
The Government Reply to
the Report by Lord Carlile of Berriew Q.C.

# Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005

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

May 2009

Cm 7624

£5.50


The Government Reply to
the Report by Lord Carlile of Berriew Q.C.

# Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005

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

May 2009

Cm 7624

£5.50

ISBN: 9780101762427

Home Office

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

Lord Carlile of Berriew QC
House of Lords
London
SW1A 0PW

**FOURTH ANNUAL REPORT ON THE OPERATION OF THE PREVENTION OF TERRORISM ACT 2005**

Thank you for your report on the operation in 2008 of the Prevention of Terrorism Act 2005. I am grateful to you for providing another considered review. I welcome your continuing conclusion that the control orders system as currently operated is a 'justifiable and proportional safety valve for the proper protection of society'. As you know, I entirely agree with your caveat that 'prosecution and conviction by a jury of criminal offences is a far more wholesome and satisfactory way of dealing with suspected terrorists.'

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 RESPONSE TO LORD CARLILE'S REPORT ON THE OPERATION IN 2008 OF THE PREVENTION OF TERRORISM ACT 2005

## Necessity and proportionality of control order system

**The Counter-Terrorism Act 2008 has introduced changes that should increase the potential for the normal criminal process to be used against terrorism suspects. (Paragraph 5)**

**I remain of the view that control orders remain a largely effective necessity for a small number of cases, in the absence of a viable alternative for those few instances. (Paragraph 37)**

**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 – but prosecution and conviction by a jury of criminal offences is a far more wholesome and satisfactory way of dealing with suspected terrorists. (Paragraph 78)**

The Government welcomes your conclusion that the control order regime remains a necessary tool to protect the public from a risk of terrorism. We need to protect individual liberty whilst maintaining our nation's security. This includes protecting the most important of civil liberties – the right to life – whilst also protecting our other fundamental values. Terrorists are criminals who seek to undermine these rights and values.

As we outlined last year, the Government's preference is to prosecute suspected terrorists. The Government is committed to doing all it can to maximise the chances of successful prosecution of such individuals, and we continue to seek improvements in our ability to do this – for example, by introducing new measures such as post-charge questioning in the Counter-Terrorism Act 2008. When we cannot prosecute, and the individual concerned is a foreign national, we look to detain and then deport them. We can only deport someone if doing so is compatible with our international commitments, including our obligations under the European Convention on Human Rights (ECHR).

There remain a small number of suspected terrorists whom we can neither prosecute nor deport. Control orders remain the best available disruptive tool for managing the risk posed by these individuals. We welcome your conclusions on the effectiveness of control orders in the particular circumstances for which they are required.

## Amendments to the legislative framework for control orders

**Other changes to *PTA2005* introduced by the 2008 Act include *section 78*, which introduces into *PTA2005* new *sections 7A, 7B* and *7C*: these facilitate the searching of controlees and their premises with a view to securing compliance with control orders… *Sections 79-81* make procedural changes primarily resulting from experience of the 2005 Act before the Courts. (Paragraph 6)**

**The 2008 Act has added a new *section 7A*. This provides the police with powers to enter and search premises connected with the controlee if there is reasonable suspicion that the controlee has absconded, in order to ascertain whether he has absconded and, if so, to assist in pursuit and arrest. (Paragraph 68)**

**New *section 7B* permits forced entry by the police where there is reasonable suspicion that the controlee is not granting access to premises where at the time he is required to be situated under the order. This power is for the purpose of determining whether any of the obligations imposed by the control order have been contravened, and, if so, for material that may assist in the investigation of the contravention. (Paragraph 69)**

**New *section 7C* allows for a warrant for entry and search to be issued at magistrates' court level for the purposes of determining whether the controlee is complying with the obligations of a control order. The bar for such warrants is quite high: by *subsection (5)* the warrant must be *necessary* for the purposes of determining whether the controlee is complying with the obligations imposed by or under the control order. (Paragraph 70)**

**Sections 10-13 of the Counter-Terrorism Act 2008 provide powers to take fingerprints and non-intimate samples from controlees. This is a proportionate and necessary part of the enforcement of control orders. (Paragraph 71)**

**The new provisions are a proportionate and necessary part of a workable control orders system, with a reasonable range of enforcement powers. (Paragraph 72)**

The Government welcomes your conclusions relating to amendments made to the legislative framework for control orders by the Counter-Terrorism Act 2008.

