the subject of the order was previously detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 ('ATSCA').¹⁸ Indeed, the first 10 of the 18 orders made so far were made under this latter exception.

14. In the event that the court's permission *is* required, however, section 3(2)(a) directs it only to consider 'whether the Secretary of State's decision to make the order is *obviously flawed*' (emphasis added). The same test applies where an order has been made without permission and is subsequently referred to the court under sections 3(3)(a) and (b). Section 3(5) allows the court to consider an application for permission or an order referred to it without notice, without the individual being present, or being given the opportunity to make representations.

15. Following the initial grant of permission or reference, the making of a non-derogating order will be reviewed in a hearing. The court's role, at this point, is to determine whether the decision to make the order or impose a specific obligation was 'flawed'.¹⁹ Section 3(11) provides the standard to be applied at this stage to be 'the principles applicable on an application for judicial review'. Of this jurisdiction, Lord Carlile states:

Judicial review is a robust jurisdiction, as even cursory examination of its developing history shows. My observations between UK human rights law and that applied in other ECHR countries leaves me in no doubt that, despite

14 See *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras. 82–83; *Lauko v Slovakia* (1998) 33 EHRR 994, para 57

15 Section 2(1)(a)

16 Section 3(1)

17 Section 3(1)(b)

18 Section 3(1)(c)

19 Section 3(10)(a) and (b)

imperfections, it stands any comparative test—both in terms of accessibility and results.

16. Given the obvious limitations on the court’s role, however, we consider Lord Carlile’s assessment to be overly-sanguine. It is worth recalling in this context that judicial review of the ‘reasonable suspicion’ of the Home Secretary was the same jurisdiction enjoyed by the Special Immigration Appeals Commission under Part 4 of ATSCA, of which SIAC itself noted: ‘it is not a demanding standard for the Secretary of State to meet’.²⁰ The application of judicial review principles to control order proceedings has also been criticised by the House of Commons Constitutional Affairs Committee in its report on SIAC.²¹ In our view, such a weak standard of proof fails to provide effective judicial control of executive interference with individual liberty, and certainly does not meet the standard required of criminal proceedings under article 6 ECHR.

USE OF CLOSED PROCEEDINGS AND SPECIAL ADVOCATES

17. Among the most problematic features of the control order system is the Act’s provision for the use of closed proceedings and special advocates.²² Since the Act was passed, the use of special advocates in SIAC proceedings was subject to criticism by the House of Commons Constitutional Affairs Committee in April 2005.²³ In our own view, the use of closed sessions and special advocates involves serious limitations on an appellant’s right to fair proceedings. The rights limited include the individual’s right to know the case against him;²⁴ be present at an adversarial hearing;²⁵ examine or have examined witnesses against him;²⁶ be represented in proceedings by counsel of his own choosing;²⁷ and to equality of arms.²⁸

18. As regards the notion of ‘equality of arms’ in particular, it is plain that the individual who is made subject to a control order in closed proceedings does not enjoy anything remotely close to an equal footing with the respondent Secretary of State: not only is the respondent able to withhold relevant material from the appellant, but the respondent is entitled to be present at all times. Nor does the respondent suffer any of the kinds of restrictions upon communication with counsel that are imposed on the individual controlee.

19. The individual controlee, by contrast, is not entitled to be present throughout the proceedings. He is also prevented from knowing all the evidence against him, as the special advocate who represents him in closed session is forbidden to discuss the closed material with him. Although the special advocate is able to cross-examine witnesses on the appellant’s behalf, the appellant is denied the full benefit of this right—without knowing the closed evidence against him, he cannot indicate to counsel the points upon which witnesses should be challenged. In the same way, the entitlement of the appellant to his own counsel throughout the proceedings is useless to the extent that his own counsel

20 *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 71

21 Para 105

22 See Schedule, paras 4–7 and CPR 76

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

24 Art 5(4) and Art 6(3)(a) ECHR. see e.g. *Nielsen v Denmark* (1959) 2 YB 412 (Commission).

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

26 Article 6(1) and 6(3)(d) ECHR. See e.g. *Unterpertinger v Austria* (1986) 13 EHRR 175

27 Article 6(1) and 6(3)(c) ECHR. See e.g. *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457

28 Article 6(1) ECHR has been interpreted as providing an implied right to each party to a ‘reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent’, *De Haes and Gijssels v Belgium* (1997) EHRR1 at para 53

would also be prohibited from attending the closed hearings and knowing the closed evidence against him.

20. The fact that a special advocate is appointed by a government official and that the appellant has no say in the choice of advocate is another plain interference with the appellant's right to counsel 'of his own choosing'.²⁹ This lack of choice is significant, not least because choice of counsel is an important factor in promoting the confidence of persons subject to proceedings in their legal representatives. Such choice is even more important in proceedings where the government is the respondent.

21. In our view, the use of special advocates cannot be justified in situations where an appellant's right to liberty is engaged. This is because the kinds of restrictions that may be acceptable to protect national security in an employment tribunal hearing or a deportation hearing are unacceptable where an individual faces imprisonment or other serious interference with their right to liberty. Although special advocates might be used to determine *preliminary* issues in such cases (such as non-disclosure applications on grounds of public interest immunity), the notion that a person could ever be subject to criminal sanction or other deprivation of liberty without knowing the full case against them is antithetical to basic concepts of justice. As Lord Steyn noted in his dissenting judgment in *Roberts v Parole Board*:³⁰

It is not to the point to say that the special advocate procedure is 'better than nothing'. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.

JUSTICE is grateful to Rabinder Singh QC of Matrix Chambers and Tom de la Mare of Blackstone Chambers for their assistance in providing material for this briefing.

7 February 2006

Appendix 6: Submission from The Law Society

INTRODUCTION

This evidence has been prepared on behalf of the Law Society by the Law Society's Domestic Human Rights Reference Group. The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors' profession and has a public interest role in working for reform of the law.

The Law Society welcomes this opportunity to respond to a call for evidence from the Joint Committee on Human Rights as part of its inquiry into counter-terrorism policy and human rights. In particular, this evidence addresses the compatibility of the powers relating to control orders contained in the Prevention of Terrorism Act 2005 to human rights legislation.

²⁹ The right to a counsel of one's own choice is not absolute under Article 6(3)(c) ECHR but the general rule is that the appellant's choice should be respected.

³⁰ [2005] UKHL 45 at para 88

CONTROL ORDERS

The Prevention of Terrorism Act 2005 (“PTA”) creates a power to make a “control order”, which is “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism”³¹.

The Act creates two types of control order:

- a) non-derogating control orders—which may be made by the Home Secretary and last for a year³²;
- b) derogating control orders—which require the Home Secretary to first opt out of Article 5 ECHR and then seek permission of the High Court to grant such an order which lasts 6 months³³. These orders are currently not being used.

The power to make orders in respect of an individual is very wide, allowing the imposition of any obligation considered “necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity”³⁴. There may not, therefore, need to be any connection between the alleged involvement in terrorism and the restrictions imposed by the control order. In addition, despite the open ended range of obligations which a control order may include, there is no need for them to be tailored to deal with the specific threat which is alleged.

COMPATIBILITY WITH THE CONVENTION

We are concerned that the creation of control orders may be incompatible with Convention rights in the following ways:-

- The power to make non-derogating control orders enables the Secretary of State to impose wide-ranging obligations which interfere with the right to freedom of speech and association, the right to respect for private life and the home and the right to peaceful enjoyment of one’s property.

The Home Secretary may make an order where he has reasonable grounds to suspect that an individual has been involved in conduct which gives support or assistance or encouragement to an individual whom he believes (whether or not on reasonable grounds is not clear) to be involved in terrorism-related activity. The power to impose orders is therefore triggered by a very wide range of conduct, of which the individual need only be suspected, and the scope of any interference appears to be open-ended.

Moreover the Act seeks to limit the grounds on which the High Court may interfere with the exercise of the Secretary of State’s power. In determining what constitutes a flawed or obviously flawed decision, the court must apply the principles applicable on an application for judicial review.³⁵ However, many of the obligations will interfere with Convention rights—in particular Articles 8 (right to respect for private and family life, home and correspondence) and 10 (right to freedom of expression) and Article 1 of the First Protocol (every natural or legal person is entitled to the peaceful enjoyment of his/her

31 Section 1(1) PTA

32 Section 2 PTA

33 Section 4 PTA

34 Section 1(3) PTA. “Involvement in terrorism-related activity” includes conduct which “facilitates” or “gives encouragement to” the commission, preparation of acts of terrorism “or is intended to do so”, and conduct which “gives support or assistance to individuals who are known or *believed to be* involved in terrorism-related activity”: PTA section 1(6).

35 PTA section 3(11)

possessions)—so that the court will be obliged to engage in stricter scrutiny than the traditional *Wednesbury*³⁶ or *super-Wednesbury*³⁷, grounds³⁸.

Although none of these rights is absolute, any interference must be “in accordance with the law” and then the proportionality of the measures in issue must be considered. This concept refers to the underlying Convention value of the Rule of Law, and we question whether the framework for non-derogating control orders complies with this principle.

- Article 13 of the Convention guarantees the right to an effective remedy to anyone who has an arguable claim that his/her Convention rights have been violated. Although the Human Rights Act does not give domestic effect to this right, the United Kingdom is bound by it in international law and before the ECtHR. The PTA requires the High Court to apply the principles applicable on an application for judicial review³⁹ when determining if decisions of the Secretary of State are flawed. This standard would be incompatible with Article 13 if it was interpreted so as to prevent the court from considering whether the interference with an individual’s rights answered a pressing social need or was proportionate to that need⁴⁰. The courts must therefore interpret “the principles applicable on an application for judicial review” to include those principles which follow from application of the HRA and the Convention rights to which it gives effect.

- Article 6 of the Convention guarantees the right to a fair trial in the determination of a “criminal charge”. This carries with it a number of minimum safeguards of procedural fairness, such as the right to examine witnesses and the presumption of innocence. What constitutes a “criminal charge” for the purposes of Article 6 is an “autonomous concept”. The classification given to an offence by domestic law is only the starting point. Also of importance are the very nature of the offence and the nature and severity of the possible penalty⁴¹. In many cases, the conduct which founds an application for a control order will be contrary to the criminal law, indeed may constitute allegations of very serious criminal offences; and the measures which may be imposed—either alone or taken in conjunction with other measures—are of a nature, severity and duration as to amount to a criminal penalty⁴². It is therefore arguable that the process for the making and review of control orders is incompatible with the guarantees of a fair trial in criminal matters.

- Even if the courts determine that these are civil proceedings, it is likely that they will find that application of the civil standard of proof—on the balance of probabilities—provides inadequate judicial protection to the potential subject of a control order. Dealing with the proper standard of proof in relation to anti-social behaviour orders, Lord Hope of Craighead said,

“... the condition ... that the defendant has acted in an anti-social manner raises serious questions of fact, and the implications for him of proving that he has acted in this way are also serious. I would hold that the standard of proof

36 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

37 *R v Ministry of Defence, ex parte Smith* [1996] QB 517

38 *R v Secretary of State for the Home Department, ex parte Daly* [2001] 1 WLR 2099

39 PTA section 3(11)

40 See *Smith & Grady v United Kingdom* (2000) 29 EHRR 493, paragraph 138

41 *Engel v Netherlands* 1 EHRR 647, paragraph 50

42 PTA section 8(2) would appear to bear this out, in that it requires the Secretary of State, before making an order, to consult the chief officer of the police force 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.

that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard".⁴³

This approach in relation to ASBOs raises many questions on the procedures in the case of control orders, in particular derogating orders, which may deprive a person of his/her liberty.

3 February 2006

Appendix 7: Submission from Liberty

SUMMARY

1. The control order regime undermines fundamental democratic values: the rule of law, the presumption of innocence and the right to a fair trial. As the Council of Europe Commissioner for Human Rights observed:

"Control orders raise not only general points of constitutional principle concerning the rule of law and the separation of powers, but also a number of specific concerns regarding their compatibility with the rights guaranteed by the [European Convention on Human Rights]".⁴⁴

For these reasons Liberty and others, including the Joint Committee on Human Rights (the "JCHR"), vigorously opposed the Prevention of Terrorism Bill as it was being rushed through Parliament. For these reasons, we now urge Parliamentarians not to renew the Prevention of Terrorism Act 2005 (the "Act").

2. When we opposed the Bill in 2005 it was not on the basis of naivety about or blindness to the threat from terrorism. Indeed, we openly acknowledged that "the United Kingdom faces a serious threat."⁴⁵ The tragic events in London, of July last year, do not, therefore, alter or undermine our principled objections to the control order regime. These events should not be used to dismiss concerns about the continuation in force of legislation which undermines our democratic values.

3. The past should, in fact, warn us of the dangerous counter-productivity of repression and injustice, of the unintended consequences of over-broad and repressive measures such as the control order regime. In 2005, we expressed our fears about "the counterproductive effects (on community relations and intelligence gathering) of visible injustice" and argued that "any departure, or 'derogation', from ancient and modern human rights standards [is] undesirable".⁴⁶ Terrorism poses a threat to the rule of law, to our democratic values and to our human rights. By responding to terrorism with legislation which undermines these very values we also undermine the ultimate antidote to the threat from terrorism and the values that separate us from the terrorist. The Government argued that the control order regime was needed to safeguard us from terrorism. In retrospect, it is far from clear that it has had this effect.

4. We do not counsel inaction on the part of the Government. Quite the opposite, we expect the Government to take effective and proportionate steps to protect us from terrorism. However, rather than doing away with the presumption of innocence and fair

43 *R v Manchester Crown Court, ex parte McCann* [2003] 1 AC 787; [2002] 3 WLR 1313, paragraph 83. To similar effect, see Lord Steyn at paragraph 37. The other members agreed.

44 Mr Alvaro Gil-Robles in his Report on his visit to the United Kingdom in November 2004, para 16

45 First Paragraph of Liberty's Briefing for Second Reading in the House of Lords, February 2005, at Annex 1

46 *ibid.*

trial guarantees, we urge the Government to prosecute and sentence those who have committed terrorist offences and to lift the ban on the use of intercept evidence in open criminal proceedings to facilitate such prosecutions. The prosecution and sentencing of terrorists would better protect members of the public than control orders, which could be counter-productive and, in terms of the protection they offer, fall far short of criminal sanctions.

INTRODUCTION

5. The control order regime, created by the Act, will expire on 11th March 2006 (12 months after the Act was passed) unless renewed by an order of Parliament.⁴⁷ On 2nd February 2006 the Home Secretary laid an order before Parliament seeking renewal of the regime for a further 12 months (the "Renewal Order"). The debate on the Renewal Order in the House of Commons is scheduled for 15th March 2006. No date has yet been set for debate of the Renewal Order in the House of Lords.

6. On 17th January 2006 the JCHR sought "written evidence focusing on the human rights implications of the operation of the control orders system since it came into effect" in order to "assist it in reporting to both Houses of Parliament on this matter in time for any orders which the Home Secretary may lay before Parliament".⁴⁸ This document has been produced in response to that call for evidence.

SUMMARY

7. Liberty believes that Parliament should not approve the Renewal Order. Our reasons are set out in more detail below but, in outline, include:

(a) Liberty and others, including the JCHR, vigorously opposed the Prevention of Terrorism Bill while it was being rushed through Parliament. We did not do so because we doubted that there was a risk from international terrorism. We did so because we feared that repressive measures which undermine the rule of law, the presumption of innocence and the right to a fair trial are not the most effective way to counter this threat. Our reasons for opposing the Bill then continue to hold true today.

(b) In practice, control orders have been used to place severe restrictions on the rights and freedoms of those subject to them and their families. Despite this, the Home Secretary has used his power to impose restrictions in a blanket and indiscriminate manner without a true analysis of what, if any, risk is actually posed by each individual and how that perceived risk should be met.

(c) Criminal prosecutions are preferable to continued recourse to restrictions on liberty, imposed by Ministers. Criminal prosecution respects the rule of law, the presumption of innocence and the right to a fair trial. Furthermore, once convicted of a serious offence, the state can protect the public by imprisoning the offender, a more effective safeguard for the public than a control order. There is no shortage of available criminal offences: a wide range already exists and a number of additional and broadly defined offences are contained in the Terrorism Bill currently before Parliament.⁴⁹ We urge the Government to remove the ban on intercept evidence in open criminal proceedings to facilitate criminal prosecutions.

47 Section 13 of the Act

48 JCHR, 17 January 2006, Session 2005–06, Press Notice No. 20

49 For information on Liberty's views on the Terrorism Bill, see <http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml>

(d) Only by refusing to approve the Renewal Order can Parliament require the Government to propose more proportionate legislation to replace the control order regime. Had the Government done what Parliament had expected and introduced a bill, Parliament could have laid and debated amendments to the Act designed to ensure its human rights compatibility. By refusing to introduce a bill, Parliament has been denied this opportunity. If Parliament is to protect our human rights and democratic values, it now has only one choice: not to approve the Renewal Order.

