



THE GOVERNMENT REPLY TO
THE FIFTH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2008-09 HL PAPER 37, HC 282

Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009

**Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty**

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REPORT ON THE RENEWAL OF THE CONTROL ORDERS LEGISLATION

Thank you for the Joint Committee on Human Rights' report on the 2009 renewal of the control orders legislation. I attach the Government's formal response to the main recommendations in your report. Copies of the Government response will be available in the Vote Office and a copy will also be placed on the Home Office website.

JACQUI SMITH

GOVERNMENT REPLY TO THE REPORT BY THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE ANNUAL RENEWAL OF CONTROL ORDER LEGISLATION 2009

Parliamentary scrutiny

We welcome the publication of the statutory reviewer's report a month before the debate in Parliament on whether the control order provisions should be renewed, in accordance with our recommendation. We look forward to the Government adopting this as good practice wherever legislative provisions exist for statutory reviewers to report prior to the renewal of powers which affect human rights, including in the context of the powers to extend pre-charge detention to 28 days which are subject to annual renewal by Parliament.

The Government appreciates the importance of making the reports of the independent reviewer of counter-terrorism legislation available in good time for the renewal debates on control orders and the extension of the pre-charge detention period from 14 to 28 days. The Government publishes such reports as soon as reasonably practicable.

Due Process

We therefore repeat our earlier recommendation that the statutory framework be amended to provide that rules of court for control order proceedings must require the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on. Unless the control orders framework is amended in this way, it is inevitable, in the light of the recent ruling of the European Court, that there will be cases in which individuals are denied the right to a fair hearing.

The Government continues to disagree with the JCHR on this point. In October 2007, the House of Lords held unanimously that a non-derogating control order does not amount to a criminal charge for the purposes of Article 6 (the right to a fair trial) of the European Convention on Human Rights (ECHR). The Law Lords did not find that the review process in the particular cases before them had breached the right to a fair trial under Article 6 (civil) of the ECHR. The majority view was that in rare cases, the provisions in the Prevention of Terrorism Act 2005 might lead to a breach of Article 6 (civil). However, they concluded that it was possible under section 3 of the Human Rights Act 1998 to interpret the provisions so that they could be operated compatibly with Article 6 in all cases. They also concluded that the High Court should examine the compatibility of control order proceedings with Article 6 on a case by case basis, to ensure that in every case the proceedings provide the individual with the substantial measure of procedural justice to which he is entitled under Article 6. Where the judge concludes that there is material that it is necessary to disclose in order for the controlled individual to have a sufficient measure of procedural protection, the Secretary of State will be put to her election. In other words, the Secretary of State is given a choice whether to disclose the information, or withdraw it from the case. If the latter, the case then proceeds without that material included. Either way, the case continues in a manner compliant with Article 6. The cases before the Lords on this issue were referred back to the High Court to consider again on this basis. This forms part of the mandatory review of each individual control order by the High Court – one of the many safeguards in place to secure the rights of the individual. Consequently, no control order will be upheld through a process whereby the individual's right to a fair trial has not been protected.

Further to the House of Lords' October 2007 judgment on compliance of control orders with Article 6, the Court of Appeal judgment of October 2008 in the cases of AE, AF and AN found that there is no minimum amount of disclosure that must be made to controlled persons in order for the proceedings to comply with Article 6. The Court of Appeal found that in order to determine whether a hearing has been fair the court must consider all the relevant circumstances of a case, not just the amount of disclosure that has been made. This could include the efforts made to disclose material, the effectiveness of the special advocates and the difference that the disclosure of the closed information would have made. AE, AF and AN appealed this decision and between 2 and 9 March their cases were heard in the House of Lords. The Government believes that the approach of the Court of Appeal is correct. The Law Lords are currently considering whether the Court of Appeal erred in its decision. Their judgment will take account of the recent ruling of the European Court of Human Rights in the case of A & Others. We await their judgment.

Exit strategy

We therefore repeat our earlier recommendation that there ought to be a maximum limit on the duration of a control order, and that Parliament ought to debate what that limit should be.

The JCHR's recommendation on this point was fully debated during the passage of the Counter-Terrorism Act 2008 through Parliament. The Government continues to disagree. As we outlined in our response to the JCHR's 2008 report on renewal of the control orders legislation, the Government accepts that control orders should be imposed for as short a time as possible, commensurate with the risk posed. However, we remain unconvinced by the idea that there should be an arbitrary end date for individual control orders. Each control order addresses individual risk. If, to protect the public from the risk of terrorism posed by an individual, a control order is still necessary and proportionate, it is the Government's responsibility to renew that order.

The statutory test in the Prevention of Terrorism Act already ensures that the Government can only lawfully renew a control order if it is necessary to do so. Any decision by the Secretary of State to renew a control order can be appealed by the controlled person – and the High Court must agree that the test has been met. This ensures that rigorous external judicial scrutiny of the necessity of the control order continues throughout the duration of the order. There are obvious risks about assuming individuals no longer pose a threat after a defined period of time. A definite end-date would mean individuals on control orders could simply disengage from involvement in terrorism-related activity on the basis that they knew they could re-engage at the end of that time period.