## Breaches, absconds and the use of so called 'light touch' control orders

**There have been numerous breaches of control orders that have not been made the subject of criminal charges. Most of these are of themselves of minor significance, e.g. a few minutes' unpunctuality in reporting; although the cumulative effect of such breaches may be regarded as serious. Some have been passed over because of family exigencies or emergencies giving rise to the breach. (Paragraph 26)**

**Breach proceedings are subject to the usual prosecution procedures and standards involving the Crown Prosecution Service. (Paragraph 28)**

**Absconding by persons who are or predictably are about to be controlees is an embarrassment to the system. The viability of enforcement must always be considered when a control order is under consideration. Enforcement of control orders is resource-intensive for the police, and affects the several police forces with controlees resident in their areas… (Paragraph 30)**

**It is worth repeating that in my view it is said all too easily that the authorities have a panoply of effective means of enforcement of control orders, including electronic and physical surveillance. (Paragraph 31)**

**All forms of surveillance involve considerable human resources. This is especially so of watching and following. A complete package of measures requires a secure place of observation. Observation of individuals generally requires several officers, observing, logging and recording images. (Paragraph 32)**

**The importance of ensuring that control orders are enforced means that so-called 'light touch' control orders are not a realistic proposition save in exceptional circumstances. My discussions with Ministers and officials leave me with the conclusion that the limitations of so-called 'light touch' control orders are well understood. (Paragraph 33)**

Control orders cannot entirely eliminate the risk of an individual's involvement in terrorism-related activity. No executive action can do this. In some cases control orders will entirely prevent involvement in terrorism-related activity. In others they will restrict and disrupt it. But they clearly do make a difference: what is absolutely clear is that the obligations in place do make such involvement more difficult.

The Government must, of course, work within the legal framework for control orders, in particular on human rights. Within these limits, it is difficult to prevent all breaches and absconds. Control orders do not equate to house arrest, and – as you acknowledge – all forms of surveillance involve considerable human resources. However, the Home Office works with our partners to take every available step to protect the public from the threat we face from terrorism, including continuing to ensure that all control orders are as effective as they can be.

We accept that so-called 'light touch' control orders can provide less assurance against engagement in terrorism-related activities and specifically against absconds. That said, there may be specific circumstances where it is necessary and proportionate to have a less stringent control order.

Considerable work has been carried out by the Government to reduce the risk of absconds, with notable success. While there have been seven control order absconds in total, the last of these absconds occurred in June 2007. As the Government explained in its response to your third annual report, in 2007 we undertook a thorough review of all control orders then in force in order to ensure that they were as effective as possible. Consequently we strengthened the obligations in a number of cases where it was necessary and proportionate to do so. We continue to keep all current control orders under review – to ensure both that they and the obligations they impose remain necessary and proportionate, and that the control order regime more generally is as effective as possible. We introduced new police powers of entry and search in the Counter-Terrorism Act 2008 specifically to aid enforcement and monitoring of control orders. Finding individuals who have absconded is an operational matter for the police and investigations are ongoing.

Moreover, the police, the prosecuting authorities and the courts all take the enforcement of control orders seriously. Where we have evidence that a control order obligation has been breached, the prosecuting authorities will take appropriate action. As you note, any potential prosecution is subject to the usual Crown Prosecution Service tests: whether the evidential threshold is met, and whether prosecution would be in the public interest. Since the beginning of 2007, six individuals have been or are being prosecuted for breaching their control order obligations – one of these prosecutions was successful (the individual was sentenced to five months' imprisonment), one was unsuccessful and four individuals are currently awaiting trial. However, as you suggest, when there is reasonable excuse for an individual breaching their control order, such as a medical emergency, the individual will not be charged.

## Technical problems with monitoring equipment

**Some apparent breaches occur because the tagging and contact equipment and service fail. For the most part, these are reliable. However, there remains room for technical improvement and increased reliability. Prosecutions are not pursued where apparent breaches are due to technical problems with the equipment. (Paragraph 27)**

The Home Office works closely with the companies responsible for electronic tagging, the police and the Ministry of Justice to ensure that the monitoring of individuals on control orders continues to be carried out effectively.