ORIGINAL CONCERNS ABOUT CONTROL ORDERS

8. We campaigned vigorously against the Prevention of Terrorism Bill as it was rushed through Parliament between 23rd February and 10th March 2005 (attached at Annex 1 is Liberty's Second Reading Briefing for the House of Lords).⁵⁰ Our concerns were shared by many both within and outside Parliament, including the JCHR. These include, in outline:

(a) Although the United Kingdom faces a serious threat from terrorism, 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.

(b) Control orders fail adequately to address the underlying human rights objections to detention without trial under, the now repealed, Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("ATCSA"). This objection is to the complete abrogation of the right to a fair trial and the presumption of innocence, in particular:

- Unending restrictions on liberty (up to and including detention) based on suspicion rather than proof.
- Reliance on secret intelligence (which by definition may be all the less reliable for having been gained by torture around the world) and which, it seems, may have been obtained by torture.⁵¹
- The inability of the subject to test the case against him in any meaningful way.

(c) The unlimited range of restrictions that can be placed on a person under a control order implicate a range of human rights guaranteed by the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998, including Article 3 (inhuman or degrading treatment), Article 5 (liberty), Article 6 (fair trial), Article 8 (private and family life), Article 9 (freedom of religion), Article 10 (free expression) and Article 11 (free assembly).⁵²

(d) The unsatisfactory judicial supervision of control orders. The supervision included in the Act operates as political palliative rather than a real cure for a process built on secret intelligence and suspicions which never solidify into charges or proof. The JCHR concluded, for example, that "it seems ... unlikely that the use of a special advocate procedure, in which the individual does not get to see the material on the basis of which the order against him is made, would be compatible with the right to a fair trial in Article 6(1) ECHR."⁵³ It also commented that "the unprecedented scope of the powers contained in the Bill, and the potentially drastic interference with Convention rights which they

50 Not printed. Available at Liberty's website: www.liberty-human-rights.org.uk

51 *A (No 2) v. Secretary of State for the Home Department*, [2005] UKHL 71

52 Section 1 of the Act

53 Ninth Report, para 14

contemplate, warrant a greater degree of judicial control than access to an *ex post* supervisory jurisdiction."⁵⁴

(e) The Act should not provide for the making of orders which would amount to executive detention in breach of Article 5 of the ECHR and would, therefore, require derogation.⁵⁵

THE PRACTICAL IMPACT OF CONTROL ORDERS

9. The JCHR's call for evidence specifically sought information "on the human rights implications of the operation of the control orders system since it came into effect". We welcome the fact that the JCHR is focusing on the impact of control orders in practice. The restrictions that have in reality been imposed; the impact these have had on individual rights and freedoms; and the way control orders have been imposed and their effects monitored, are all vital to Parliament's decision about whether or not it should approve the Renewal Order. Parliament must also consider how effective control orders have been as a means of protecting the public from people who the Home Secretary considers to pose a threat to our security.

10. The way control orders impact on the lives of those subject to them will, of course, depend on the restrictions they impose—the Act does not impose any limit on the obligations that can be imposed.⁵⁶ Although we do not know exactly what restrictions have been imposed by each control order, we understand that many control orders have imposed a standard range of restrictions. These are set out in Annex 2 to Lord Carlile's Report and, as Lord Carlile states "[o]n any view those obligations are extremely restrictive."⁵⁷

11. These restrictions would give rise to a range of severe interference with human rights and freedoms guaranteed by the ECHR and the Human Rights Act 1998.⁵⁸

(a) The right to freedom from inhuman or degrading treatment (Article 3): The question of whether a person's treatment will breach Article 3 is dependant "on all the circumstances of the case, such as the duration of the treatment [and] its physical or mental effects".⁵⁹ A number of factors applicable to control orders would support an assertion that control orders violate Article 3, including: (i) that those subjected to control orders were previously detained without charge for a number of years; (ii) the fact that, during this time and as a result of the internment, a number of those people had become seriously mentally ill;⁶⁰ (iii) the fact that those subject to control orders must feel powerless as they do not know the nature of the case against them, are unable to defend their position and do not know when they will cease to be subject to restrictions imposed by the executive; and (iv) the fact that some of those subject to control orders are aware that attempts are being made to return them to countries in which they may previously have faced persecution and in

54 Tenth Report, para 12. See also the JCHR's comments on the need for the involvement of the independent judiciary in the making of control orders in paras 16-17.

55 Cf JCHR, *Prevention of Terrorism Bill: Preliminary Report*, Ninth Report of Session 2004–05, HL Paper 61, HC 389, paras 5–9

56 Section 1(4)

57 *First Report of the Independent Review Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 2nd February 2006, para 42

58 For more information on the range of human rights implicated by the restrictions imposed by control orders, see paper delivered by Tom de la Mare (Blackstone Chambers) on 28th June 2005 "Control Orders and Restrictions on Liberty" (available at: <http://www.blackstonechambers.com/papers.asp>)

59 *Selmouni v France* (2000) EHRR 403

60 Cf European Committee for the Prevention of Torture report dated March 2004 and published on 9th June 2005. See also Robbins I, MacKeith J, Davison S, Kopelman M, Meux C, Ratnam S, Somekh D and Taylor R (2005) Psychiatric problems of detainees under the 2001 Anti-Terrorism Crime and Security Act, *Psychiatric Bulletin*, 29, 407–409 (http://www.rcpsych.ac.uk/press/parliament/StatementAntiTerror_01.pdf)

which there is a real risk that they would be subjected to torture or other extreme rights violations once returned.

(b) The right to respect for private and family life (Article 8) would be severely restricted by the powers to access, search and monitor the home; the powers to interfere with correspondence; restrictions on who can visit the controlled person at home and who they can and cannot visit; and the impact of control orders on normal family life.

(c) The right to religious freedom (Article 9): may be implicated by the restrictions on the controlled person's movement which could, for example, prevent or restrict attendance at a place of worship.

(d) Freedom of expression (Article 10) would be severely restricted by the controls imposed on a person's ability to receive and impart information, including by restricting access to communications equipment and restricting who a person can meet and converse with and when.

(e) Freedom of association (Article 11) would be severely restricted by, for example, the ban on unapproved pre-arranged meetings and the restrictions on who can visit the home.

We attach at Annex 2 a redacted witness statement by Gareth Peirce, solicitor for a number of the men subject to control orders. This outlines the impact control orders have had in practice on those subject to them⁶¹ and explains the context in which control orders have been used.

12. As the European Commissioner for Human Rights observed "[s]ubstituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive."⁶² Given the severe nature of the restrictions that have been imposed by control orders, and the purpose of those restrictions, the fair trial guarantees in Article 6 of the ECHR would apply. These include the right to a fair and public hearing by an independent and impartial tribunal; the entitlement to the presumption of innocence; and the underlying principle of equality of arms. The procedure for the imposition of control orders would not meet these requirements:

"non-derogating control orders are initially made by the executive rather than, as Article 6 ECHR would properly require, the judiciary ... it does not seem to me that the weak control offered by judicial review proceedings satisfies the requirement of the judicial determination of what could be considered, in effect, as criminal charges. Added to this, the proceedings fall some way short of guaranteeing the equality of arms, in so far as they include *in camera* hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect of the order. The proceedings, indeed, are inherently one-sided, with the judge obliged to consider the reasonableness of suspicions based, at least in part, on secret evidence, the veracity or relevance of which he has no possibility of confirming in the light of the suspect's response to them. Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent, and impartial with some difficulty."⁶³

61 Paras 14–17

62 Mr Alvaro Gil-Robles in his Report on his visit to the United Kingdom in November 2004, para. 22

63 *ibid.*, para. 21

13. Control orders do not only impact on the men subject to them. Given the nature of the restrictions imposed, they also impact on their wives and children. Gareth Peirce has been instructed to act, in a collateral legal challenge to control orders, on behalf of the wives and children of two men subject to control orders (we understand that control orders were made against these two men last March and that they are still in place). We provide at Annex 3 a redacted witness statement by Ms Peirce explaining how, in practice, control orders have affected her clients and other wives and families in similar positions. The statement explains, for example that:

(a) The restrictions imposed have meant that the families of men subject to control orders could not obtain the support, including from qualified professionals, needed to help them cope with the return home of men mentally damaged by indefinite detention for three and a half years under the Anti-Terrorism, Crime and Security Act 2001.

(b) Control orders have resulted in families being imprisoned in their own homes and stigmatised and isolated from society. Friends of wives and children are no longer willing to visit the home and there are also restrictions on who the families are able to visit. Given the cultural and religious context this has meant that the women and children are socially isolated.

(c) Families no longer have privacy and security in their own homes and are constantly disturbed by police disruption and telephone calls.

(d) Wives and children feel constant and severe anxiety that their husbands or fathers will be taken into custody for breaching the control order. This is exacerbated by the uncertain nature of some of the restrictions imposed.

(e) Family members are unwilling to communicate with people outside of the home as they fear that their conversations are intercepted.

Control orders not only engage the human rights of those subject to them but also the rights of their families. Ms Peirce states, for example, that the rights of families under Articles 3, 8, 10 and 11 of the ECHR have been violated by the imposition of control orders.

14. As Lord Carlile explained in his report:

“The key to the obligations is proportionality. In each case they must be proportionate to the risk to national security presented by the controlee. I would urge that in each case the individual risks are examined closely, and the minimum obligations consistent with public safety are imposed.”⁶⁴

It seems unlikely that the Secretary of State has adequately assessed the proportionality of the restrictions imposed by control orders. It is also notable that Lord Carlile has not sought in his report to assess the impact that control orders have had on those they affect, directly and indirectly.⁶⁵

15. We understand that control orders impose a standardised set of restrictions.⁶⁶ Lord Carlile explains, for example, that “the proforma of the Schedule of Obligations [at Annex 2 of his Report] [have been] imposed on most but not quite all of the controlees so far”.⁶⁷

64 Para. 45

65 Despite the fact that he has “tasked himself to replicate exactly the position of the Home Secretary” (para 35)

66 Annex 2, para 14

67 *First Report of the Independent Review Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 2nd February 2006, para 42

We doubt whether standardised restrictions, which interfere with fundamental rights in the ways set out above, could satisfy a proportionality assessment. In order for a control order to satisfy such an assessment, the Government would have to show that it had considered the threat posed by each individual and, in each individual case, that it had assessed what limitations on the person's rights are really needed to address that threat. The Government must also undertake regular proportionality reviews of the restrictions imposed by control orders and, following the recent House of Lords judgment on the admissibility of torture evidence, must review the evidence used in that assessment to ensure that it was not obtained by torture.⁶⁸

16. As noted above, control orders also impact on the families of the controlled men. Therefore, a proportionality assessment of the restrictions imposed by control orders would require a consideration of the specific family circumstances in each case.⁶⁹ Ms Peirce's witness statement explains that this has not been done:

"Despite the fact that the Control Orders are very clearly having a significant impact upon the families as a whole, the Secretary of State has never consulted with the [wives and children] about the terms of the Control Orders or their effects, and has never sought any information about their impact."⁷⁰

17. The danger of giving the executive sweeping statutory powers to impose severe restrictions on individual liberties is that these powers will be applied in an arbitrary, unfair and disproportionate manner. The Government frequently answers such criticisms by stating that, as a public authority, it is bound by the Human Rights Act 1998 to act compatibly with Convention Rights, which includes the requirement to act in a proportionate manner.⁷¹ The experience of control orders over the last year illustrates that such an answer is unsatisfactory and that Parliament should not allow it to be used to justify the creation of sweeping powers, exercisable by the executive with little substantive judicial supervision. Despite its legal obligation to respect human rights, it appears that the Government has not undertaken a satisfactory proportionality assessment when making control orders and when deciding to keep them in place.

18. Lord Carlile felt the need in his report to recommend "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 restrictions imposed on each controlee."⁷² Given the range of rights engaged by control orders, and the extent to which these rights are restricted, it is unacceptable that no such procedure is already in place. The only way Parliament can ensure that the Government does not impose disproportionate restrictions on human rights pursuant to control orders is to refuse to approve the Renewal Order.

19. A consideration of the practical impact of control orders also illustrates their limited capacity to protect the public from people who the Home Secretary considers to pose a threat to our security. This has been admitted by the UK Government in its recent intervention in the case of *Ramzy v the Netherlands* before the European Court of Human Rights in which it described the control order system as providing "at best partial protection for the public."⁷³ Cases of controlees attending public meetings and

68 *A (No 2) v. Secretary of State for the Home Department*, [2005] UKHL 71

69 *Anderson v Sweden* (1992) 14 EHRR 615

70 Para 45

71 Section 6

72 Para 46

73 Application No. 25424/05, Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, 21st November 2005, para 16

demonstrations have, for example, been reported.⁷⁴ Mahmoud Abu Rideh, one of those subjected to a control order, has been cited as stating "The government is playing games. If I am a risk to security, why are they letting me out to be with people?"⁷⁵ Control orders are not a satisfactory way of protecting the public against those suspected of serious terrorist crimes. It would be more effective for world and national security if such people were prosecuted and, if found guilty, sentenced accordingly.

CRIMINAL PROSECUTION

20. Individuals suspected of committing terrorism offences should be prosecuted wherever possible.⁷⁶ This would allow more effective measures to be taken to protect the public while also respecting the rule of law, the presumption of innocence and fair trial guarantees.

21. A wide range of criminal offences already exist which would enable those directly and indirectly involved in acts of terrorism to be prosecuted. The Terrorism Bill currently before Parliament would create a number of additional, widely defined terrorism-related offences.⁷⁷ As Lord Carlile observed:

"Proposals in the *Terrorism Bill* ... may well have the effect of reducing the number of control orders as a result of prosecutions for new offences provided for in the Bill. If that is the effect, it will be beneficial in that due criminal process will apply to more terrorism suspects."⁷⁸

If the Bill is enacted there should be very few cases in which it would not be possible to prosecute someone involved, directly or indirectly, in terrorism. Accordingly, there should be no "need" for the Government to avoid the rigours of the criminal justice system by resorting to the use of control orders.

22. In his recent report Lord Carlile reiterates his view 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 convertible into criminal evidence".⁷⁹ Liberty has never supported an absolute bar on the admissibility of intercept evidence in criminal trials. The imperative behind the historic bar was clearly the protection of Security Services' sources and methods rather than any obvious concerns for the fairness of the trial process. In legal terms, this bar is an anomaly. The UK is the only country in the world, with the exception of Ireland, to maintain a ban on the use of such evidence. While the Regulation of Investigatory Powers Act 2000 forbids the use of domestic intercepts in open UK court proceedings, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised and interfere with privacy rights. There is no fundamental civil liberties or human rights objection to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

23. Removal of the bar on intercept evidence would overcome one of the primary obstacles to bringing proper criminal proceedings against terrorist suspects. The continued failure of the Government to bring forward proposals to remove the bar is, to say the

74 Cf Guardian, "Control order flaws exposed", Thursday March 24, 2005

75 *ibid.*

76 A belief shared by Lord Carlile and the JCHR and, apparently, also Government

77 For our comments on these offences see: <http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml>

78 Para. 76

79 Para. 37

least, surprising given the threat we face from international terrorism and the fact that criminal prosecution would be the best way of tackling the threat, from the perspective of both fairness and effectiveness.

THE MANAGEMENT OF RENEWAL

24. When he presented Lord Carlile’s report and the Renewal Order before Parliament on 2nd February, the Home Secretary stated:

“Mr Speaker, the last stage of the Prevention of Terrorism Act was a significant Parliamentary occasion. All members of this House will remember it well. During the debate I made a commitment to timetable further counter-terrorism legislation for the spring of this year in order that Lord Carlile’s report would be available to inform the House in considering any amendments to the control order legislation.”⁸⁰

The reasons Parliament insisted that the Home Secretary give this commitment in March 2005 are clear—control orders are a very serious matter and Parliament was not given sufficient time in 2005 properly to scrutinise the legislation creating the control order regime.⁸¹

25. Unfortunately, Parliament has been denied the opportunity to consider ways of amending the Act to ensure its compatibility with fundamental democratic values and human rights. The Home Secretary explained to Parliament: “On receiving Lord Carlile’s report, Mr Speaker, I was left to consider the merits of bringing forward a Bill with little content to enable the Hon Members to lay amendments to the Prevention of Terrorism Act”.⁸² For a number of reasons, enumerated in his speech on 2nd February, he decided not to introduce a Bill. This decision has thereby left Parliament with only two choices: (i) renew the Act or (ii) refuse to renew the Act.⁸³

26. A further option would have been open to Parliament had the Home Secretary laid the Renewal Order a day earlier or made clear that he did not wish to stand by the commitment to introduce primary legislation this spring. Amendments might then have been laid to the Terrorism Bill designed to improve the control order regime in the Act. Unfortunately,⁸⁴ the final opportunity to lay amendments to the Terrorism Bill was 1st February (the Third Reading of the Terrorism Bill), the day before the Home Secretary’s announcement and the introduction of the Renewal Order.

