



Control Order Appeals Briefing

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CONTROL ORDER APPEALS Q&A

What are control orders?

Control orders are civil orders made by the Home Secretary against any person she suspects of being 'involved in terrorism'. They allow a very wide range of restrictions to be imposed on individuals, including electronic-tagging, extended curfews, being restricted to a certain address or geographic location, restrictions on use of phones and computers, limits on movement and travel, employment, and bans on meetings with others.

Breach of conditions is a criminal offence punishable by imprisonment. Each order lasts for 12 months, but can be renewed indefinitely.

Control orders were introduced by the Prevention of Terrorism Act 2005. The Act was the government's response to the judgment of the House of Lords in December 2004 that indefinite detention of foreign terrorist suspects under Part 4 of the Anti-Terrorism Crime and Security Act 2001 breached Articles 5 and 14 of the European Convention on Human Rights. Like indefinite detention under Part 4, control orders are intended as an alternative to criminal prosecution, in situations where the government says there is not enough admissible evidence to charge suspects with a criminal offence.

The Act provides for a right of appeal against control orders but to a special division of the High Court, in which the government is able to argue its case without disclosing key evidence to defendants or their lawyers. In so-called 'closed' hearings, defendants are instead represented by security-cleared 'special advocates' who are unable to discuss the evidence with those they represent. The standard of proof in control order proceedings is also much lower than that in criminal cases.

What is the background to the appeals?

Since the introduction of control orders in 2005, there have been a number of cases in the High Court and the Court of Appeal involving different aspects of the control order system. Several of the appeals were grouped together and heard together in a single hearing by the House of Lords in July 2007. These appeals were:

- **MB** - a 24 year old student and a Kuwaiti-born UK citizen who was stopped in March 2005 from travelling to Yemen. In September 2005, he was served with a control order that banned him from leaving the UK, on the basis that the Home Secretary suspected him of planning to 'go to Iraq to fight against coalition forces'. He was also required to report daily to a police station and surrender his passport. In April 2006, Mr Justice Sullivan in the High Court declared the control order legislation incompatible with MB's right to a fair hearing under

Article 6 of the European Convention on Human Rights, stating that 'without access to [the closed] material, it is difficult to see how, in reality [MB] could make any effective challenge to what is, on the open case before him, no more than a bare assertion' (para 39, *MB and AF* judgment).

- **AF** - a dual UK and Libyan citizen who was made subject to a control order in May 2006. The order involved an 18 hour/day curfew, which was changed to 10 hours/day following the judgment of the Court of Appeal in August 2006. He was required to wear an electronic tag at all times, was restricted to a 9 square mile territory, and was subject to a number of restrictions on visitors and communications with others. In March 2007, Mr Justice Ouseley in the High Court concluded that 'the essence of the Secretary of State's case against AF was in the closed material, and AF did not know what the case against him was. The open material disclosed to AF did not give grounds for reasonable suspicion' (para 42, *MB and AF* judgment). The judge allowed AF to appeal on the issue of whether the use of closed evidence in control order hearings was compatible with AF's right to a fair trial under Article 6 ECHR.
- **JJ and others** - a group of 6 individuals, including 5 Iraqi nationals, all of whom were subject to control orders whose conditions included 18 hour/day curfews in specified NASS accommodation, with all visitors to their accommodation being authorised in advance by the Home Office. While outside, each was restricted to a fixed geographic location, the largest of which is 72 square kilometres, and prohibited from meeting anyone by pre-arrangement without Home Office clearance. In June 2006, the orders were quashed by Mr Justice Sullivan in the High Court on the basis that the orders deprived the individuals of their liberty in breach of Article 5 of the European Convention on Human Rights, and that under the Prevention of Terrorism Act 2005 the Home Secretary had no power to make such an order without a derogation from the Convention first being in place.
- **E and S**- E is a Tunisian national who was one of several foreign nationals who were subject to indefinite detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001. S is E's wife. Following repeal of Part 4 by the Prevention of Terrorism Act 2005, E was one of the first people to be subject to a control order in March 2005. His control order imposed a 12 hour curfew, required him to reside at a specific address, prohibited unauthorised visitors to the residence or prearranged meetings elsewhere, and prohibited him from having a mobile telephone, or access to the internet. In February 2007, Mr Justice Beatson in the High Court held that the restrictions on E and his family deprived E of his liberty contrary to Article 5 ECHR. The judge also concluded that the failure of police and the Home Office to review the possibility of prosecuting E following the receipt of fresh evidence from Belgium meant that the decision to maintain his control order was flawed. However, the High Court decision was overturned by the Court of Appeal in May 2007.

How have the Law Lords decided the appeals?

MB v Secretary of State for the Home Department; AF v Secretary of State for the Home Department – a majority of 4 Law Lords (Lord Hoffman dissenting) ruled that the right to a fair trial under Article 6 of the European Convention on Human Rights meant that defendants in control order cases had the right to know the key evidence against them.

Although the Lords rejected the appellants' arguments that control orders were the equivalent of criminal charges (and hence required a much higher standard of proof), they agreed that the severity of the consequences for breach of control orders meant that defendants were entitled to '*such measure of procedural protection as is commensurate with the gravity of the potential consequences*' (Lord Bingham, para 24).