The monitoring equipment is designed automatically to alert the monitoring company to suspected breaches. There are, inevitably, occasions when this sensitive equipment gives what we believe, after investigation, to be a false alarm. In such circumstances, we ensure that the issue is investigated and resolved as soon as possible.

All types of electronic monitoring equipment are subject to rigorous testing before being approved for use. The National Audit Office report of 2006 on electronic monitoring concluded that the equipment was robust and effective.

## Number of individuals on control orders

**The continuing relatively low number of control orders, set alongside the vastly greater number of known terrorism suspects, confirms that the Home Secretary remains rightly reluctant to expand their use. (Paragraph 34)**

The Government believes that control orders remain the best available disruptive tool for managing the risk posed by individuals whom we can neither prosecute nor deport. Non-derogating control orders can only be imposed where there is reasonable suspicion of the individual's involvement in terrorism-related activity, and where the order is considered necessary to protect the public from a risk of terrorism. The imposition of control orders is considered on a case by case basis. There is no linear relationship between the number of known terrorist suspects and the number of control orders in force.

## Former Guantanamo Bay detainees

**It has been suggested in some quarters of the media that control orders would have to be made against any former Guantanamo Bay detainees returned to or accepted from the UK. In this context it should be said that control orders are not a routine form of control of people who are perceived to be potentially troublesome, and it is over-simplistic to assume that they would be appropriate, acceptable, practicable or even lawful against a group of people simply because they had been detained elsewhere, under a foreign (and unusual) jurisdiction. (Paragraph 35)**

We agree. The imposition of a control order is considered on a case by case basis and, as previously outlined, non-derogating control orders can only be imposed where there is reasonable suspicion of the individual's involvement in terrorism-related activity, and where the order is considered necessary to protect the public from a risk of terrorism. The Government does not speculate publicly about the potential use of control orders in individual cases.

## Availability of advice

**Whenever controlees are willing to discuss their own position and concerns, appropriately knowledgeable and qualified persons should be made available to them. Whenever possible, credit should be given for co-operation. (Paragraph 39)**

We agree. As the Government set out in its response to your last report, we consider as quickly as possible all requests from controlled individuals to meet specialist or qualified persons – as with all other requests for modifications of control order obligations. The Government also seeks representations from the individuals on their own position and their concerns – both in terms of the impact of the order and its obligations on them and their family and in terms of the open national security case against them.

## Intercept as evidence

**I remain of the view that there are cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. The Committee of Privy Councillors chaired by Sir John Chilcot in their report published on the 6th February 2008 set out 9 tests to be passed before any such evidence will be admitted to a court. Debate about this issue has not lost momentum. The use of intercept evidence in a criminal court possibly has the potential for reducing the number of control orders, though this is far from certain. (Paragraph 47)**

The Government is committed to enhancing, wherever possible, its ability to bring forward prosecutions using the best evidence available. That is why it accepted the recommendations of the Privy Council Review Report for the introduction of intercept as evidence provided it is possible to meet the nine tests outlined in the report to ensure that national security and public protection are not compromised. An Implementation Team is taking work forward with urgency

although, as outlined in a Written Ministerial Statement by the Home Secretary on 12 February, key legal and operational issues remain to be resolved. The Government's intention remains to be in a position to bring forward legislation for the use of intercept as evidence as soon as possible, subject to the key implementation issues being successfully resolved.

However, the Privy Council Report noted that it had 'not seen any evidence that the introduction of intercept as evidence would enable prosecutions in cases currently dealt with through control orders.' The report highlighted that a review of nine current or former control order cases by independent senior criminal counsel had concluded that:

> 'the ability to use intercepted material in evidence would not have enabled a criminal prosecution to be brought in any of the [control order] cases studied – in other words, it would not have made any practical difference. In four cases, Counsel concluded that such intercepted material as exists, even if it had been admissible (including the assumption that it could be made to meet evidential standards), would not have been of evidential value in terms of bringing criminal charges against the individuals in question. In the other five cases, although Counsel assessed that there was intercepted material capable of providing evidence of the commission of offences relating to encouraging, inciting or facilitating acts of terrorism (as opposed to the direct commission of terrorist or other offences), he stated that *"it is clear to me that in reality no prosecution would in fact have been brought against these five men"*. This was because deploying the crucial pieces of intercepted material as evidence would have caused wider damage to UK national security (through, for instance, exposing other ongoing investigations of activity posing a greater threat to the public, or revealing sensitive counterterrorism capabilities to would-be terrorists) greater than the potential gains offered by prosecution in these cases.'