27. If Parliament is to perform its vital constitutional role and to protect our fundamental freedoms and democratic values, like the right to a fair trial and the presumption of innocence, the Government has now given it only one option. Parliament should not approve the Renewal Order. Only by refusing to approve the Renewal Order can Parliament require the Government to introduce more proportionate counter-terror legislation.

7 February 2006

80 HC Deb., 2 February 2006, col. 478

81 Lord Carlile explains at para 2 of his report that the Act “came into force on Royal Assent, on 11th March 2005, following very intensive Parliamentary stages concentrated between 23rd February and 10th March”

82 HC Deb., 2 February 2006, col. 479

83 It was exactly in order to avoid this situation that the Opposition had sought a sunset clause which would have required the Home Secretary to introduce new primary legislation after a year.

84 Though, we suspect, not coincidentally

Annex 2: Redacted Witness Statement by Gareth Peirce, solicitor, for a number of the men subject to Control Orders

In the Special Immigration Appeals Commission

Re applications for bail on behalf of

[...] (A), [...] (B),

[...] (H), [...] (P),

[...] (K) and

[...] (G)

First statement of Solicitor Gareth Peirce, dated 21 August 2005

(In relation to the background and circumstances relevant to the service of deportation orders upon the Applicants and their applications for bail.)

1. I, Gareth Peirce, solicitor in the firm of Birnberg, Peirce and Partners, 14 Inverness Street, London, NW1 7HJ, make this statement in support of the separate individual applications for bail lodged on behalf of the seven applicants we represent. It is intended to provide a background to their respective arrests on Thursday 11 August 2005 from the addresses where each was residing under obligations imposed by Control Orders to which all had been made subject on Saturday 12 March 2005.

2. I first set out here the general history of their respective detentions prior to their being granted bail on 11 March 2005 and prior to their being made the subject of Control Orders on 12 March 2005, then describe their recent arrests and the subsequent circumstances and conditions of detention and describe important psychiatric and medical factors now affecting those detained.

3. Where this statement is based upon my personal knowledge, I confirm that it is accurate and true and where it is based upon instructions or information from others, I confirm that I believe those instructions and that information to be accurate and true.

HISTORY OF DETENTION FROM DECEMBER 2001

4. In December 2001, the Anti-Terrorism Crime and Security Act was brought into force and a small number of individuals, all of whom were foreign nationals, were arrested and detained thereafter as a result, that detention being of an indefinite nature, and involving no trial. Of the twelve individuals originally detained, a number were held thereafter at Woodhill Prison, and the majority at Belmarsh Prison. Most of those detained under the 2001 Act were detained as from December 2001; a smaller number were arrested and certificated subsequently; of the present applicants those arrested later include ..., ... and All were refugees in this country; a number had directly experienced torture in their countries of origin from which they had fled.

5. During the course of the following three years challenges were made both to the correctness of the certification of each individual, and, in parallel (but in the chronology of appeal hearings, in advance of the individual challenges), a challenge to the propriety of the legislation, including a challenge to the choice made to legislate to detain foreign nationals alone, when the evidence put forward on behalf of the Secretary of State was that a perceived danger to national security emanated from British citizens either equally or to a greater degree. In parallel with individual and joint challenges, a number of applications for bail were made on behalf of a number of the detainees during the three years of detention that followed. The most pressing grounds articulated were those within bail applications made as a matter of urgency on behalf of detainees who clearly were falling into severe mental illness, that mental illness creating in turn life-threatening

circumstances in part by reason of an extremely serious risk in a number of cases of self-harm and potential suicide, and in part because an aspect of increasing depressive illness was marked by inability to eat, which led to a number of those individuals detained being at serious physical risk, in combination with their mental deterioration. The mental and physical breakdown of a number of the detainees during the course of the three years of detention under the 2001 Act of course had significant effect upon them as individuals (and for those who were married, their families also), but in turn had a marked effect upon the small group of detainees as a whole also subject to the same legislation. Those individuals found it incumbent upon them (and indeed volunteered as a moral obligation) to provide care, both mentally and physically, for those who were disabled and who became ill.

6. The first of the detainees to deteriorate sharply into florid mental breakdown was ..., a Palestinian with refugee status in this country. (... has not been made the subject of the current deportation orders; he does not, of course, have a country to which he could be deported. He remains at home, the subject of a Control Order, in constant touch with his lawyers and psychiatrists, indicating that he is too terrified to attempt any normality of existence, believing that he too may well be about to be the subject of arbitrary rearrest.) In the summer of 2002, ... was transferred by the Secretary of State to Broadmoor Hospital. Thereafter two others of those currently detained also came to be transferred to Broadmoor (in late 2004). Those were ..., ... suffering by then from severe depression and paranoia and (The Home Office jointly instructed a psychiatrist with ...'s solicitors; there was no disagreement as to the high risk accompanying any continued detention of ... in prison; he too was therefore transferred to Broadmoor Hospital.)

7. In March 2004, a fourth detainee, ... , had been granted bail by the Special Immigration Appeal Commission on conditions of complete house arrest. The basis for the grant of bail was that his mental and physical health had deteriorated in Belmarsh Prison to such a degree and the dangers to his health constituted so high a degree of risk, that it was considered by all psychiatrists consulted (by the Applicant and the Home Office) that it was necessary for ... to be removed from prison and placed within his home environment albeit under the most extreme and severe of restrictions. ... had been suffering from florid psychotic episodes and held a number of extreme paranoid delusions.

8. It became apparent during their three years of detention that a number of those in prison who had borne the brunt of caring for others were themselves beginning to be affected, both by that responsibility and its continuous seven-day a week necessity, and because of the impact of the continuing indefinite detention upon them also. Thus, it became apparent that ..., one of the primary carers, was himself becoming seriously mentally ill. He had taken on much of the physical care of ..., ..., as well as that of ... as his physical strength deteriorated (...). ... took on a large degree of responsibility for carrying, washing and attempting to feed other detainees. As he in turn crumbled, the responsibility of the remaining detainees towards him also became the greater. ... was transferred to Broadmoor Hospital in late 2004.

9. The increasing incidence of mental illness and/or severe depression and behaviour had necessitated the instruction of a number of experienced consultant forensic psychiatrists (and one consultant psychologist, ...) on behalf of a number of the detainees in turn. In the light of the clear pattern of deterioration observed in the detainees, and in the light of the similarity of conclusions of a number of different psychiatrists, we asked that they consider whether there were any circumstances particular to these detainees, that caused specific concern. As a result of their joint consultations, they agreed a joint report published in October 2004.

10. Their report concluded that indefinite detention per se was directly linked to the deterioration in the mental health of the detainees and in addition, that fluctuations in

their mental state were related to the prison regime itself and the vagaries of the appeal system.

11. The conclusions of this report having been published, after consideration of its findings, the Royal College of Psychiatrists provided its endorsement to the conclusions to which that group had come. I exhibit with this statement at (a) the joint psychiatric report and at (b) the statement of the Royal College of Psychiatrists.

12. In parallel with these findings, a report of the European Committee for the Prevention of Torture, the experienced body appointed by the Council of Europe, was given to the UK government in March 2004, but not made public by the government until June 2005. This body visited the United Kingdom twice to 'assess the treatment of foreigners in the United Kingdom pursuant to the Anti-terrorism Crime and Security Act 2001'. The conclusion of the Committee was that the impact of conditions of detention upon the mental and physical health of the detainees was at least for some, amounting to inhuman and degrading treatment. It found that *'many of them were in a poor mental state as a result of their detention and some were also in poor physical condition. Detention had caused mental disorders in the majority of persons detained under the ATCSA. For those who had been subjected to traumatic experiences in the past, it had clearly reawakened the experience. The absence of control resulting from the indefinite character of detention, the uphill difficulty of challenging the detention and the fact of not knowing what evidence was being used against them had a detrimental effect on their health.'* I exhibit a copy of the ECPT report at (c).

THE PROCESS BY WHICH BAIL CAME TO BE GRANTED IN MARCH 2005

13. On 16 December 2004 the House of Lords held by an overwhelming majority that the detention of those held under the 2001 Act was in breach of their right to liberty and security under Article 5 of the ECHR. As a consequence of the House of Lords ruling, on behalf of those we represented we took a number of further steps:

a) On 12 January 2005 we wrote to the Home Secretary, Charles Clarke, asking for an urgent meeting to discuss ways in which the situation of those detained might be resolved. We emphasised to the Secretary of State that at no stage (contrary to what was said to Parliament during the passing of the 2001 Act) were any of the detainees before being taken straight to prison, ever questioned about the assessment that his presence 'constituted a threat to this country or at all'. We indicated on behalf of our clients that those we represented would consider it entirely appropriate to discuss ways of entering into a form of undertaking sufficient to reassure any who considered them as a potential threat to this country. Other than ourselves, no one had in fact interviewed or spoken to the detainees, an omission that they, and we, had always considered extraordinary in the circumstances of what was said to have constituted a suspicion upon which each was certificated and detained. I enclose a copy of the letter to the Secretary of State at (d).

b) A number of applications for bail on behalf of a number of the detainees were already before SIAC. Thereafter we lodged notices of application for bail on behalf of the remaining detainees. (In support of many of those applications we had placed before SIAC and the Secretary of State psychiatric reports in relation to the men and in some cases to their families.) By now, early 2005, three detainees had been transferred to Broadmoor Hospital, one was at home under complete house arrest for similar reasons, and the majority of those still detained were clearly rapidly deteriorating mentally and physically.

c) I here describe the specific position of ... from December 2004 to his release on bail in March 2005. this is by way of example only; in practical terms the position of all the detainees followed effectively an identical course.

(i) ... had already lodged a renewed application for bail. This was listed for a hearing by SIAC on 31 January 2005.

(ii) On 18 January 2005, the Secretary of State lodged an open statement objecting to bail, stating that he had '*considered whether there are any conditions of bail, or combinations of conditions, which could adequately reduce the risk of ... absconding or resuming his former activities.*' He concluded there were none. I produce a copy of that statement at (e).

(iii) On 28 January 2005 Counsel for the Secretary of State served a skeleton argument in advance of the hearing on 31 January 2005 in which they stated: '*...The factual landscape has changed significantly in the light of the Government's announcement this week explaining in outline the proposals it intends to put before Parliament to supersede part 4 of ATCSA. Those proposals will not include detention in prison but will allow controls of the sort effected by SIAC via bail in the case of G. In those circumstances the Secretary of State will not oppose the grant of bail in either of these cases (...as well ...) subject to conditions similar to those applied in ...'s case*' (i.e. complete house arrest). I produce a copy of that skeleton argument at (f).

(iv) ... bail hearing was then adjourned for conditions to be attached to bail to be considered by the parties. The response on behalf of ... to the proposal for complete house arrest in correspondence with the Secretary of State pointed out that ECHR jurisprudence equated complete house arrest with detention and hence would, equally, violate his Article 5 rights. The response emphasised his wish to play a proper part in the life of his family and his wish to live a life of purpose and constructive activity that could in turn benefit his family.

(v) ...'s adjourned application was listed for hearing on 10 March 2005. Under cover of a letter dated 9 March, the Secretary of State in a statement set out his proposals for conditional bail for (At the same time he sent to their lawyers initially identical proposals for release for all detainees under the 2001 ATCSA Act). I produce a copy of that statement at (g). The Secretary of State had again altered his position from one of seeking bail with a 24-hour curfew (ie house arrest) to one in which he proposed '*a stringent combination of conditions which will reduce the threat posed by ... to the greatest extent possible short of such a restriction (ie 24-hour curfew).*'

The Secretary of State indicated that he had evaluated the risks for each detainee and was proposing '*specific and proportionate controlling measures in order to minimise them*'.

(vi) On 10 and 11 March 2005 all detainees under the 2001 Act were released on conditional bail, from their respective prisons, or from Broadmoor, or in the case of ..., from conditions of hitherto complete house arrest. The conditions for all were virtually identical. (A copy of each bail notice ordered by SIAC is attached to each individual bail application submitted in parallel with this statement.)

(vii) On 12 March their certification under the 2001 Act was withdrawn and each detainee was made instead the subject of a Control Order, the obligations for each under that Order being effectively an exact reproduction of the conditions of bail ordered by SIAC some 48 hours previously. (A copy of each list of Control Order obligations is attached to each individual bail application submitted.)

RELEASE ON BAIL MARCH 2005 ONWARDS

14. The release of all of those detained under the 2001 Act on 11 March 2005 itself created many and various practical and often exasperating difficulties. We do not here outline the level of correspondence, contact and attempted resolution of difficulties that arose day by day. What must be self-evident from the level of contact between ourselves and those

responsible for administering Control Orders is that we were at every stage, and in relation to even the most minor of queries, being consulted by those we represented in a way that reflected their anxiety not to be in breach of the obligations imposed upon them. A number of those obligations were unclear; in the case of some they were unworkable; we do not consider that it could be suggested that there was not an attempt at every level, from our clients and ourselves, to observe the obligations that were imposed. Should SIAC find it of assistance, we can provide all of the material in the way of correspondence and telephone contact that has been generated by the attempts individually and overall to comply with the individual Control Orders respectively.

15. Three of those granted bail, were granted bail directly from Broadmoor Hospital. Each had already expressed his nervousness at re-entering the world abruptly; each expressed his concern that he would not be able to cope with that experience. (Broadmoor in relation to all other patients has a carefully organised gradation when discharge is anticipated, involving close liaison with local mental health professionals and social workers attached to the relevant local authority). In the case of these detainees no such liaison or gradation was satisfactorily achieved; ...and ..., both single men, both mentally ill (and in the case of ...), were taken by police and placed alone in premises that were in no way adapted for their particular needs. ... suffered a complete mental breakdown during his first night of release from Broadmoor, and was admitted to the psychiatric department of the Royal Free Hospital where he remained as an inpatient for five months until in the early morning of 11 August he was arrested on foot of the present notice of intention to deport. Police officers came to the psychiatric ward, handcuffed him and dressed him and took him first to Woodhill Prison and then to Long Lartin Prison.

16. Similarly, ..., required to comply with his curfew between the hours of 7pm and 7am, was entirely isolated in the premises in which he was placed in March 2005 after being taken abruptly from Broadmoor Hospital and had no means of contacting the outside world. He also again as ... became immediately an outpatient of concern to his local psychiatric hospital. On several occasions we became aware he was attempting to take his life, on one by attempting to throw himself from a window. His life, after release under a Control Order, has been one beset by serious psychiatric, physical and emotional difficulty.

17. We do not set out here in any detail whatsoever, the constant liaison that we have had on behalf of those particularly mentally or physically affected, other than to say that release under Control Orders did not necessarily alleviate much of the mental and physical damage that had been caused and had accumulated as a result of the lengthy detention in particular in Belmarsh Prison. Challenges to the Control Orders were lodged with the High Court, and in parallel, after some months had elapsed, a number of challenges on behalf of wives and families were also lodged in the light of the fact that they too had become subject, in many fundamental ways, to the restrictions of the Control Orders themselves which in turn, were affecting the mental stability of wives and children beyond the individuals specifically the subject of the Control Order obligation. At the time of their re-arrest in August 2005, a number of other detainees and their wives had been referred by their respective GPs to psychiatrists; one of these was

18. The hearings of Control Order 'trials' were unlikely to have occurred until January 2006 since it was considered by Mr Justice Ouseley at a preliminary hearing, that the House of Lords consideration in October 2005 of the issue as to whether a court in this country was required to exclude evidence or information that had emanated from torture might affect the basis upon which Control Order hearings might come to be considered.

ARRESTS AND DETENTION SINCE 11 AUGUST 2005

19. It was with this immediate background that the arrests of all individuals subject to Control Orders took place on the morning of 11 August 2005. (Two exceptions, ..., a

Palestinian and hence stateless, and ..., a Tunisian national, have not been made the subject of similar notices of intention to deport.)

20. We during the course of the day of their arrests were unable to locate the places of detention to which those men we represented had been taken.

21. We learned subsequently that all had been taken originally to Woodhill Prison where a number had been assessed as being suicide risks immediately. However, during the course of the day none remained at Woodhill. Half the detainees (five in all) were taken to Long Lartin Prison in Worcestershire near Evesham, and the remaining five to Full Sutton Prison near York. Both groups were placed in units in which they were entirely isolated from the main prison population and where they have remained in total isolation since, other than via association with each other.

22. In the light of the fact that both units in which they are detained are not merely unsuitable, but we suggest on advice are highly dangerous, we now set out in some detail a description of the respective units and the circumstances of the five men placed within each.

1. LONG LARTIN PRISON

23. The 'Unit' in which the five men are detained is one designed to be segregated from the remainder of the prison (including from health care to which the unit is adjacent). Upon our first visit to our clients there on Friday 12 August 2005, we were informed that it was a 'segregation unit'; on our second visit on Friday 18 August, we were informed that it had been previously used a short-term isolation unit for those dependent on drugs who were attempting to break their addiction. Since their placement in the unit, none of the detainees have been permitted to visit or make use of any of the facilities available for the remainder of the prison population in Long Lartin. Thus, the five are in each other's exclusive company.