Among the most basic procedural guarantees of a fair trial, the majority found, is the right of a defendant to know the case against him. Lord Bingham referred to '*the fundamental duty of procedural fairness*' as requiring a defendant to know as much of '*what was said against him*' that was '*necessary to enable [the defendant] ... effectively to challenge or rebut the case against him*' (para 34).

In normal criminal or civil hearings, judges always have the power to order disclosure of evidence to a defendant to enable him or her to receive a fair hearing. In control order hearings, however, key evidence is typically withheld from the defendant by the Home Secretary on the basis that it is sensitive intelligence material. In particular, paragraph 4(3)(d) of the Schedule to the Prevention of Terrorism Act 2005 prohibits judges in control order cases from ordering the disclosure of such evidence to a defendant where '*the disclosure of the material would be contrary to the public interest*'.

In MB and AF, the majority found that paragraph 4(3)(b) of the Schedule to the Prevention of Terrorism Act meant that '*the judge is precluded from ordering disclosure [to the defendant] even where he considers that this is essential in order to give the controlled person a fair hearing*'. (Baroness Hale, para 69).

The majority also rejected the government's arguments that special advocates were a sufficient safeguard to prevent the unfairness that would result from non-disclosure of key evidence. As Lord Bingham noted, a normal defence '*may be impossible*' where the defendant does not know the key allegations against him and is unable to discuss the evidence with the special advocate representing him (para 35). Lord Brown similarly noted '*the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so*' (para 90).

Secretary of State for the Home Department v JJ and others – a majority of 3 Law Lords (Lords Hoffman and Carswell dissenting) upheld the earlier judgments of the High Court and the Court of Appeal that the Home Secretary had no power to impose control orders whose conditions had the cumulative effect of depriving individuals of their liberty contrary to Article 5 ECHR.

The Prevention of Terrorism Act 2005 provides for two kinds of control orders – ‘derogating’ and ‘non-derogating’ orders. Under the terms of the Act, non-derogating orders can be made by the Home Secretary and can impose a wide variety of conditions short of actually depriving an individual of their liberty. Derogating orders, by contrast, can actually be used to deprive individuals of their liberty but can only be made where the government has already derogated under Article 15 ECHR (i.e. declared a state of national emergency).

The majority upheld the earlier judgments of the High Court and the Court of Appeal that the particular conditions imposed on the defendants – including 18 hour curfews, being required to live at a particular address with all visitors and all outside meetings being subject to Home Office approval, and being restricted to a confined geographic area when in non-curfew hours, amounted to a deprivation of liberty contrary to Article 5 ECHR. As Lord Bingham noted (para 24):

The effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size ... [b]ut they were (save for GG) located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason. The requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable. The judge’s analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.

Since there was no derogation currently in force, this meant that the Home Secretary’s orders had breached the terms of the 2005 Act and were therefore legally invalid – ‘a nullity’ (Lord Bingham, para 27).

Both Lord Bingham and Baroness Hale declined to suggest what length of curfew might be compatible with Article 5, noting that it is dependent on the particular conditions in each case. As Baroness Hale noted, it ‘is necessary to focus on the actual lives these people were required by law to lead, how far

they were confined to one place, how much they were cut off from society, how closely their lives were controlled' (para 63). By contrast, Lord Brown expressed the view that daily curfews of up to 16 hours would not qualify as a deprivation of liberty contrary to Article 5 ECHR but that '*[b]eyond sixteen hours, however, liberty is lost*' (para 108).

Secretary of State for the Home Department v E and S – the Law Lords unanimously rejected E's appeal on both grounds. They found that the 12 hour/day curfew did not amount to a deprivation of liberty contrary to Article 5 ECHR. They also held that, despite the failure of the Home Office to consider fresh evidence that may have allowed E to be prosecuted, the failure did not invalidate the control order.

Does this mean that Prevention of Terrorism Act 2005 has been declared incompatible with the Human Rights Act?

No.

In the case of **MB and AF**, instead of making a declaration of incompatibility under section 4 of the Human Rights Act, the Lords have used a different power under section 3 of the Human Rights Act – the power to interpret the 2005 Act consistently with Convention rights, in this case the right to a fair trial under Article 6 ECHR.

Although the majority found that the language of paragraph 4(3)(b) of the Schedule of the 2005 Act prevented on its face the disclosure of evidence to a defendant in circumstances where the disclosure was '*contrary to the public interest*', they agreed that section 3 of the Human Rights Act 1998 could and should be used to imply additional language into the provision to make it operate consistently with the right to a fair trial under Article 6 ECHR. In other words, para 4(3)(b) will continue to prevent the disclosure of sensitive intelligence material contrary to the public interest in control order cases '*except where to do so would be incompatible with the right of the controlled person to a fair trial*' (Baroness Hale, para 72) or, in Lord Carswell's formulation, with the qualification that '*the powers conferred do not extend to withholding particulars of reasons or evidence where to do so would deprive the controlee of a fair trial*' (para 84).

