Control Orders and Human Rights.

By Simon Parsons,

Senior Lecturer in Law, Southampton Solent University.

The Government's first legislative reaction to the terrible events of 11th September 2001 was the Anti-terrorism, Crime and Security Act 2001, s 23 of which provided for the indefinite detention of suspected international terrorists who were not UK nationals. Detention depended on the Home Secretary issuing a certificate instead of there being a trial. A trial not being possible because of the sensitive evidence and the criminal standard of proof. The enactment of s 23 required a derogation by the Government from Article 5 of the European Convention of Human Rights –the right to liberty. It was possible for the Government to enter a derogation to Article 5 under Article 15 of the Convention. However the derogation was criticised because there was not enough of a public emergency as required by Article 15 to justify the derogation. The Government was caught between a rock (no trial possible) and a hard place because of the decision of the European Court of Human Rights in *Chahal v UK* (1997) 23 EHRR 413 where it was held that a violation of Article 3-prohibition of torture or inhuman or degrading treatment- would arise where a suspected international terrorist was deported to his home country if there was a real risk that he would be subject to torture or inhuman or degrading treatment in that country. It was not possible for the Government to enter a derogation to Article 3. So the Government was forced to introduce s23 so as to prevent terrorist outrages.

The scheme of indefinite detention was considered by the House of Lords in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (the "Belmarsh" case) in which the House decided that it was open to the Government to find there was a public emergency as that was a political issue. But in respect of the issue as to whether detention without trial was a proportionate response to the emergency the House held that the scheme did not fully address it because the scheme only enabled detention without trial to be used against foreign nationals but not against UK nationals. The clear and continuing threat from UK nationals was shown by the profiles of the London bombers of 7th July 2005.The House quashed the derogation and issued a declaration under section 4 of the Human Rights Act 1998 that section 23 was incompatible with Articles 5 and 14 (prohibition of discrimination) because first detention without trial was disproportionate response to the emergency and second it discriminated on the ground of nationality status.

The declaration of incompatibility did not affect the validity of section 23 but the Government accepted that it could no longer sustain the scheme so it introduced a new scheme of control orders under the Prevention of Terrorism Act 2005 (PTA). In that Act Parliament repealed section 23 and introduced control orders which like section 23 are proactive rather reactive. The new scheme represents part of the current UK response to terrorism and is based on a fundamental distinction between derogating and non-derogating orders. A derogating order can amount to detention without trial and would require a derogation from Article 5 but so far no such orders have been made. Non-derogating orders do not require a derogation and at the end of

September 2008 16 such control orders were in force, four of which were in respect of UK nationals.

A non-derogating order may be made by the Home Secretary under section 2(1) of the PTA on the basis of "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" (section 2 (1) (a)) and that it is "necessary for purposes connected with protecting members of the public from the risk of terrorism" (section 2 (1) (b)). A control order made against an individual can impose *any* obligations that the Home Secretary or the court considers is needed to prevent the individual from carrying out terrorist related activity: (s 1 (3) PTA). A list of the obligations is contained in s 1 (4).

Terrorist related activity is widely defined by section 1 (9) of the PTA as the commission, preparation or instigation of acts of terrorism or facilitating, encouraging or supporting the commission, preparation or instigation of acts of terrorism and it is irrelevant whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally. The Home Secretary must first obtain permission from the court to make the order, and can do so without notice to the controlee, unless the order is urgent as then the Home Secretary can make the order without permission: (s 3(1) PTA). If an urgent order is made the Home Secretary must within seven days apply to the court for confirmation of the order: (s3 (3) & s 3 (4) PTA). In both cases the function of the court is to consider whether the Home Secretary's decision was "obviously flawed": (s 3 (2) & s 3(3) PTA). This involves a hearing to determine whether any of the following decisions of the Home Secretary was flawed: (a) his decision that the requirements of section 2(1) (a) and (b) were satisfied for the making of the order; and (b) his decision on the imposition of each of the obligations imposed by the order: (s3 (10) PTA). If any are flawed the court may refuse permission or quash the order or any the obligations in it: s 3 (2) & s 3 (6) PTA. In every other case the court must give permission or decide that the control order is to continue in force (s 3 (13) PTA).