24. Held in Long Lartin are ..., whom I have previously described as having been arrested from the psychiatric ward at the Royal Free Hospital; ..., arrested from his home where he lives with his wife and six-year-old daughter; ... living alone but with the attendance of carers from the local authority; and ..., a single man living alone. The fifth detainee is ... represented by Tyndallwoods. (With their permission, we refer to his position and his interaction with our clients. We understand that he also upon his release from Belmarsh Prison has been under the care of a psychiatrist,)

25. The cell in which each is placed is approximately 1.8 metres by 2.7 metres. The window of each cell has not only bars built within the window itself, but a cage outside the window which covers its aspect. Although there is a partial view of the sky from the window of the cell, this is obscured by netting which covers the entire outside area. The cells themselves run along a corridor; the corridor is narrow although two men can with difficulty pass each other in the corridor. However, ...cannot move his wheelchair along the corridor or through any door. He has constructed an adaptation of his wheelchair folding the seat with a belt to restrict its width. As a result he has no comfortable or safe place in which to sit or move; this in turn is causing pain in his hips and his back. The unit is on the first floor. To access an exercise yard, ...has to be carried downstairs by his co-detainees; the exercise yard is bordered by a high brick wall on one side and metal sheeting on the other three sides, with a form of chicken wire. The detainees believe the yard to be approximately 15 metres by 8 metres. The yard is watched by cameras and lit. Although the sky can be seen, it is only above the narrow funnel of high and restrictive walls. ... when at home, had been undergoing regular physiotherapy. That has not been available to him to date at Long Lartin Prison.

26. ... who has had contact now over an extended period with a number of the detainees is providing us as a matter of urgency with a report, he having visited Long Lartin Prison on Wednesday 17 August. We are advised by him, and have observed for ourselves, that the psychiatric state of all of the detainees is rapidly deteriorating. In the case of ..., he is already beginning to experience again the delusions that affected him in Belmarsh Prison and led to his release in early 2004 under house arrest. ...comments, and we provide the same lay comment, that all those detained now, believe that they cannot again survive the experience of detention that they survived with such difficulty and under which they sustained so much personal damage. ...comments that ..., ...and ...are all clearly now already seriously affected; he reserves his highest degree of alarm for ...whom he describes as 'even worse than the other two'. ..., taken as he was from the Royal Free Hospital as an inpatient, had been sustained while a patient with medication which went some way to alleviating his acute paranoia and delusional preoccupations. We ourselves were aware that ...was able to trust no one and nothing His fears extended to food, (He believed food to be poisoned, and the majority if not all of those with whom he had contact to be combined in a conspiracy to his detriment). Since ...has been placed in Long Lartin Prison, he has not been taking food. This is not a new preoccupation; the same difficulties arose in Broadmoor Hospital; prior to that had come the horrifying official confirmation which affected all Muslim prisoners in Belmarsh, that for a number of years the 'halal' meat that they had been given there, had in all likelihood not been halal at all.

27. Although ...'s stay in Broadmoor Hospital assisted in some ways to encourage him to take food, his psychiatric problems had in no way been solved at the time of his abrupt release on bail from Broadmoor in March 2005 and, as we have described, he had been returned within 24 hours to psychiatric care, this time in the Royal Free Hospital. (At the time of ...'s original transfer from Belmarsh Prison to Broadmoor, we had been in the highest state of alarm as to the increasingly life-threatening condition he was in. That alarm is now even greater and we anticipate will be reflected in ...'s report which we hope to have within 24 hours of making this preliminary background statement.)

28. No carer had been provided within the prison for ... at the time of our second visit to Long Lartin Prison on Friday 19 August 2005. Thus the situation that pertained in Belmarsh Prison, has replicated itself in Long Lartin but within worse conditions and more crushing and debilitating circumstances even than before; those men who are capable, are attempting to nurse, wash, feed, move and carry the others. Since ...'s arrest, his co-detainees have been feeding him, washing him and dealing with all his most intimate and private needs. He, we observe, has become again seriously depressed; we were already aware whilst he was at partial liberty under a Control Order, that his depressive illness had not been cured, and he, like ..., had needed to realign himself quickly with psychiatric care, for him under the umbrella of Camlet Lodge Psychiatric Hospital in North London. We anticipate a report will come from his consultant psychiatrist within a short space of time.

29. We understand from ... that all the three referred to above are seriously contemplating in some way bringing their lives to an end; none can see any hope for the future; none can revive within himself the energy or constructive approach to challenge the situation in which he has been placed.

30. We should indicate in relation to ..., also in Long Lartin Prison that although he had not whilst in Belmarsh placed himself under the care of a psychiatrist, nor has done so since he has been under a Control Order, nevertheless we observe with him, a particularly reserved individual, real despair at his ability to cope with those around him who are mentally ill; he is, for instance, woken throughout the night by ...'s screams and we understand also that ...is now again shouting out during the night, he being the subject of delusional ideas throughout the course of day and night. Because of ...'s inability to take food or medication, there is by now according to ..., no vestige of drugs remaining in his

system that could inhibit or control or assist with his paranoia and delusion. There is therefore no support in medical terms for him whatsoever at this point of time.

31. It is very clear (and we do not make this a complaint directed at Long Lartin Prison or its staff) that the officers who are now required to deal with these men have no understanding or appreciation of their particular needs and circumstances. We point to the example experienced on our visit to the prison on Friday 19 August; each man was required to be strip-searched before coming to see the two solicitors from this firm who visited (a factor that led to two men to decline the second proposed visit in the afternoon), but ..., in addition to being asked to take his clothes off, a request deeply troubling to a devout Muslim man, was asked to stand in order for this to be accomplished; he of course is not able to stand, that being his particular disability. Equally, the impact of the last three and a half years cannot be appreciated or dealt with by officers at Long Lartin Prison (a potential factor that the European Committee for the Prevention of Torture commented upon previously when they were in Belmarsh and Woodhill, respectively).

32. There is very little natural light within the unit whatsoever; there is a need for artificial lights to be on the whole time; those members of our office who visited the unit found that their eyes had to readjust to light when they came out of the unit. We should indicate that officers from Long Lartin Prison itself have commented that they themselves find it difficult to be for any prolonged period in that unit. (The consensus of the previous joint psychiatric reports relating to the detention of these same men was that while indefinite detention continued it would be highly unlikely that the prison health care teams would be adequately able to combat the deterioration in their mental health).

2. FULL SUTTON PRISON

33. The second group of detainees is held in what was built as a Special Secure Unit at Full Sutton Prison for prisoners designated 'exceptional high risk'. That categorisation was never applied to these detainees at any stage, nor were any categorised even as high risk other than for the first week of their respective detentions in 2001; thereafter they were all categorised as standard category A prisoners, and of course, since March 2005, have all been regarded as suitable for release first upon conditional bail, and thereafter subject to identical obligations under Control Orders.

34. The conditions in Full Sutton Prison are as claustrophobic or even more so than the conditions in Long Lartin Prison. Prison officers there who have spoken to the members of our office visiting, have commented that they find any prolonged duty in the unit as suffocatingly claustrophobic; they refer to it as 'like being in a submarine' and have indicated variously, that they find it very hard to tolerate the experience, however short-lived their period on duty.

35. Exactly a decade ago, I as a solicitor was engaged in litigation on behalf of a number of convicted prisoners who were or had been held in those units. Their challenge to imprisonment in those conditions was on the basis that two factors amounted to the infliction of inhuman and degrading treatment and the imposition of intolerable conditions of confinement:

a) the combination of the poor and claustrophobic physical environment, the lack of opportunities for constructive or useful work, the lack of proper educational facilities, the absence of reasonable exercise opportunities, the lack of any stimulation or alteration of company with whom to associate and the grossly intrusive security arrangement for all visits including family visits and

b) the cumulative effect of the suffocating and restrictive environment which demonstrably produced ill health.

36. I here exhibit two documents:

a) The conclusions of a number of experienced psychiatric and medical practitioners in 1996 including Dr Adrian Grounds of the Institute of Criminology, at (h) and

b) The response of the Home Office to that research at (i) in a report produced by a committee headed by Sir Donald Acheson in 1996, which commented upon *'cramped design at Belmarsh and Full Sutton, the lack of natural light and the limited view from the cells at Belmarsh all gave the team particular concern. It was felt that the designs at Belmarsh and at Full Sutton might, over time, lead prisoners to suffer from mental health problems associated with living in cramped conditions for extended periods. The most likely symptoms would be anxiety-related such as irritability, poor concentration and poor sleep. In addition, particularly vulnerable prisoners might develop more severe symptomatology. . . . In our view the restrictions in the designs of Belmarsh and Full Sutton SSUs carry potential risks to mental health under the current regime.'*

37. The report underlined the dangers of the *'combination of uncertainty concerning the sentence plan and the length of stay on the unit, together with lack of:*

*opportunities for meaningful work
natural visual and auditory stimuli
social contact outside a small group of prisoners
incentives
physical contact with families and friends.'*

38. The joint report of the psychiatrists and medical practitioners instructed on behalf of the prisoners themselves had previously concluded:

'1. The five men described here all have in common a prolonged detention in Specialist Secure Units under the new SSU regime since the breakout of the 9th September 1994. The new SSU regime comprises an environment, a set of practices in that environment and a set of rules regarding decategorisation which constitute a systematic physical and psychological stressor likely to lead to mental and physical disorders.

2. The spectrum of symptoms observed in these men, in which features of depression, anxiety and sensitivity combined with physical and psychosomatic disorders is shared also by other patients known to us who have been detained in SSU conditions.

3. A substantial number of these men have developed severe mental illnesses including depression, anxiety and post traumatic stress disorder during the period since September 1994. Their mental capacities to fully engage with and anticipate in preparation of their defence in connection with their forthcoming trial has been impaired by these disorders, to an extent greater than would normally be produced by conditions of imprisonment. Their long-term mental health is likely also to have been adversely affected.'

39. Prior to the conclusions by the psychiatrists on behalf of the detainees, no research had been conducted as to the dangers inherent in such detention. As a result, the Home Office's report, under Sir Donald Acheson (previously Chief Medical Adviser to the government) came to be produced. It agreed with the conclusions as set out above. The experience of detentions within Special Secure Units found as a fact that there were severe and damaging effects as a result of their impoverished regimes; association with fewer than a handful of persons, similarly held, who are confined side by side, week after week, month after month, provides no variety of stimulation or relief from monotony. There is no possibility of escape from each other's company, both because of the tiny and static nature of the population and because of the miniature confines of the unit. Visitors are struck by the close proximity of walls and the lack of distance vision including the inability

of the prisoner ever to see real light, even the small exercise yard being covered with three layers of metal grid and mesh. No choice exists in relation to work or education as in the main prisons. As a result of the lack of stimulation from other prisoners and from varieties of activities, all prisoners within such regimes were found to develop reclusiveness and inability to communicate having 'said everything there is to say' to fellow prisoners, as well as appearing to suffer, after time, from a number of further effects including a degree of memory loss.

Most forcibly, a lack of access to open air and to a sense of distance, as well as to exercise other than in an enclosed and small yard, inadequate to accommodate team games and running, led to a variety of physical effects including the recurrent complaint that eyesight (particularly distance vision) deteriorates as a consequence.

40. Following the research above, the Unit at Full Sutton was closed down, and, we understand, remained unused until it came to be reactivated on 11 August 2005 for these detainees. The Unit was and still is literally covered in cobwebs. The cells are filthy; however, more importantly, the claustrophobic physical construct of the Unit has, of course, been unable to be enlarged. Detained in Full Sutton now is ..., for whom (and for whose wife also) psychiatric evidence was submitted in support of his bail application commenced in December 2004 and decided upon in March 2005, and who since his release under a Control Order has further, with his wife, been the subject of psychiatric concern by In the Unit at Full Sutton are also ..., referred by his general practitioner to a psychiatrist after his release under a Control Order (and also his wife), ..., and two Algerian men represented, we understand, by Tyndallwoods.

41. The three men we represent were all already affected by their extended detention, two in Belmarsh Prison, and one, ..., in Woodhill Prison. Although the Woodhill Prison experience was slightly less severe and unpleasant than the experience of those detained in Belmarsh (a prison described in harsh terms by Lord Carlile), ... had nevertheless deteriorated mentally prior to his release on bail in March 2005. Since his release members of our office have expressed to the Control Order officers and the Secretary of State our extreme concern as to the mental effects upon Mrs ...and their children of the Control Order and in the case of the ... family, extraordinary and continuing difficulties and intrusions as a result of, it appears, malfunctioning of the electronic tag equipment. ... is we understand the subject of considerable concern to the medical staff at Full Sutton prison already; the psychiatric nurse there wishes already to increase the dosage of tranquilisers prescribed to him, after he has been in the Unit at Full Sutton for only one week. ... suffers from claustrophobia; he fears that he is under so much pressure that he cannot sustain any alteration in demeanour or approach of any other person in the unit towards him without snapping.

42. ... had already been referred by his general practitioner to a psychiatrist, as had his wife after his release under a Control Order; there is concern on the part of the other prisoners as to ...'s vulnerability in respect of his considering taking his own life. (He was immediately placed, we understand, on suicide watch whilst he was in transit to Full Sutton via Woodhill Prison on 11 August 2005. We are aware that ... is engaged on a minute-by-minute basis attempting to provide help and support to those detainees who are clearly at high risk in Full Sutton.)

43. The position at Full Sutton is that the five prisoners there are entirely on top of each other at all times, and always within inches of prison officers. The tiny and claustrophobic nature of the unit has not changed since it was closed down as being unfit for human habitation in approximately 1996 and clearly cannot change. Its abrupt revival was manifest to the prisoners from their first moment of entry; the drinking water from the taps remains rusty; there is a smell of sewage; the unit was and remains filthy with dead spiders and flies throughout, covered in cobwebs and with blood stains on the windows of

at least one cell. The door to the exercise yard is so rusty it opens only with difficulty. The cells themselves are slightly smaller than the cells at Belmarsh prison. The maximum height of any ceiling in the unit enhances the suffocating atmosphere being no more than 7 feet high. The prisoners themselves were paid during the first week to try to clean the unit from top to bottom.

44. Even if clean, however, the physical dimensions of the unit cannot be altered. The windows of the cell give out onto the exercise yard. The exercise yard is completely covered by three layers of metal netting. If there is sunlight it at best reflects off the top layer of the metal netting. The exercise yard, onto which the windows of the cells give out, is intended as the origin of light for the cells; however, it is never light enough for artificial lights within the cells not to have to be kept on at all times. In consequence day and night within the unit remain the same.

45. There are no facilities, no stimulation and no distraction from each other. Although there is a small room entitled the 'gym' there is no ventilation in it; any attempt at exercise quickly produces intolerable conditions; prison officers have advised that exercise machines should not be used as they will simply hit the walls.

46. The largest room is a 'television room' which is the equivalent of two cells. The corridor provides for two people with difficulty passing each other.

47. The overall atmosphere of the unit is of silence. No one has anything to say to each other; the place is lifeless, frighteningly unintruded upon by any stimulation, distraction or conversation. There is no meaningful activity; there is no education, exercise, sport, work or craft work as is available to all other prisoners within the main body of the prison. Prison officers themselves appear to have no idea how long these detainees are intended to stay in the unit and for what purpose and can offer no guidance.

48. None of the detainees believes that it is possible for him to remain in these conditions for very long; all regard this as the clearest possible attempt to pressurise them into agreeing to deportation to countries where they know they will be tortured. All have expressed their strong view that they find it inconceivable that it could be thought that each does not have a serious and justifiable fear on the basis of strong evidence that he will be tortured or killed if returned to his country of origin; all say that the experience of Control Orders was such as to create significant mental pressure upon them and their families and yet, none felt able to contemplate return to his own country; the same overriding fear of return to torture had perpetuated throughout three years of intolerable conditions in Belmarsh in which each had observed his co-detainees in turn being driven into madness.

49. Equally, each detainee stresses that he attempted to comply with every condition imposed upon him under a Control Order however onerous, and each expresses his disbelief that it could be considered that he had any connection with any of the incidents that took place in July in this country, or that it could be considered he approved of such events. We are aware ourselves, from the contact we have had with those we represent since the time of incidents, of the levels of anxiety and concern the incidents generated, not only for themselves and their own position, but anxiety for the safety of those persons they knew who travelled on public transport in London, and the grief shown on the part of two men, when a member of the community with which they were familiar, was found to have died on 7 July a much-loved shop keeper known to all members of that community.

50. It is with this background to date that each detainee applies for bail, this statement being made to provide background information up to and including 21 August 2005. It is our expectation that within at most 48 hours, some medical evidence in support will be

able to be provided. Examples of individual pre-existing psychiatric/medical reports are included separately within the individual bundles in support of each notice of application for bail.