In the case of **JJ and others**, no declaration of incompatibility was necessary. Parliament itself had provided in the 2005 Act that a control order involving a deprivation of liberty contrary to Article 5 ECHR (a 'derogating order') could only be made by a court once the government had made a derogation. Since the legal conditions for making a derogating order had not been made out, the control orders by the Home Secretary were automatically invalid.

Will there be any appeal?

It is possible that the various individuals subject to control orders could appeal further to the European Court of Human Rights in Strasbourg. In MB and AF, the main point of appeal would be that control orders are in fact tantamount to a criminal charge so the low standard of proof is incompatible with Article 6 ECHR. AF, E and JJ and others could also appeal further against the shorter curfews, e.g. 12 hours in E's case, as a deprivation of liberty contrary to Article 5 ECHR.

What will happen now?

Both MB and AF will go back to the High Court for rehearing under the revised disclosure rule. The original control orders imposed on JJ and others will remain quashed, although fresh control orders involving less restrictive conditions have already been made against them. E's appeal was denied and the control order against him continues in force.

Will the revised disclosure rule mean an end to secret evidence and special advocates?

Not exactly, but the nature of the closed hearings will be significantly changed and the role of special advocates will shift accordingly.

At the moment, control order proceedings begin with the Home Secretary indicating which evidence she is prepared to disclose to the defendant and which evidence she wishes to keep secret or 'closed'. There is then a closed hearing in which the government and the special advocate appointed to represent the defendant argue over whether the closed evidence can safely be disclosed to the defendant. In some cases, judges can order the Home Secretary to disclose evidence to the defendant but not if the judge agrees with the Home Secretary that its disclosure would harm the public interest in maintaining national security. There would then be a closed hearing between the government and the special advocate on the basis of the evidence that the judge agrees cannot be disclosed to the defendant.

Under the new disclosure rule, the judge will have the power to order the Home Secretary to disclose all evidence that the judge deems necessary for the defendant to receive in order to receive a fair trial. This means that the role of the special advocate will change towards maximising disclosure to the defendant, not merely on the basis that it is *safe* to do so but that it is *necessary* to do so in order for the defendant to receive a fair trial. As Baroness Hale noted (*MB and AF* judgment, para 66):

Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully

tailored questions of the client The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.

In some cases, where the judge decides that certain evidence must be disclosed to a defendant, the government may decide that it is better to withdraw the control order than to proceed with the hearing. Note that the government cannot be forced to disclose evidence even where it has been ordered to by the court. If it does not comply with a disclosure order, however, it cannot rely upon the evidence as part of its case against the defendant (see para 4(4) of the Schedule to the 2005 Act and the comments of Baroness Hale in *MB and AF*, para 72).

Key quotes: *MB v Secretary of State for the Home Department*

Lord Bingham of Cornhill (the senior Law Lord):

I have difficulty in accepting that MB [the appellant] has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired. [paragraph 41]

The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB's*, it seems to me that it was not. [para 43]

In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. [para 35]

Baroness Hale:

In my view, therefore, paragraph 4(3)(d) of the Schedule to the 2005 Act, should be read and given effect 'except where to do so would be incompatible with the right of the controlled person to a fair trial'. [para 72]

Lord Carswell:

I do not consider that the provisions of the 2005 Act and CPR Part 76 are necessarily incapable of being made to operate compatibly with article 6. It seems to me possible to imply into them, and in particular into paragraph 4(2)(a) and 4(3)(d) of the Schedule to the 2005 Act, a qualification that the powers conferred do not extend to withholding particulars of reasons or evidence where to do so would deprive the controlee of a fair trial. [para 84]

Lord Brown of Eaton-Under-Heywood:

[T]he special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so [para 90]

I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. [para 91]

By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing [para 91]

Key quotes: Secretary of State for the Home Department v JJ and others

Lord Bingham:

The effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size, much larger than that open to Mr Guzzardi. But they were (save for GG) located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason. The requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.

[para 24]

[S]ection 1(2) of the [Prevention of Terrorism Act 2005] provides that the court on the application of the Secretary of State has power to make an order imposing obligations that are or include derogating obligations, while the power to make a control order is exercisable by the Secretary of State "except in the case of an order imposing obligations that are incompatible with the individual's right to liberty under article 5" of the Convention. Thus the Secretary of State has no power to make an order that imposes any obligation incompatible with article 5.

[para 27]

Baroness Hale:

The reality is that every aspect of their lives was severely controlled.

[para 62]

It is not surprising that the Judge concluded that "The respondents' 'concrete situation' is the antithesis of liberty, and is more akin to detention in an open prison, where the prisoner is 'likely to be released from prison regularly in order to work, take town visits and temporary release on resettlement or facility licence'.... Indeed, in several respects a prisoner might be better off.

[para 62]

Lord Brown:

The borderline between deprivation of liberty and restriction of liberty of movement cannot vary according to the particular interests sought to be served by the restraints imposed. The siren voices urging that it be shifted to accommodate today's need to combat terrorism (or even that it be drawn with such need in mind) must be firmly resisted. Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here.

[para 107]