The Government notes that Lord Carlile's fourth annual report on control orders, while reiterating his view that 'it is only in a few cases that control orders can be justified for more than two years', acknowledges that 'Nevertheless, the material I have seen justifies the conclusion there are a few controlees who, despite the restrictions placed upon them, manage to maintain some contact with terrorist associates and/or groups, and a determination to become operational in the future.' This is within an overall context in which Lord Carlile notes that control orders remain 'a largely effective necessity for a small number of cases'. In the case of GG, the High Court has now upheld the second renewal of a control order, meaning that the judge in that case also agreed that a control order remained necessary to protect the public from a risk of terrorism for a longer period than two years. In the judgment handed down in 2009, the High Court made the following observations on this matter:

‘Lord Carlile in reporting on the use of control orders has indicated that it is his view that no person should remain subject to an order for more than 2 years, save in rare cases. He believes that such a person’s usefulness for terrorist purposes will have been seriously disrupted. The government has not accepted that there should be what it describes as an arbitrary end date for individual orders. If there is evidence that an individual remains a danger, an order should continue for however long is necessary. That I entirely accept, and, to be fair, Lord Carlile recognised that there could be cases in which a duration of more than 2 years was appropriate. Much will depend on whether there is material which persuades the Secretary of State and the court that the individual remains a danger because he has been, notwithstanding the order, continuing so far as he could his terrorist-related activities or because he is likely to do so once an order is lifted. That in my view is the position with GG.’

Consideration of appropriate exit strategies is an integral and significant part of the Control Order Review Group’s formal quarterly review of every control order. The quarterly Control Order Review Group process, supported by ad hoc review meetings as required, remains a rigorous internal safeguard to ensure the ongoing necessity and proportionality of control orders and individual obligations.

The Government has implemented exit strategies for a number of individuals subject to control orders:

- 9 have been served with notices of intention to deport (6 of whom have been deported);
- 4 individuals have had their orders revoked; and
- 2 individuals did not have their orders renewed.

Need for amendments to the control orders legislation

We continue to have very serious concerns about the human rights compatibility of both the control orders regime itself and its operation in practice. We remain concerned that it will continue to result in breaches of both the right to liberty and the right to a fair hearing. Moreover, with every annual renewal, we grow more concerned about the length of time for which a number of individuals have been the subject of control orders. Subjecting individuals to indefinite preventive measures is not acceptable and, as Lord Carlile predicts, will at some point inevitably lead to a violation of their human rights.

As in previous years, we therefore have very serious reservations about the renewal of the control order regime unless the Government is prepared to introduce the safeguards we have identified as necessary to render it human rights compatible. Without those safeguards, the use of control orders will continue to give rise to unnecessary breaches of individuals’ rights to liberty and due process.

The Government disagrees. As a result of the House of Lords’ judgments of October 2007, control orders legislation is fully compliant with the European Convention on Human Rights.

The question of what constitutes a deprivation of liberty in the context of control orders is one that has been very carefully considered by the House of Lords – and clear guidance on Article 5 (right to liberty) issues is available to the courts. In their October 2007 judgments on control orders, the Law Lords unanimously agreed that 12 and 14 hour curfews do not

deprive an individual of their liberty. Further, a majority of the Lords effectively indicated that a control order with obligations including a 16 hour curfew would not breach Article 5. A 16 hour curfew has since been upheld by the High Court and the Court of Appeal in the case of AE. 16 hour curfews were also upheld in the High Court in the cases of AU and GG. There has also been a case where a 16 hour curfew was not upheld in the High Court in the context of the particular circumstances of that individual – the Government is appealing that decision. The Lords also judged (by a majority of three to two) that an 18 hour curfew would amount to a deprivation of liberty. It is clear that the approach taken by the courts to interpreting deprivation of liberty is case specific and carefully nuanced.

As outlined above, as a result of the Law Lords' October 2007 judgment on compliance of control orders with Article 6, no control order will be upheld through a process whereby the individual's right to a fair trial has not been protected. The Law Lords are currently considering again the compliance of three control orders with Article 6. We await their judgment.

Finally, control orders are not 'indefinite' preventative measures. Non-derogating control orders are time limited to 12 months' duration. As outlined above, although they can be renewed, the safeguards in the Prevention of Terrorism Act already ensure that the Government can only lawfully renew a control order if it is necessary to do so. While the Government accepts that control orders should be imposed for as short a time as possible, commensurate with the risk posed, we do not agree that there should be an arbitrary end date for individual control orders. The Government continues to work hard to identify exit strategies for every control order case, and exit strategies have been implemented for a number of individuals subject to control orders.



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