Gareth Peirce
Birnberg Peirce & Partners
21 August 2005

Annex 3: Redacted Witness statement by Gareth Peirce explaining how, in practice, control orders have affected her clients and other wives and families in similar positions.

I, Gareth Peirce, of Birnberg Peirce & Partners, 14 Inverness Street, London, NW1 7HJ, a solicitor of the Supreme Court of England and Wales STATE as follows:

1. I am instructed by [blank], the wife of [blank], to act on her behalf and on behalf of her five children who are aged between four years and ten years. I have personally known Ms [blank] for three and a half years since I was first instructed by her husband. I have had very close dealings with her during the past two and a half months, since he was made the subject of a Control Order in March 2005. I have visited her at home on some five occasions since then. I have also spoken to her by telephone extremely frequently, often several times a day, and on occasion at night when crises have occurred. As a consequence I have detailed knowledge of the Applicants' circumstances.

2. I am also instructed by [blank], the wife of [blank] (referred to in proceedings before the Administrative Court as 'E'). I am instructed to act on her behalf and on behalf of her three children who are aged between three and five years old. I have met with [blank] also, during the past three and half years since husband was arrested in December 2001, and have had contact with her since he was made the subject of a Control Order in March 2005. I have during the same period of time, seen their children on a number of occasions; the family and its circumstances are known to me well.

3. I have furthermore come to know well the wives and family members of a number of other individuals who were detained under the 2001 Anti-Terrorism Crime and Security Act and who have been made the subject of Control Orders and I have had the opportunity of visiting and observing all during recent months. I am aware that the experiences of [blank] and Ms [blank] and their children, are not unique to them but are reflected in the experiences of other families also.

4. Save as set out herein, the matters set out in this witness statement are within my knowledge.

Factual background to this application

5. The Applicants in these proceedings are the family members of men who have been made subject to Control Orders issued under the Prevention of Terrorism Act 2005 ('the 2005 Act'). I am aware from Ms [blank] herself, and from Ms [blank] herself, from my own observations, and from my close dealings with their respective husbands of the impact that has to date been experienced by them and their children since 11 March 2005. The two and a half months since that time have involved continuous emergency work, and in the case of the husband of Ms [blank], some five separate court appearances to deal with the crises created by his reaction in particular to aspects of the Control Order. Similarly with Ms [blank], and with other families affected by identical obligations, I and colleagues in this firm have been attempting to deal with continuous difficulties. Full and detailed statements from the two Applicants in respect of their own positions have yet to be

completed and I would wish to supplement this witness statement with more detailed witness statements from them in due course.

6. It is important to put the Control Orders into context. In December 2001 the majority of those men who are now the subject of Control Orders were arrested in their homes in the early hours of the morning. They were subsequently detained indefinitely under the Anti-terrorism Crime and Security Act 2001 ('the 2001 Act'). Although there had been national publicity as to that incoming legislation, neither the men nor their families anticipated that they would be persons to be made the subject of any legislation. All were shocked and astonished, beyond the inevitable shock of any person and his family upon his arrest; in the case of each individual, he was not ever questioned in relation to terrorism or suspected offences prior to his detention. Thereafter he was not provided with the 'evidence' upon which his detention was said to be justified and at no stage did he know, nor was it possible to explain to his family, why he was detained, and by what means he could ever successfully challenge his detention, nor know when he would ever be released.

7. The arrests and subsequent detentions had an enormous impact upon the individuals and their families. So far as the families were concerned, a number were compelled to move for their own safety as a consequence of their notoriety, locally or beyond. In the case for instance of [blank] a photograph appeared of a house in the local newspaper, neighbours commented upon her husband's arrest and upon him, and in the minds of the public she and here children became the family of an 'international terrorist'.

8. Their indefinite detention under the 2001 Act had exceptionally serious consequences for the mental health of many of the men who were detained. As one example, Mr [blank] mental health was destroyed to such an extent that he was transferred from prison to Broadmoor Hospital. I personally visited Belmarsh prison with Ms [blank] when her husband had reached a life-threatening condition there, and I again maintained the closest possible contact with her throughout his period of detention thereafter at Broadmoor Hospital. I am aware of the immense strain that was placed upon Ms [blank] in continuing to care for her five children alone, to support and maintain close contact with her husband in Broadmoor Hospital, his doctors and lawyers, and to provide an underpinning of stability to the lives of her children, including what she has felt at all times is her duty to ensure their optimum education, in particular because she is herself by background a teacher.

9. In the light of the burden upon Ms [blank], she nevertheless at all times placed the difficulties of her husband and her children above her own. She was able to obtain some support and companionship through the three and a half years in which her husband was detained from other women. She had a network of social support which gave her some relief; mothers of children who would take turns with her in caring for their children and providing some relief. In these circumstances the extent to which Ms [blank] was able to ensure the mental and social stability of her children was remarkable.

10. For a number of other families that stability was already seriously affected by the arrest and detention of their respective husbands. For example, [blank], for the second time, experienced with her husband a night time arrest, with police intrusion into their house, her husband having been previously arrested in 1998. It was subsequently acknowledged that that arrest had been entirely wrongful; the effect upon Mr [blank], and his wife had been considerable and had created for both damage; when that nightmare was revisited by his arrest in December 2001, it triggered in both during the next three years of his detention, serious depression and evidence of post-traumatic stress including for their children. All of this was the subject of psychiatric investigation and evidence available long before the imposition of Control Orders in March 2005; a group of consultant psychiatrists and a psychologist who had come together after seeing detainees under the 2001 Act separately, and their families, considered their repeated and similar findings to be sufficiently marked,

so as to conclude that indefinite detention itself was causing significant damage to those made the subject of the legislation. Those findings were endorsed by the Royal College of Psychiatrists and, we note today, were endorsed also by the European Committee for the Prevention of Torture in a report dated March 2004, although that report, made available to the United Kingdom Government, was not made public until today, 9 June 2005.

11. A number of the wives of the detained men slipped into serious depression whilst their husbands were detained; those who were detained were unable to offer any significant support to their families during the period of their detention, a factor that caused them particular additional despair.

12. All of the families concerned come from a refuge background; none are originally native to this country; all come from a bad ground of fleeing persecution, and in the cases of some, torture or severe ill treatment. To each of the families, arbitrary detention, is the circumstance from which each fled to this country. All are based here without a wider family grouping. All are hence from vulnerable communities or come from a vulnerable background.

13. Although the House of Lords' judgment in *A v Secretary of State for the Home Department* [2005] 2 WLR 87 signalled the potential end to that indefinite detention, the Secretary of State did not move to release the detainees. Bail applications were lodged (some prior to the judgment of the House of Lords) but were resisted by the Secretary of State whose position changed first to ask if bail were granted that it be under conditions of complete house arrest, and then by agreement, to bail upon conditions. These conditions were approved by the Special Immigration Appeals Commission on 11 March, and all the detainees released on the evening of the 11th March. On the following day, all those released on bail were made the subject instead of Control Orders under the Terrorism Act 2005. Although conditions of bail had been agreed by the Secretary of State on the previous day, in at least one regard, the Control Orders adopted a different obligation without explanation.

14. For the most part those bail conditions that were imposed were similar to conditions now included in the Control Orders; the conditions have not been in any way individualised, and are effectively the same in all cases.

15. The return home of men already mentally damaged by indefinite detention for three and a half years, to homes where families had also been damaged, or had been unaccustomed to the presence of their father or husband for a number of years, created circumstances in which considerable flexibility and adjustment could be anticipated as being required, and where support for those in those homes including support on an easily accessible basis would clearly be needed. Instead, the Control Orders have ensured that in large part support is not available to the families generally, or to the individual subjects of the Control Orders, and furthermore, the family itself is now subject equally to the restrictions placed upon the intended object of the obligation. The families believe themselves to be imprisoned in their own homes, to be stigmatised and isolated from society, to be no longer able to have privacy or security within their homes without fearing at every moment entry by police or disruption from telephone calls especially throughout the night, and an atmosphere of fear and apprehension that is constant.

16. The requirements of the Control Orders have resulted in constant disruption to the respective households; a number of the households have been disrupted day and night by telephone calls, inquiries and intrusions from the police asking whether the subject of the Control Order is in the house as he has been lost by the electric monitors. These disruptions and entrances, occur inevitably during the night since it is between 7pm and 7am that the subject of the Control Order is required to be at home and controlled by the electronic tag to ensure that he complies with that curfew. That has created for the wives and the

children concerned a repeated fear that their husband and father is about to be rearrested, and a belief that the house is no longer their own but police can and do come in constantly day and night. It is clear that a number of the wives and a number of the children are now in a state of permanent fear.

17. The disruptions to two of the households have been so great that the husbands have requested that they be provided with separate accommodation away from the house. In the case of [blank] the disruption to his mental stability was so great (resulting in a number of suicide attempts during the weeks following his release) that he was admitted to the psychiatric department of Charing Cross Hospital in order to provide not only him, but in particular Ms [blank] with respite so that she could sleep. Although Ms [blank]'s husband's most extreme reaction was to the tag, and, following five court appearances, Mr [blank] is no longer required to wear a tag, the history of that experience has not disappeared. He is now required to call the monitoring company between 3am and 4am every morning as a substitute for wearing the tag, and as he is prescribed a heavy dosage of tranquiliser to assist him in gaining some sleep, it is Ms [blank] who feels obliged to wake herself to ensure that her husband complies with the obligation imposed upon him. It is clear that Ms [blank] is suffering now from serious exhaustion as a result of the ongoing experience of attempting to support her husband since his release, abruptly, from Broadmoor Hospital on 11th March 2005. (The history of Mr [blank]'s experience post release from Broadmoor is set out separately in the proceedings that related to him; it was the decision of Mr Justice Ouseley that the Secretary of State, had he been aware of the psychiatric opinions available to the Court as to the effect of the electronic tag upon Mr [blank], could not have required that obligation.) The effect of that tag was not, however, felt only by the subject of the electronic tag himself; it was the entire household that was constantly and seriously affected; in addition to sleep disruption for the entire household, still ongoing that is caused by the obligations, and which was particularly exacerbated for the duration of the electronic tag, Ms [blank] and her children remain terrified that Mr [blank] will be arrested again. He was for two weeks imprisoned after he had been arrested when he went to the police and stated that he did not feel if discharged from the psychiatric hospital, that he could comply with the obligation to have the tag (temporarily removed) refitted without being driven mad. Unexpected visits by the police, furthermore, caused further fear and distress.

18. One child walks around his house with his father's watch around his leg as a tag. He believes that all men are subject to tagging requirements.

19. The stresses on the children are evident in their daily behaviour. For example, a number of the children are terrified when their fathers speak to other parents when collecting them from school. They believe that such contact may be seen as unauthorised and so might result in them being arrested. This reaction stems in part from the uncertainty of the meaning and ambit of the obligations imposed upon their fathers and the reasons for them, together with their past experiences, meaning that they fear again an arbitrary imposition of detention.

20. For both Ms [blank] and Ms [blank], the most significant difficulties, and those most unlikely to disappear, arise since the Control Orders restrict entirely their ability to obtain support from friends and family.

21. All the children believe that their households have been stigmatised and that they are not like other families. That is not a surprising reaction. For example, in the case of more than one family, the frequent visits to the house by uniformed police have drawn attention to the family in the neighbourhood where they live.

22. The obligations contained in all Control Orders forbid any visitors to any household who do not submit photographs and extensive personal background information in

advance has ensured at neither Ms [blank] nor Ms [blank] have had visits from friends since their husbands and fathers were released (save for immediate relatives who, even though they had already been cleared to visit Broadmoor or Belmarsh, were nevertheless refused entry until an extended re-clearance process had been undergone). No adult friends however are willing to visit them as they are unwilling to go through the vetting process. This is not because they are any form of security risk. Instead it is because they are unwilling to consent to the intrusion upon their privacy that will result from vetting. For example, one Ms [blank]'s friends was unwilling to obtain police clearance because Ms [blank] was unable to promise that her friend's photograph would not be kept on file. Children do not visit as their parents do not wish them to be vetted by the police. There is also a concern that visits by adults or children may be disrupted by police visits. All of the families, as indicated, come from refugee communities already in fear.

23. The lack of visitors has particular impact in the case of these families; it must be clear that these wives and their children have an urgent need of support from those to whom they are close; they have a greater need than normal for social support as a consequence of the stress to which they have been subjected for three and a half years, as well as the new stresses under which they exist and the consequent deterioration in their mental health.

24. Furthermore, the lack of visitors needs to be considered in the light of their cultural and religious background and their families. All are devout Muslims. All come from a background where the homes of women are the focus of their lives. It is in their homes that they nurture their families and conduct their social lives with other women, It was in their homes that they received support from a network of women while their husbands were imprisoned.

25. What has occurred during the past two and a half months since the imposition of the Control Orders means that the support networks built up, have been destroyed at a stage when wives and families need as much or even more support than they did when their husbands were detained. Of importance is the fact the Secretary of State has restricted visits even by health officials and qualified professionals to the respective houses in the same way as other visitors; in consequence even doctors and social workers have been required to go through an identical process and even where their visits concern the family members and not the individual who is subject to the Control Order. This in turn has had an interfering effect upon the ability of wife and children to enjoy normal access from professionals (this restriction was a restriction imposed overnight in relation to Control Order obligations even though the Secretary of State had agreed the day before to obligations attached to bail under the preceding legislation that would exempt registered professionals from having to comply with such additional obligations before entering the respective houses). This restriction, as the restrictions upon other visitors appears to the families particularly irrational since the men who are the subject of the Orders can go out from the house each day and meet with any other person providing that that meeting has not been prearranged. (It thus appears to the family members, that they are placed in a number of ways under even greater restrictions since for wives and children, their home is their most important potential meeting place with others.) The families point out to us that it is no relief to be allowed children as visitors of the same age as the children of the family, since it is not customary for children to visit a household without their parents visiting also at the same time.

26. The lack of visitors has been particularly harmful to the children. Ms [blank] reports how her children question why people no longer visit their home.

27. Furthermore, difficulties with visits are compounded by two other matters which mean that social contact no longer takes place by telephone or at the homes of friends and relatives.

28. In particular, people are now unwilling to talk openly with the wives and families of men subject to Control Orders on the telephone; as the subjects of Control Orders are able only to talk on one telephone, that being a landline from their respective homes, all believe that all telephone conversations from that line will be monitored. In consequence women are unwilling to discuss private matters as they do not want their conversation to be heard by a man (this is of particular importance to women of the cultural and religious background of those who are the Applicants in this case).

29. In addition, the Applicants find that the restrictions contained in the Control Orders make it difficult for them to attend the homes of their friends or relatives. The Control Orders prevent the men who are their subjects attending prearranged appointments; it would however culturally be discourteous for men and their families to go to the house of another person unannounced. If announced and anticipated, application to the Home Office is required, providing again, the details of friends fearful of such exposure to official scrutiny, not because of any criminal activity on the part of those to be visited, but because of their fear that they in turn will be made suspect.

30. The extent to which the children of the respective families are clearly in fear is a matter of considerable concern; the extent to which the return of their fathers to the respective household has caused disruption, intrusion and reactivated all of their past experiences of frightening detention of their fathers for reasons that were never known, and a result of which their fathers have been themselves damaged, has created a never-ending circumstance from which the family has not emerged and believes it will never now emerge.

31. In the light of the above, I believe that the Control Orders have had, and are continuing to have, a serious impact on the mental health of the Applicants and their respective families, and in addition, that they are very clearly contrary to the best interests of the Applicants' children.

32. Despite the fact that the Control Orders are very clearly having significant impact upon the families as a whole, the Secretary of State has never consulted with the Applicants about the terms of the Control Orders or their effects, and has never sought any information about their impact.

33. We are at present obtaining relevant expert evidence to address the central issues of the effect of the Control Orders, in particular upon the mental health of the Applicants, the mental health of their children, and the overall interests of their respective children in the round. It will be appreciated that the past two and a half months have involved a considerable disruption and have created a situation in which day by day the effects of this new legislation have become apparent. It is in these circumstances that I respectfully request permission to place evidence in a consolidated form before the Court as it is accumulated.

THE RIGHTS OF THE APPLICANTS AND THEIR FAMILIES

34. It appears to me that the restrictions contained in the Control Orders that are described above mean that the Applicants' rights under the European Convention of Human Rights ('the ECHR') are engaged by the Control Orders. In addition the rights of the Applicants' children are engaged. I have reached this conclusion for the following reasons among others:

34.1 As I have already commented, Control Orders restrict the people who can visit the Applicants and their children. The right to private life includes a right to establish and develop relationships (e.g. *Niemietz v Germany* (1992) 16 EHRR 97 at paragraph 29).