In *Home Secretary* v *JJ and others* [2007] UKHL 45 (JJ); *Home Secretary* v *MB*, *Home Secretary* v *AF* [2007] UKHL 46 (MB & AF) and *Home Secretary* v *E* [2007] UKHL 47 (E) the House of Lords considered the non-derogating control orders made against the respondents. In all the cases respondents were the subject of non-derogating control orders (which last for 12 months but can be renewed) because they were suspected by the Home Secretary of being involved in terrorist related activity. None had been charged or prosecuted for any offence relating to terrorism. In JJ the six respondents were subject to following controls. An 18-hour curfew (16.00 to 10.00) in which they were confined in their small flats and not allowed into the building's common parts. The Home Office authorised visitors who were required to give their name, address, date of birth and photographic identification. Prearranged meetings at the flats required Home Office clearance. The police subjected the flats to spot searches .During the six hours when the respondents were allowed out, they were confined to restricted area of 72km2.This excluded, except in one case, any area in which they lived before. The areas each contained a mosque, a hospital, primary health care facilities, shops, and entertainment and sporting facilities. The respondents were required to wear an electronic tag and had to make daily reports to a monitoring company. Communications equipment of any kind was forbidden although one fixed telephone line in their flats was maintained by the monitoring company. None of the

respondents were able to work and they received state benefits. The House of Lords held that the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the respondents were in practice in solitary confinement. This amounted to a violation of the respondents' right to liberty under Article 5 of the European Convention of Human Rights (ECHR). The orders were in fact derogating orders which the Home Secretary had no power make. The orders were a nullity and could not be cured by amending particular obligations. The House quashed the orders.

In the conjoined appeal of MB & AF, MB aged 24 became a British Citizen in 1998 after being born in Kuwait. He was stopped on two occasions when he was due to fly first to Syria and second to Yemen. The Homes Secretary asserted that on both occasions it was MB's intent to travel on to Iraq so that he could fight against coalition forces. MB was subject to a control order the obligations of which were aimed at preventing him leaving the UK. He had to live at certain address. He had to surrender his passport and report to the police every day. He as forbidden to leave the UK from any airport or seaport. But he was able to travel freely within the UK and was subject to no curfew and there were no restrictions on who he could meet. AF was born in England in 1980 and held dual UK and Libyan nationality. The allegation against him was that he had contacts with extreme Islamist groups some of whom were connected Libyan Islamic Fighting Group which was a proscribed organisation. The control order against him imposed very similar obligations to those imposed against the respondents in JJ except that AF was subject to a 14 hour-hour curfew (18.00 to 08.00). The important evidence against both men was contained in closed material so neither man nor their lawyers knew the case against them although both men had special advocates to represent them in the hearing. The House of Lords held (i) that the 14-hour curfew imposed on AF did not amount to a violation of Article 5; (ii) the imposition of a control order was preventive in purpose and not punitive or retributive so did not amount to the determination of a criminal charge for the purposes of Article 6 (2) & (3) but Article 6 (1)-the right to fair trial- was engaged. As neither MB nor AF had been told of the case against them there were violations of that article. The House also held that the control order procedure specified in the PTA and CPR Pt 76 should be read down under section 3 Human Rights Act 1998 so its use would comply with Article 6(1). This means that the question whether the control order procedure complies with Article 6(1) is depended on how the order is arrived at in any given case. The issue is whether there has been a fair trial after taking into account open material, closed material and the effect of the special advocate. The cases were sent back to the High Court for reconsideration on that basis. Lord Hoffmann dissented as he asserted that the use of special advocates meant that the control order procedure complied with Article 6(1).

In E the respondent challenged a control order imposed on him by the Home Secretary. The control order against him imposed very similar obligations to those imposed against the respondents in JJ except that E was subject to a 12 hour-hour curfew (19.00 to 07.00) and he was allowed to live at his home address. There were Belgian criminal judgments which implicated E in terrorist related activity. When the Home Secretary was made aware of these judgments he did not forward the details to the police for advice as whether they would form the basis of a prosecution of E. The House of Lords held (i) that the curfew imposed on E did not violate Article 5; (ii) the Home Secretary's failure to forward Belgian judgments to the police was a breach of his implied duty under s 8 (4) PTA to do what he could to ensure the possibility of

prosecution was under effective review. But it was not the case that but for that breach, a successful prosecution of E would have been possible. Therefore the control order imposed on E was valid.

Conclusion. The central issue for the House of Lords in all these cases as to whether the non-derogating control orders violated Article 5 was the curfews and as it clear that 18 hours amount to a violation. Lord Brown was sympathetic to the operational difficulties facing the Home Office and stated that 16 hours would be acceptable to the House (at [105]). Since then control orders against the JJ respondents have been reissued with 16 hour curfews. The trend of being proactive rather than reactive against crime is now moving into the area of organised crime with the introduction of serious crime prevention orders under Part I of the Serious Crime Act 2007. These orders will be similar to control orders as they will prevent those involved in organised crime from committing such crime. Will this trend continue into ordinary street crime and be another move towards an authoritarian model of criminal justice?