Preventing visits to a person's home will inevitably impact upon her ability to establish and develop relationships;

34.2 Police officers may and do enter the home of the Applicants at any time of day to monitor the men subject to Control Orders. Such searches engage article 8 of the ECHR (e.g. *Funke v France* (1993) 16 EHRR 297 at paragraph 57); and

34.3 The limits on the communications equipment that can be brought into the homes of the Applicants restricts their ability to receive information that others wish to impart to them through the media. As a consequence article 10 of the ECHR is engaged (*Leander v Switzerland* (1987) 9 EHRR 433 at paragraph 74).

35. Although it is clear that, for the reasons set out above, the individual obligations contained in the Control Orders interfere with the rights of the Applicants under the ECHR, it is my submission that over all impact of the obligations also engages the ECHR.

36. Firstly I have already indicated that I believe that the Control Orders are having an adverse impact on the mental health of the Applicants and their children. In my opinion that suggests that at the very least article 8 of the ECHR is engaged by the imposition of the Control Orders. In *Bensaid v United Kingdom* (2001) 33 EHRR 10, the European Court of Human Rights held that:

Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see e.g. *Bunghartz v Switzerland*, Comm. Report, op. cit., § 47; *Friedl v Austria*, Series A no. 305-B, Comm. Report, § 45). The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.

37. It may also be that article 3 of the ECHR is violated by the harm being caused to the Applicants' mental health. Degrading treatment that violates article 3 is:

such as to arouse ... feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (*Ireland v United Kingdom* (1978) 2 EHRR 25).

It appears to me that Control Orders may well be having such a significant impact on the Applicants that it is breaking their moral resistance.

38. When considering the submissions above regarding article 3 of the ECHR, it needs to be remembered that the European Court of Human Rights has held that when considering whether article 3 has been violated:

it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. (*Selmouni v France* (2000) 29 EHRR 403)

It appears to me that this dicta is particularly significant in the context of the Applicants' children. It suggests that this Court should find it easier to find a violation of article 3 of the ECHR in relation to the children. That submission is also supported by the importance that the European Court of Human Rights attaches to protecting the interests of children (see below).

39. The overall impact of the Control Orders is also relevant as it means that those orders are clearly contrary to the best interests of the Applicants' children. That is significant as it

appears to me that the ECHR requires consideration to be given to the children's interests and the manner in which their interests may be harmed by the overall impact of the Control Orders. This submission is based upon the following matters:

39.1 Article 3(1) of the United Nations Convention on the Rights of the Child ('the Children's Convention') provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

39.2 The European Court of Human Rights has recognised that it is proper to take account of the Children's Convention when considering the obligations imposed on states by the ECHR. In particular the Court has noted that the Children's Convention 'is binding in international law on the United Kingdom in common with all the other member States of the Council of Europe' (*per* European Court of Human Rights in *T. v United Kingdom*, (2000) 30 EHRR 121). As a consequence the ECHR requires the welfare of children to be considered as a primary consideration;

39.3 The submissions in the sub-paragraph above are consistent with the remarks of Sedley LJ in *R v F. (Adult Patient)* (2000) UKHRR 712 in which he held that:

The family life for which Article 8 [of the ECHR] requires respect is not a proprietary right vested in either parent or child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child [at 732D]; and

39.4 The Court of Appeal has expressly recognised the great weight that the European Court of Human Rights gives to the best interests of children (e.g. *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002).

40. In the light of the matters above, it appears to me that the rights of the Applicants under articles 3, 8 and 10 of the ECHR have been violated by the imposition of the Control Orders. Paragraph 5 of the witness statement of Robert Whalley dated 8 April 2005 states that:

In those cases in which the individuals [who have been subject to Control Orders] are married with one or more children, additional consideration was given to a proposed obligation that would or might interfere with any family member's Convention rights and whether such interferences outweighed or reduced to any extent the proportionality of each obligation. This consideration resulted in the tailoring of some of the proposed obligations (for example, allowing other children of a similar age to enter the residence without prior permission etc). Insofar as the obligations imposed do still interfere with any family member's Convention rights, the Secretary of State considered such interferences to be justified and proportionate, bearing in mind the legitimate aim sought of preventing and restricting terrorism-related activity.

41. In response to the evidence of Mr Whalley, I would comment that it appears to me that it is impossible to see how the Secretary of State has adequately assessed the proportionality of the impact of the Control Orders on the Applicants when he has failed to seek any information about the impact of those orders. The European Court has held that there is a need to consider the specific circumstances of a case to determine whether an interference with family life protected by article 8 of the ECHR is proportionate (e.g. *Anderson v Sweden* (1992) 14 EHRR 615). That is not surprising in light of the obligation to consider the impact of a decision on mental health and the best interests of a child (see

above). It is difficult to see how these matters could be addressed without individualised consideration being given to the specific circumstances of each Applicant's case.

TEST TO BE APPLIED

42. As far as I am aware, there are no specific provisions governing the addition of a party to proceedings regarding Control Orders under the 2005 Act. As a consequence, it appears that part 19 of the Civil Procedure Rules applies. Paragraph 19.2 (2) provides that:

(2) The court may order a person to be added as a new party if—

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

43. It appears to me that it is desirable to add the Applicants so that they can present arguments regarding the interference with their rights under the ECHR. If they are not parties, it appears to me that it is difficult to see how the Court can resolve the issue of the legality of the Control Orders as it will not have considered whether the Control Orders violate the ECHR rights of the Applicants. In addition, the matters that the Applicants wish to raise are obviously connected to those that are already in dispute.

44. Further, paragraph 19.2(2) does not exclude the principles of common law procedural fairness. Indeed, if a person has a common law right to be heard then it is obviously desirable that they should be heard. As a consequence it is my opinion that the discretion in paragraph 19.2(2) should be exercised to enable the Applicant to be heard if that is required by common law procedural fairness.

45. In addition, paragraph 19.2(2) cannot justify a court acting in a manner that is contrary to the ECHR. As a consequence it is my opinion that the discretion in paragraph 19.2(2) should be exercised to enable the Applicant to be heard if that is necessary to comply with the ECHR.

COMMON LAW PROCEDURAL OBLIGATIONS

46. *In R v Commission for Racial Equality ex p Hillingdon London Borough Council* [1982] AC 779 Lord Diplock held that:

Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons ... here is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.

47. The principle set out in the paragraph above is primarily applied to people who are directly affected by a decision. However, as the judgment of Glidewell LJ (that was endorsed by the other members of the court) in *R v LAUTRO ex p Ross* [1993] QB 17 makes clear, persons indirectly affected may be entitled to a fair hearing. Glidewell LJ commented in *ex p Ross* that:

it is my opinion that when a decision-making body is called upon to reach a decision which arises out of the relationship between two persons or firms, only one of whom is directly under the Control Of the decision-making body, and it is apparent that the decision will be likely to affect the second person adversely, then as a general proposition the decision-

making body does owe some duty of fairness to that second person, which, in appropriate circumstances, may well include a duty to allow him to make representations before reaching the decision.

48. The 2005 Act clearly gives the Secretary of State the power to issue Control Orders. For the reasons set out above, those Control Orders interfere with the rights of the Applicants and their children. As a consequence the dicta cited above suggests that there is a common law duty to act fairly towards the Applicant. That in turn suggest that the Applicants should be heard in proceedings regarding the legality of the Control Orders.

PROCEDURAL OBLIGATIONS INHERENT IN THE ECHR

49. In *Aerts v Belgium* (1998) 29 EHRR 50 the European Court of Human Rights held that the right to liberty was a civil right that engaged article 6 of the ECHR. If the right to liberty is a civil right, it would appear to me that there is no reason why the right to privacy is not a civil right. As a consequence article 6 of the ECHR may entitle the family members to bring court proceedings to challenge the legality of the Control Orders.

50. My opinion in the paragraph above is supported by the decision of the Court of Appeal in *R (on the application of Wilkinson v Broadmoor Hospital)* [2002] 1 WLR 419. In that case the Court of Appeal appeared to conclude that arguable breaches of article 3 and 8 of ECHR entitle a person to an article 6 compliant hearing.

51. In addition, article 8 of the ECHR imposes procedural obligations on states when decisions are taken that interfere with article 8 of the ECHR. In particular, in *McMichael v United Kingdom* (1995) 20 EHRR 205 at paragraph 87 the European Court of Human Rights held that:

Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.

52. Similarly, *Human Rights Practice*, Jessica Simor and Ben Emerson QC, states that:

... a denial of procedural protection prior to a decision interfering with an individual's Article 8 rights, may mean that the interference cannot be justified as necessary and proportionate because there is insufficient protection against arbitrariness. [paragraph 8.47]

53. In addition, *The Law of Human of Human Rights*, Richard Clayton QC and Hugh Tomlinson QC, states that:

The obligation to respect family life requires procedural safeguards which are **sufficient** to protect the interests of the family. [paragraph 13.146] [Emphasis in the original]

54. It is not surprising that article 8 of the ECER should impose procedural obligations. The purpose of article 8 of the ECHR is to protect an individual against arbitrary interference by public authorities (*Marckx v Belgium* (1979) 2 EHRR 330). Procedural obligations may prevent the actions of the state being arbitrary by ensuring that there is adequate justification for them.

55. In light of the matters above, the fact that the Control Orders may interfere with rights under article 8 of the ECHR suggests that those whose article 8 rights are interfered with should be heard. In particular it suggests that the Applicant should be heard so that she can present arguments regarding her ECHR rights.

56. Finally, it appears to me that article 3 of the ECHR may entitle clients to participate in the proceedings regarding the Control Order. In *R (on the application of Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399 Jackson J held that:

From this review of recent decisions I derive [the following] propositions:

1. Articles 2 and 3 enshrine fundamental human rights. When it is arguable that there has been a breach of either article, the state has an obligation to procure an effective official investigation.

2. The obligation to procure an effective official investigation arises by necessary implication in articles 2 and 3. Such investigation is required, in order to maximise future compliance with those articles.

3. There is no universal set of rules for the form which an effective official investigation must take. The form which the investigation takes will depend on the facts of the case and the procedures available in the particular state.

57. In the light of the matters above, it appears to me that the ECHR entitles the Applicants to participate in the hearings regarding the Control Orders.

Summary

58. In light of the matters above, I make this application for the Applicants to be added as a parties to the above proceedings.

Anonymity

59. All the Applicants seek reporting restrictions that prevent reporting of their names and the names of their children. They believe that reporting may cause significant harm to their families.

60. It appears to me that the Applicants' concerns are very reasonable ones. Orders preventing reporting have been made in most of the proceedings for Control Orders. Those orders have been made because the Court has been satisfied that reporting may result in harm. That is not surprising as families have been forced to move as a consequence of their notoriety.

61. Although Mr [blank] has not sought a reporting restriction, Mrs [blank] is concerned that reporting could be contrary to her interests and the interests of the children.

62. In light of the matters above, it appears to me that the Court should make orders preventing the reporting of the names of the Applicant and the names of her children.

I believe that the facts stated in this statement are true

Appendix 8: Submission from Peace and Justice in East London

The following submission is put on behalf of members of the multi-faith group Peace & Justice in east London. The group has closely monitored the situation with the individuals first being detained without trial and later released into house arrest under control orders. A number of the men were re-arrested last August following the London bombings pending deportation. Since then, some of the men have been bailed under conditions practically identical to those operating when under control orders.

Adrienne Burrows of Peace & Justice in east London has been vetted for two of the men and has been supporting them and their families over recent weeks. She has first hand knowledge of the suffering of the men and their families under control order conditions. Tim Wardle has made his home available as a bail address and had one of the detainees staying with him.

The Peace & Justice in east London group also monitored what became known as the ricin trial—where no ricin was found. This trial lasted for many months resulting in the acquittal last April of all concerned, except Kamal Bourgass who received a 17 year sentence for public nuisance. A number of these individuals were also re-arrested in September following the London bombings despite being cleared by a court of law. Some of them have been bailed pending deportation also. Olive Flynn of Peace & Justice in east London stood surety for one of these men.

Adrienne Burrows tells of her experience in the first case. The second contribution reflects the thoughts and feelings of another man Adrienne has contact with. The third account is told by Olive Flynn.

Adrienne Burrows -

"The details given below are typical of the control order regime and the difficulties encountered are repeated in many other cases. The corrosive effect of control orders on the lives of the people involved can only be appreciated by engaging with the details of the restrictions, both large and small, governing daily life. These are far too numerous to deal with fully here.

* One man has already experienced three separate periods of detention with different regulations. First a period of full house arrest lasting nine months (the worst experience), followed by four months of control order (dusk till dawn curfew plus tagging, monitoring and numerous other restrictions), followed by rearrest, then bail with conditions even stricter than control orders. Many of the issues raised affect all three periods of detention.

A matter of real concern has been the denial of access to worship freely. "There has been no access to the mosque. I have been unable to perform Friday prayers at the mosque (two hours, once a week). Even in prison the right to take part in Friday prayers together is respected. I cannot attend the mosque for the world wide celebration of Eid – every Muslim should attend the mosque," said the man. "We cannot take part in the daily early evening prayers during Ramadan (30 days) a very holy month for Muslims. No Imam has been cleared to read the Koran or to visit. All these things are allowed in prison."

Another concern is medical issues. The man concerned suffered from polio and has had mental health issues in recent years as a direct result of his indefinite detention and harsh conditions. He has been out of prison now for three months under bail conditions. During this time his physiotherapist has not been cleared to see him for the essential work on his legs. She has been his physio for many years and cleared on previous occasions but new clearance was asked for the new conditions. Lack of treatment has brought about deterioration—he's now confined to a wheelchair instead of being able to walk on crutches. He uses plastic leg splints—all hospital appointments to do with these have to be requested by solicitor and given clearance. One such essential visit has been cancelled in the last few days because clearance was not given in time. The GP is only 10 minutes away but is not allowed to visit, each visit has to be cleared by the Home Office.

Mental health has been another problem area. During the recent period since leaving prison he was at first unable to get access to his psychiatrist. This was badly needed because he had spent most of the four months in prison in the Health Care Unit under special treatment for mental health crisis. (Even in prison he was only allowed one 10

minute session with a physiotherapist in the whole four months.) When a psychiatrist was cleared he asked the Home Office to allow access to the hospital day centre for occupational therapy for a couple of hours each day. A Home Office decision on this request has still not been given. No activity or therapy has been allowed up till now during this bail condition period.

Social isolation is another feature of control orders. The family has no visitors or guests and this applies to the whole family, not just the man under restrictions. All visitors need to be vetted. They are a refugee family and so most of their friends are also refugees. Traditionally visits would be gender divided, therefore the wife's friends would be women with whom her husband would not have any contact during their time in the flat. But all her visitors still have to be vetted and no one in their circle would want to risk being tarred with the same brush of suspicion and fear is strong in the community on such matters. Even her sister who had been cleared for a previous visit was forced to stay elsewhere at the last minute when she arrived as planned from abroad with her baby to see her sick sister. New vetting was called for by the Home Office. I was called to deliver food to the visitor and her child in their temporary accommodation away from the family home.

If anything happens—if anyone needs to repair things in the flat, as when the hot water system broke down, or the washing machine—any one coming into the flat has to be cleared, and this takes time.

The man's wife was recently hospitalised for several weeks bringing difficulties for father and child. Agreements had to be reached to allow the father to take and fetch the child to and from school. On one occasion I was called to take the child to school. Visiting the hospital also brought problems. The wife is still not well enough to deal with these tasks and with shopping. The father is now allowed out on the school walk and allowed 15 to 20 minutes for a few shopping trips to the local shop each week. All trips out of the house have to be registered before and after by phone calls. And this is in addition to the fact that the man is tagged. As for the tagging—the wife says "It has become normal but shouldn't be normal—controlling everything."

The phone-calls on this issue average around eight a day and have increased recently. The tagging company phone even when they know he is out – and the wife has to say that he's not back yet.

If there's the slightest fault in the tagging equipment, the police are called and arrive with the tagging company (two police and three taggers) - at times like 2.30 or 3.00 in the morning. Once when the father was collecting the child, the Home Office people arrived and demanded that the wife let them in so that they could question her about the state of her health. They have no right to do this. The sick woman suffered severe stress in this situation. At a later date I witnessed the Home Office official call the wife into the living room to be questioned about her state of health.

Other than these domestic trips, he is not allowed time out and has no access to library, school or colleges for study etc. He does not enter anywhere where internet is in use as he is prohibited to access it. He is not allowed to use a mobile or any phone at all other than the land line in his home. No mobile phones can be used by anyone in the home. His own computer was inspected by the Home Office and returned to him broken.

The consequence for the family is that they have lost hope. This situation seems indefinite – it may never end. The wife suffers extreme stress, severe headaches and eczema. She says "Every day you live in fear and every day you have more fear." Since she has been ill, a psychiatrist has been cleared to visit her. A nurse has refused to be cleared. The family is constantly aware that a rearrest could come at any time.

The effects on a child who has grown up in this country with the idea that a visit from the police or Home Office could be to take father away, can be imagined. The child also suffers symptoms of stress. "They have done this and they are abusing their power". His wife says "These people are doing a great job at destroying my life and my family's life."

* A second man under control order type conditions expressed the following sentiments - "This is madness, this is torture".. "We are the mice in a government experiment" .."A control order is like being in a space capsule isolated from the world".. "It is not physical torture but mental—driving you to madness".. "It is torture for the family, paying the price for what they didn't do".. " A control order is a punishment for someone who hasn't been convicted of anything—especially for anyone disabled"

.."We suffer under control orders—disorientation, no way of knowing when this will end or what will happen next—waiting for rearrest?".. "It is like being part of a game – they are playing with us. You are not in control of your life, someone is in control of it".. "You cannot think properly—you have to think twice before doing simple things like going shopping. If you make a mistake you will be rearrested. Even the little freedom they give you is controlled by these conditions. If you make a joke on the phone, just for a laugh to forget the situation you are in, you still have to be careful what you say—they are going to take it seriously". "You live in total anxiety and fear and depression. The control order drives you to madness". "You feel like you're in a maze with no way out." "There are so many restrictions, you can't go to a library or a college because they have internet. You feel isolated—not in the real world".. There is no 'daily life' for you and your 'entourage'"

Olive Flynn -

* One of the men acquitted in "the ricin trial" was on bail from March to September 2005. He did not breach any bail conditions but was rearrested in September. He was injured during his arrest, despite offering no resistance. The arrest was conducted in a high profile way. At the reception of Belmarsh Prison he asked for his injuries to be photographed but this was not done. He was later transferred to Long Lartin and put on suicide watch. When I saw him in September, before his arrest he was a healthy 27 year old man. When I saw him again on 27 January he was a mental and physical wreck. He is in pain as he limps.

This man has been bailed under control order conditions that allow him to go out for six hours of each day. He has to report to a police station each day. All visitors coming to see him have to be vetted. If he wants to visit someone he has to give three days notice to the authorities. He has been tagged.

3 February 2006

Appendix 9: Submission from Ann Alexander, Scotland Against Criminalising Communities (SACC)

We welcome your inquiry into powers to impose Control Orders. SACC is a grassroots group that campaigns against Britain's anti-terrorism acts and offers solidarity to the communities most affected by them. Our aims are—

1) To campaign against the use of excessive state powers to criminalise political activity which are contained within the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005; to campaign for the repeal of these acts; to campaign against any other legislation that has a similar effect; to monitor the use of such legislation and to work in close association with the communities most affected by these acts in order to highlight their discriminatory nature.

2) To demand that that everyone is treated as innocent until proven guilty; that *habeas corpus* (the right of a person to be brought before a judge to decide whether or not his detention is lawful) be restored and to demand that those imprisoned without trial under this legislation are released or granted a fair trial.

We submit our evidence on the practical impact and operation of Control Orders. We have first hand knowledge through one of our group, Ann Alexander, who has been vetted to visit four of the men under house arrest. These men were held under Control Orders until 11 August 2005 when they were rearrested by the Department of Immigration with the intention of deporting them to Algeria. Some of the men have now been released under bail conditions of house arrest and one of them is still held in Broadmoor Hospital. Although previously cleared to visit her friend in Broadmoor Hospital, Ann has now to be vetted again and, 5 months later, still awaits clearance. Her initial vetting to visit four of the men placed under Control Orders, after their released from Belmarsh in March 2005, took over 4 months.

Ann's submission

I have been made aware in recent weeks that I am now classified as "a known associate of a terror suspect" due to my desire to support my Muslim friends and their families by going through Home Office vetting to visit them in their homes when I am in London. I find this classification ominous but, even on hindsight, I have no regrets. I cannot visit my friends as often as I would like as I live a long distance from London but I phone them most evenings to keep them company for a while.

My contact with the men and their families has given me a great insight into the human effect of the anti-terror powers and I am grateful for the opportunity to inform the JHRC about the suffering of my friends, their families and the wider Muslim community who are targeted through their acquaintance with my friends.

Firstly I must say that I am distressed that the men are suffering a very cruel injustice. Before their release on Control Orders on 11th March 2005, they were confined without charge or trial for over three years as Category A prisoners in High Security prisons. They have never been questioned by the police or security services or been accused of any terrorist acts in this country. Their living conditions are claustrophobic. They live in very small flats, isolated from their communities and most cannot even perform the religious duties that are of utmost importance e.g. their restricted areas do not include a Mosque or a shop to purchase halal food.

FEAR

When I meet the men and their families or speak to them, I am aware how scared they are. It overwhelms me at times as I have no words to allay their fears. They know better than me what awaits them if they are deported to their country, Algeria, where torture and disappearances are systemic. They live in total seclusion under very strict conditions. They exist with the certainty that they will eventually be arrested again and they suffer severe depression and post traumatic stress disorders due to their previous harrowing experiences and arrests at dawn. Their wives sleep fully clothed in trepidation of their doors being broken down in the middle of the night. The monitoring company can visit their homes at any time of the day or night and often their tagging equipment does not function properly and the families pay a distressing price for this. I know of two families living under Control Orders who had malfunctioning boxes which gave them sleepless nights without limit. The box emits a sound like a smoke alarm and their children are constantly awakened by the noise. They live in fear of their neighbours too as the constant visits from the police and tagging people alert them to their situation. Their children live in trepidation. They have witnessed their fathers' arrests on more than one occasion and they

are severely traumatized. The constant visits from the police and monitoring company, often in the middle of the night (5 police officers and 3 tagging people) alert their neighbours to their living conditions and the children are stigmatized at school. Some of the families endure the indignity of searches of their homes at any time of the day or night. The Control Orders have clearly breached their right to family life, privacy and home.

The Control Orders seem to change constantly and from the outset have been plagued by inconsistencies, lack of clarity and no means by which to obtain clarification of the conditions from the Home Office. This only compounds the anxieties of the men who live in perpetual fear of breaching their conditions and being returned to prison.

HEALTH CONSIDERATIONS

Sometimes when I call the men they can barely speak as they are so depressed. I constantly worry about the single men under Control Orders. Because of the strict conditions, the single men are extremely isolated and spend so much time on their own with their thoughts and feelings of foreboding. All the men suffer depression and psychiatric problems as a result of their situation and they need the help of psychiatrists. The Royal College of Psychiatrists stated in their report in 2005 "Detention has had a severe adverse impact on the mental health of all detainees and the spouses interviewed. All were clinically depressed and a number had post-traumatic stress disorder. The indefinite nature of detention was a major factor in their deterioration". Since this report was written, the relentless manner in which these families have been criminalized under Control Orders and House Arrest has a similar impact and has done nothing to alleviate their mental health problems.

These professionals also have to go through the vetting procedure to enter their house and in the past have had extreme difficulty obtaining permission from the Home Office. A visit to their GP or dentist also causes great problems. If their GP's surgery is out of their limited area, they must make an appointment a week in advance and then ask permission of the Home Office to both leave their area and attend the appointment. Their alternative option is to dial 999 but they cannot consider using emergency services just to receive a repeat prescription for their medical needs. Many of the men are prescribed anti-depressants and sleeping pills and sometimes have to function without them until they can consult their GP. As these pills should be taken regularly, being without their medication causes them significant amounts of additional stress. In one friend's case, his wife was involved in a car accident and, unlike other husbands, could not rush to her hospital ward as he had to wait anxiously for permission from the Home Office to leave his home and attend the hospital. The staff at the Home Office seem to me to be the most intransigent of people and the Islamic culture of the families are totally disregarded. By restricting the men's movements within defined areas and restricting the admission of health care professionals to their homes, Control Orders prevent the men from obtaining adequate medical treatment. I must add that every one of the wives I know suffer various degrees of depression. Some are clinically depressed and all of them sleep with the aid of sleeping pills.

SOCIAL IMPLICATIONS

There are restrictions on the use of communication equipment. This means that their children have no internet access to aid with their school work and the wives have to access information to help with their course work outside the home. This causes great difficulties and resentment within the families. The men's movements are strictly monitored and when they inform the monitoring company staff that they are going out, they are asked where they are going and, on their return, asked where they have been. Their lives are dictated by the monitoring company, security services and the Home Office. They have no

privacy at all. They are not allowed to write to people outside Britain so they cannot write to their families and friends abroad. They can have one landline into their homes but on their small finances they cannot afford to make calls to their families. Some cannot even afford a phone connection and have no social contact at all while they are interred. If they do have a phone, it has to be examined by the Home Office and I know of one single disabled man who waited over 4 months to have his phone returned to him. As the men are closely observed, it creates apprehension amongst their acquaintances who prefer to keep their distance from the men.

Many people are still waiting months after applying for vetting and in particular Muslim friends of the men—that is the friends who are willing to go through rigorous vetting procedures. Not everyone wants to put themselves in the spotlight like this. Many Muslims are afraid because, as mentioned above, they will be classified as a known associate of a terrorist suspect—a very onerous burden for Muslims, particularly without citizenship, in the current climate in Britain. Some of family members are finally vetted, but the delay caused many upsets and the Home Office rules are very petty. For example, one of the men has a four year old child so children under five could enter the house, but no child over the age of four. One friend's father visited from abroad and as he could not enter her house, she had to travel for two hours across London to visit him at her sister's house. She was fraught with fear making this journey on public transport on her own in Islamic dress.

The men were all provided with a Home Office hotline which supposedly they could phone to ask questions regarding what they could and could not do but this line was often just a recorded message so it was hopeless. I have been speaking on the landline to one of the wives when the Home Office phone has rang, and it was someone trying to sell kitchens! This lady tells me this often happened.

Any time they go out, they are always so anxious to be home in time and often do not want to leave their homes at all for fear of returning late. Breaking any of the Control Orders mean that the man could be convicted and serve up to 5 years in prison. There is a great strain on their mental state because of all these conditions. If they want to go somewhere, they are in constant fear of breaching one of the conditions.

When first under Control Orders, one man applied for a college course but that created many difficulties. His first entry date came and went without permission from the Home Office. Then he got another entry date but the Home Office wanted assurances that he would not have access to a computer and they also wanted the names of everyone else in his class so they could perform security checks on all fellow classmates. This was so humiliating for him that he never took up the placement.

One of the men, who has no arms below his elbows, lived for 5 months with little furniture and his belongings unpacked around him as no one could enter his home to assemble his flat packed wardrobes. Recently a man from the Peace and Justice Organisation passed the vetting and he has assembled them for our friend. This man has such a restricted area that he can move in that it doesn't include a Mosque. This has added to his depression and indeed breached his right of religious freedom.

Many of the men are totally isolated from their communities. Life is about meeting, arranging, visiting, having a social life, doing things. They are not allowed to arrange meetings or allowed to use a public phone. If someone is not allowed to work, not allowed to study, not allowed to have a social life, then after a while - although its better than prison at the beginning because they have some freedom, it becomes difficult for them to have any sort of normal life. They can go out and just go home again. Other than that, there's nothing much else for them to do in the very limited time they are allowed out.

I understand that 18 Control Orders were served last year, but nine of them were still in place at the end of the year. All of my friends are now under Deportation Orders to countries with notoriously poor human rights records. Of the men under Deportation Orders, most are now back in prison in the equivalent of indefinite detention from which they were released after the fall of the 2001 ATCSA. However, some of them are now released on “bail”—a term which in this instance actually equates to Control Orders with even more oppressive conditions. The fears of the men, their wives and children are palpable. Each passing minute is a minute closer to a Memorandum of Understanding with their countries. They are all well aware of what awaits them there (torture chambers and “disappearances”) from personal experience or from the innumerable testimonies of fellow countrymen.

I have much more to say on the treatment and living conditions of the men and their families—they live half lives—but the remit of the JHCR is limited to my evidence of Control Orders and the impact it has on the men interred under the Prevention of Terrorism Act 2005 and I write with consideration of human rights issues. I believe the human rights of the men under Control Orders have been totally disregarded.

I must add that when the men discovered that the British Government intended to reach a Memorandum of Understanding with Algeria their first thoughts were not for themselves or the implications for their families in Algeria. What struck me most was their profound dismay that Britain, once renowned world wide for its human rights, would consider an agreement with their country which is renowned for its total disregard for human rights.

In submitting written evidence focusing on the human rights implications of the operation of the control orders system since it came into effect, SACC sincerely hope that Control Orders are abolished and are not replaced with yet another gross violation of human rights under a different name.

3 February 2006

Appendix 10: Submission from Tyndallwoods, Solicitors

This is not really about Control Orders. It is about the rampant erosion of civil liberties and human rights that is taking place under the current government. Control Orders are simply the most recent tool of oppression brought in under the aegis of the “war on terror” and serve only the political interests of the government.

I represent two of the men that were issued with the first Control Orders, two who were issued with more recent Control Orders and several who are facing deportation with assurances to countries that use torture as a matter of routine. I also represented two of the men that were interned in December 2001 under the Anti Terrorism Crime and Security Act 2001.

I wish to convey to the Committee the enormity of these repressive measures and the abuse of legislative process that is taking place. In order to do so I think it necessary to set out some of the history before providing some case studies from clients who have been/are on Control Orders.

I also wish the Committee to note that Control Orders have been used almost exclusively for foreign nationals. The Home Secretary informed Parliament that one had been issued to a British national but to my knowledge this is the only one. This is significant when one looks at the history:

In 1997 the Special Immigration Appeals Commission (SIAC) was set up in response to the judgement in the European Court of Human Rights in the case of Chahal.

Chahal had found that there was an absolute bar on return to a country where to do so would breach Art 3 of the European Convention on Human Rights—that a person must not be subject to torture or cruel inhuman and degrading treatment even where the Secretary of State alleged that return was in the interests of national security.

Prior to Chahal national security deportation cases were dealt with by the ‘three wise’ who would sit entirely in secret and decide whether the person should be deported. SIAC was set up on the Canadian model to replace that system with something deemed to be more akin to a hearing and to deal only with cases of deportation where issues of national security were alleged. It was clearly set up to deal solely with immigration cases. The SIAC procedures do not, however, give the Appellant a fair hearing.

This was the situation before 9/11. After 9/11 the government wanted to be seen to be doing something and taking some strong action. It could not simply arrest and detain British people where there was no evidence of an offence having been committed, neither could it detain foreign nationals on national security grounds under immigration legislation if there was no prospect of removal because of Article 3 ECHR. It should be borne in mind that a simple allegation of some sort of terrorism related involvement by the British government would in itself give rise to a risk of treatment in breach of Art 3 if returned. The government said in terms that it could not hold British nationals indefinitely without trial as there would be an outcry against such measures.

Art 5 of the ECHR prohibits indefinite detention without trial but it can be derogated from in times of emergency. The government therefore decided to declare a state of emergency and to derogate from Article 5. Once they had derogated from Article 5 they were able to propose legislation directed only at foreign nationals providing for indefinite detention without trial. The legislation was rushed through parliament at break neck speed and became the Anti-Terrorism Crime and Security Act 2001 which came into force on 14.12.01. It was without doubt a knee jerk reaction to 9/11.

On 19.12.01 eight men were interned under the legislation and over the period of its life a further nine were interned making a total of seventeen. They were all foreign nationals from Arab countries where torture is endemic and systematic. Some of them had already been granted refugee status in the UK, and in one case at least, on the basis of the same facts which were later used to found the allegations against him under ATCSA 2001.

The men were served with 2 certificates signed by the Home Secretary - under section 21 of the Act and under section 33. The section 21 certificate read:

“I hereby certify that the presence of X in the UK is a risk to national security, and that I suspect that he is a terrorist, within the meaning of section 21 of the ATCSA 2001.”

The section 33 certificate read:

“I hereby certify that X is not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) or Article 33(2) applies to him (whether or not he would be entitled to protection if that Article did not apply), and his removal from the UK would be conducive to the public good.”

At the same time they were also served with a decision to make a deportation order which said that “the Secretary of State deems it conducive to the public good for reasons of national security to make a deportation order against you” and certifying that “detention is necessary in the interests of national security.”

I reproduce section 21 of ATCSA 2001 below:

21 Suspected international terrorist: certification

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if-

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

Section 21 provided for indefinite internment without trial on the basis of a far lower standard of proof than that which is required even in civil cases. In these cases the standard of proof was only "reasonable suspicion" and "reasonable belief".

Although the threshold for the standard of proof was so low, the consequence for the internee was inversely high as it amounted to the type of tariff imposed by the Home Secretary on prisoners such as Myra Hindley who have faced all the rigours of a full criminal trial and have been convicted after a fair hearing of all the evidence. The internees in these cases faced proceedings which were not subject to such rigours, where the 'evidence' was not even presented to them, let alone fairly heard and where they were not been charged with any offence or convicted of any crime.

The men were taken—not arrested with the rights that arise from that—from their homes in the early hours of the morning, in December 2001, and taken straight to high security prisons where they were held as category A prisoners from throughout their internment. They were immediately locked up in solitary cells for 22–23 hours a day. For some it took about 3 months just to get access for family visits or telephone calls as family members and telephone numbers had to be security cleared. They were not taken to a police station for questioning and were not questioned by anyone, they did not have any allegations put to them and they were not told the reasons for their internment. This was acknowledged in the Privy Counsellors Report which stated that "the suspects face no specific charge and are not presented with and given the opportunity to refute, all the evidence against them" and that "this is a significant limitation in what is an essentially adversarial legal process and increases the risk of a miscarriage of justice".

The appeals against the certificates and the decision to deport were to SIAC which, as explained, was set up to deal with immigration cases of deportation on national security grounds. But because these detentions were of foreign nationals and the legislation was in the guise of immigration provisions SIAC was seconded to deal with internment and what amounted to allegations akin to criminal accusations. This meant that what should have been dealt with in the criminal courts—with all the safeguards for fair trials and due process—was instead dealt with in an administrative court without such safeguards. It is important to understand that the Secretary of State stated in terms for each case that there was no evidence that could be used to found a prosecution.

All of this is compounded by the use of closed evidence and closed sessions during the appeal procedure in SIAC. The Home Secretary prepares two cases against the Appellant - one open and one closed. A separate legal representative, the Special Advocate, is appointed from a small list provided by the Attorney General's office to seek to represent the Appellant in closed sessions. He is not allowed to communicate with the Appellant or his legal representatives once he has received the closed material. This means that all the lawyers involved in the case to supposedly defend the Appellant are unable to do so in any meaningful way. The lawyers dealing with the open material take instructions in a vacuum in that they have no idea what may be in the closed material. The lawyers dealing with the closed material cannot take the Appellant's instructions on that material. It is a basic principle of justice that a person should be able to challenge the evidence against him, but in these cases that principle was completely demolished. The closed material may be based on malicious "evidence", inaccurate "evidence" from dubious sources and/or may be based on complete misunderstandings of conversations or events. It is likely to be information emanating from the very repressive regimes from which the Appellants fled in the first place. It emerged during the Court proceedings in these cases that the security services think it appropriate to consider evidence obtained under torture in making their assessments and it is likely that such evidence was presented in the closed sessions. This would be inconceivable in a normal criminal prosecution.

The appeals to SIAC were divided into two parts—an appeal against the derogation and an appeal against the individual certificates.

The appeal against derogation went to the House of Lords and is known as the case of *A and Others*. The Lords gave judgement in December 2004 (three years after the men were interned) and found that the legislation was unlawful in that it discriminated against foreign nationals and was not "strictly required by the exigencies of the situation". Memorably Lord Nicholls said that:

"Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford." and *"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."*

The men were not, however, released as soon as the Lords made their judgement. They remained detained for a further 4 months until March 2005 when the new control order legislation W55 rushed through parliament.

Under the Prevention of Terrorism Act 2005 there can be derogating control orders - which provide for 24 hour house arrest and non-derogating control orders which allow for some time out of the house. These can be made equally against British and non British nationals.

I reproduce below section 2 of PTA 2005

2. Making of non-derogating control orders

(1) The Secretary of State may make a control order against an individual if he-

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

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

The appeal against the control order is to the High Court and the criteria is that it be dealt with as if it is a judicial review. There is provision for closed evidence, again, and special advocates, so the procedure is, in effect the same as that in SIAC. In addition, because the standard is judicial review it is a civil forum rather than a criminal one and there is no straight appeal on the facts. The standard of proof is again low—being only “reasonable grounds for suspecting”.

The Control Orders were issued after new legislation was passed by parliament following days of heated debate which, however, missed several crucial points.

Parliament seemed to think that by getting Judges involved in the decisions to make Control Orders, rather than the Secretary of State, that the system would be fair. However, the first batch of Control Orders were issued by the Secretary of State himself and not a Judge. The new legislation gave him the power to do this specifically for those foreign nationals already detained under ATCSA 2001. Even where it is a Judge who makes the control order he does so on the basis of a request from and information provided by the Home Secretary. The judges role as set out in s.3(2Xa) PTA 2005 is only to “consider whether the Secretary of State’s decision that there are grounds to make that order is **obviously flawed**” (emphasis added). There is no definition as to what “obviously flawed” might mean, but it is clear from the legislation that the judiciary is placed in the position where all it can do is to rubber stamp the decision of the executive. Even worse, the Secretary of State’s decision is based on information from the security services, so, the judiciary is placed in the position of having to rubber stamp intelligence to authorise curtailment of liberty as if it were evidence tested in open court and resulting in a criminal penalty. The result of this is that the security services are indirectly given the power to curtail people’s liberty completely by passing the police the CPS and the criminal justice system. There is no obligation on the Secretary of State to provide anything other than the barest of allegations to the judge and to the Appellant and, as I have already explained, there will once again be closed hearings to deal with secret material from which the Appellant and his lawyers will be entirely excluded.

The conditions of the Control Order are therefore equivalent to criminal penalties without the possibility of anything approaching a criminal trial to try to clear your name. It is a case of being presumed guilty rather than presumed innocent. Even worse, in the case of those previously detained under ATCSA 2001 it is a case of being presumed guilty on the basis of the same secret material that you have been unable to challenge for three years and for which you still do not have a proper mechanism of challenge.

The process of releasing the men in March 2005 and serving the Control Orders was chaotic and showed a complete lack of humanity. My client was released at 10:30 pm and taken to his accommodation address. He was released without any money and there was no food at the address. He remained without food and without money until approximately 4:30 pm the following day. He was supposed to have access to a Home

Office telephone number. There was no landline installed in the accommodation and it took weeks to get it. He had no access whatsoever to the telephone. The *terms* of the Control Order prohibited the use of mobile phones, public call boxes and the internet. You have no means of contacting the outside world. My client was not allowed to meet anyone by arrangement or have visitors who had not been cleared by the Home Office. He was allowed to leave the accommodation between 7am and 7pm, but was cut off from all normal social contact as, unless he happened to bump into somebody by chance, he was not allowed social interaction.

Control Orders were issued more recently to two of my clients who had been facing deportation with assurances. To show how control orders are unworkable in practice I provide below and two excerpts from correspondence concerning the installation of a telephone line, the contents of which are self explanatory:

a) Extract from letter from COCO dated 23.12.05

“Unfortunately, the Home Office is unable to arrange for the installation of a telephone to the property due to new requirements by telephone companies of needing to speak to the bill payer before agreeing to install a line.

The Home Office is prepared to reimburse the cost of installing a telephone line and the cost of one corded handset. Please send a copy of the original bill to the Home Office for reimbursement. All line rental and telephone calls must be met by Mr “X”.

Please inform us as soon as a date for installation has been agreed, so that Mr “X” will not breach the terms of his control order by allowing unauthorised entry to his property.”

b) Extract from letter to COCO dated 11.01.06

“Thank you for your fax dated 23rd December 2005 concerning the installation of a land line for Mr “X”. You state that:

‘Unfortunately the Home Office is unable to arrange for the installation of a telephone line to the property due to new requirements by telephone companies of needing to speak to the bill payer before agreeing to install a line’.

As you are aware, Mr “X” is precluded by the terms of the Control Order from either using a mobile phone or a public call box to make any telephone calls. We therefore write to enquire how exactly you propose that he contact a telephone company to arrange for installation. Furthermore, as you will be aware, Mr “X” does not speak English and is not in a position to arrange installation even if he were allowed to do so. Furthermore, please explain how you propose that Mr “X” could pay for the installation costs and then send the original bill to the Home Office for reimbursement. Mr “X” receives only £35.00 per week from NASS and has no funds whatsoever to pay for installation. In addition, at £35.00 a week he does not have funds for pay for line rental.”

The client currently remains without a land line and this issue remains unresolved a further complication being that the NASS support that he receives is in the form of vouchers and not cash. This is just one example of a myriad difficulties of a practical nature that arise for the person subject to the Control Order. I reproduce below, at his request, extracts from the statement of another client on the effects of the Control Order on his family:

THE EFFECT OF THE CONTROL ORDER ON MYSELF AND MY FAMILY

1. I was in prison before on my own but now my whole family is in prison.

2. The Control Order has a massive impact on my life and that of my family. I am confined to the house for twelve hours a day, cannot go out and people cannot visit me. I am a prisoner in my own home during this period. In some ways it is more difficult to cope with this than being in prison because you see normal life going on outside your house. You can see people going about their daily lives. I am prevented from doing that. It is deeply frustrating and disturbing. Even during the time that I am allowed out of the house I am tagged and my every movement is monitored. My daughter is three and a half and asked me about the "watch" on my ankle. I did not know what to say to her.

3. I cannot walk down the street or go into a shop or the Mosque without worrying that I may meet someone I know or someone might come up to me and the Home Office will think that I have arranged to meet them. It makes me nervous and affects all my interactions with other people. Sometimes I avoid people or sometimes I don't go out because the pressure of the whole situation gets to me.

4. The provisions of the Control Order that require the Home Office to approve any person I wish to meet in a pre-arranged visit or visit to my house is a sick joke. Very few people are willing to come forward and go through the process of approval, providing photographs and so on. They do not know what assumptions the security services or police will make about them associating with me. This also affects my wife as her friends feel the same. Furthermore, it is inevitable that if people are approved in this way that I have to disclose to them why they have to go through this process. This is deeply offensive. I have a daughter and I cannot cut her off totally from her friends. They are allowed to come but I have had to explain to their parents that they cannot bring them or come into the house. This was extremely difficult and embarrassing.

5. I do not want my family to be cut off from other families and children. At the moment my daughter's friends are brought to the end of the street and my wife goes to collect them and bring them in. Normal social contact is not happening. As my daughter is only three her friends would usually be accompanied by an adult it would not be usual for children to be just brought and left on their own with us at this age, so she does not have friends to play with very often.

6. My wife's life has been greatly affected. She used to have friends coming to see her everyday. She had friends to come and sleep over and all the children with them. It was her social life, but now she has no real social life left. She goes to see people but it is not the same. She is now always the guest and never the host. Before it was the other way round. She cannot use a mobile phone in the house and cannot be contacted anymore in this way, which also interferes with her social life.

7. The Police or the tagging people can come to my home at anytime of the day or night. They may come at 8pm at night to check the equipment or as late as 11pm. I am obliged to let them in and it is a significant intrusion, in particular for my wife, who does not wish to have strange men in the house. It causes her distress as well as practical inconvenience in that she has to cover herself quickly if men come in. She finds the whole thing very disturbing and it makes her feel anxious and unsafe in her own home because you never know when they will turn up and enter the house.

8. With this Control Order I am still in Prison. I need to ask permission for every little thing and I find this humiliating. If I simply want to go to the doctor or the dentist they have to be cleared. If anyone wants to visit myself or my wife they have to be cleared. This even includes anybody from the Refugee Housing Association in (X city) who deal with my wife's NASS support. I cannot have any pre-arranged meeting with anyone whatsoever who has not been cleared and this would include, even, for example, an appointment to meet the bank manager or my daughter's doctor. My daughter's nursery wanted to make a routine appointment for me to discuss her progress but I have had to refuse as this would

also be a pre-arranged meeting. It is simply impossible to lead anything approaching a normal life. The restrictions are overwhelmingly heavy for myself and for my family. They are also insulting, absurd, discourteous and disdainful.

9. I have not been given any Immigration Status or proof of identity. I have been released into a vacuum. I am having a great deal of difficulty convincing my bank to re-activate my bank account without ID. At first they refused altogether and I am not sure at the moment whether it will be reactivated or not I cannot get a provisional driving license and even doctors and dentists need proof of identity. Without immigration status I cannot work or claim benefits.

10. I would prefer and have seriously considered living somewhere else to let my family have peace and to carry on a normal life not subject to my restrictions. I want to live separately in a different house—it is too restrictive and disturbing for my family—it makes them suffer too much but I have no choice but to stay where I am.

11. People have already said unpleasant things to my wife and I worry that as my daughter gets older people may say things to her as well and that she will find it very difficult to deal with the whole situation.

12. I find it deeply distressing that as the days get longer throughout spring and summer and the congregational prayer times get later, for the early evening and late evening prayers, the curfew means that I cannot attend the Mosque for group prayers. This cuts me off even more from the limited social contact that I can have, and also means that I feel that I am not able to properly practice my religion. Congregational prayers are an extremely important part of being a good Muslim and I feel that I am failing my religion if I cannot go to the Mosque.

13. I am especially worried about Ramadan when congregational late evening prayers are held every day. These are an essential part of worship during Ramadan and even people who do not pray during the rest of the year attend the Mosque for these prayers. These prayers during Ramadan (Tarawih) are so important to Muslims that huge numbers from the Muslim communities around the world attend Mosques for them—men, women and children. It is almost as important as the fast itself to attend these prayers. If I am prevented from attending these prayers I will feel that I have not properly completed Ramadan which is one of the most important obligations in Islam.

14. The conditions of the Control Order are unworkable. The Refugee Housing Association dealing with NASS in (X city) used to visit my wife regularly but these visits have had to be cancelled so as not to breach the Control Order. I had to refuse entry to the electricity man to come into the house to read the meter as it was not an emergency. I did not tell him why and he wasn't happy about it. I am worried that they may cut the electricity off because I refused to let him enter. This could lead to them cutting the power from us. I have also had to refuse entry to the gas man who wanted to read the gas meter.

15. I have problems continuously with the Premier Tagging Line. It takes a long time to get through to them when I try to contact them to tell them that I am leaving or returning to my house. The number is just not answered and rings out for between 10-20 minutes before there is a reply. I am extremely anxious to ensure that my return call is registered before 7pm and this delay causes me great anxiety.

16. I do not know how long these conditions will be imposed. It could simply be on an indefinite or indeterminate basis. The hearing in the case itself will not be until next January 2006 at the earliest.

17. The conditions of the Control Order are a punishment for something which I have not done. They are a punishment both for me and for my family and are unjust, humiliating, and unfair.

The men previously detained under ATCSA 2001 were released on control orders in March 2005 and then in August 2005 those of them that are Algerian as well as one Jordanian were detained again, this time under immigration legislation (the Immigration Act 1971). They were served with fresh decisions to deport, even though the previous decisions remained in place, and once again the Secretary of State certified that their detention was necessary in the interests of national security. They were taken to special high security units within high security prisons at Long Lartin and Full Sutton and held again as category A prisoners. When the Secretary of State makes an allegation of national security then the appeal is to SIAC. These appellants are facing the third set of proceedings in SIAC, or its equivalent, on the basis of the same allegations by the Secretary of State and still without having any proper mechanism to challenge them. The psychiatric effect of this continued and repeated injustice upon the detainees cannot be overestimated and has been well documented in the press.

Why are they back at square one, in SIAC, facing deportation proceedings and detained in high security prisons? Once again as a knee jerk reaction to a terrorist attack—the 7th July—as the government wishes to be seen to be doing something and the easiest way to do this is to pick on the same foreign nationals. This time the government is seeking assurances from countries that torture—Memorandum of Understanding—that the person will not be tortured on return. They are trying to find another way round Chahal and another way to intern people indefinitely without trial. The first ones detained on this basis were those who were previously on control orders, there have since been further detentions of some of the Algerians that were acquitted in the Ricin proceedings and more recently 5 Libyan nationals and then 5 Iraqi nationals that were subsequently released on control orders in November 2005. The circular nature of all of this is felt acutely by the detainees/controlled persons.

Going back to the appeals of those who were originally interned in December 2001. One part of their appeals was about derogation and the other part was about their individual appeals. These were heard in the House of Lords in October 2005 and judgment was given in December 2005. The issue in the appeals was whether information obtained under torture by third parties could be admissible in SIAC proceedings. The Lords ruled that were it was clear on the balance of probabilities that this was the case such material could not be relied upon. This highlights another crucial aspect of this whole tendency by the government which is to rely on material or evidence from the security services which may well include evidence obtained through torture. They admit as much in the statement provided by Eliza Manningham-Buller for the House of Lords in October 2005. The statement does not mention torture but says that they do not ask too many questions about how information is obtained from countries which are known to torture for fear of either getting no further information or of upsetting diplomatic relations.

Of those that were detained in August 2005 some have now got bail from SIAC—but it is on terms even more onerous than the previous control orders. At least one is under 24 hour house arrest, one is allowed out for only 2 hours a day and one is allowed only into the garden. In effect, through immigration legislation, by going through SIAC and using PTA 2005 the government has obtained indefinite internment for some—as there is no prospect of assurances either being either reached or satisfactory, and derogating control orders for the others. When you think of the outcry that there was over the proposals for 90 days detention without charge you can see how the government has achieved measures far worse than that, reserved almost exclusively for foreign nationals, almost by stealth and sleight of hand.

The control order legislation provides only for injustice. This is inherent in the way that control orders are issued and the subsequent proceedings. Setting up a system that hands out injustice is plainly wrong and for all these reasons I ask that the Committee recommend in its report to Parliament that PTA 2005 should not be renewed after its expiry in March

6 February 2006

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899