**Mental health of individuals subject to control orders**

**I can confirm that the CORG discusses the extent of obligations in every case, and that changes have been made to meet the circumstances including the personal and family situation of the controlee and family members. (Paragraph 48)**

**The case of *Abu Rideh* is an example of discussion of the potential psychological effects of control orders. Especially in relation to relocated controlees, and of course those with a mental health history, this is an important consideration in relation to the obligations imposed by such an order. This places responsibilities on both sides. Those representing the controlees should (and surely have a professional and ethical duty to) ensure that any such evidence is drawn to the attention of the Home Office as early as possible. There is support in European case law for the proposition that, where the State takes coercive measures that could affect the physical or mental well-being of the individual, it is under a duty to monitor effectively the impact of those measures. (Paragraph 53)**

The physical and mental health of an individual and his family is taken extremely seriously by the Government when a control order is considered and imposed, and on an ongoing basis. We regularly seek representations from controlled individuals on the impact of the control order.

As you acknowledge, the impact of the control order is formally considered when the control order is imposed and every quarter from then on by the Control Order Review Group. The Group considers representations provided by controlled individuals on the impact of their orders on both themselves and their families. The Group also takes account of lay assessments made by those who meet with controlled individuals on a regular basis (e.g. police officers). Where appropriate, we arrange for our own independent medical assessment of an individual's mental and physical health.

The impact of the control order is also considered during each mandatory High Court review of the control order by the judge and often additionally during ad hoc modification appeals relating to certain control order obligations. As we noted in the Government's response to your third annual report, the Control Order Review Group's consideration of Mr Abu Rideh's control order was recognised in a 2007 High Court review of the modifications to his control order:

> 'The Home Office was aware of Mr Abu Rideh's mental condition and his mental health was taken into account when considering whether to modify the obligations. The need to monitor his mental health and keep it under review was recognised and the letter of 4 April shows a certain proactivity by the police in relation to the risks.'

However, as the courts have also acknowledged, an individual's mental health does not automatically trump the national security case against him, and the right of the public to be protected from a risk of terrorism. In the substantive review of Mr Abu Rideh's control order in 2007, the High Court concluded that:

> 'While account must be given to his mental health problems, they do not trump the national security case against him. That national security case means it is legitimate for him to be subjected to a control order with consequent restrictions.'

Similarly, in a 2008 High Court modification appeal relating to Mr Abu Rideh's control order, the High Court concluded that:

> 'I am also satisfied that the SSHD's conclusion that the obligations in the control order are necessary to restrict the extent to which Abu Rideh is and can be involved in terrorism-related activity is not flawed. I accept that his mental health has some effect on his ability to engage in those activities, but it would be quite wrong to approach this case on the basis that his general mental state operates as a complete or even very significant inhibitor.'

## Use of control orders for more than two years

**Officials and representatives involved in managing control orders should meet regularly to monitor each case, with a view to advising on a continuing basis as to the necessity of the obligations imposed on each controlee, and as to whether the order should continue. Included in those considerations must be the effect on their families, especially any children living with them. The CORG is now a matter of public knowledge, and its activities have been scrutinized by the High Court. Once again this year I have attended some of its meetings, as an observer. I have been able to contribute when matters of principle and relevance to the review process have arisen. CORG includes officials from the Home Office, police and other relevant parts of the public service. They scrutinize each control order methodically and in detail, and discuss the proportional needs of the case. One of the matters always discussed is the potential for bringing the order to an end. (Paragraph 55)**

**I can report that the work of CORG is well-organised and methodical. I am in no doubt that Ministers and officials have a genuine interest in seeing control orders brought to an end as long as the national interest remains protected. As in previous reviews, I am concerned about the ending, or endgame, of each control order. There has to be an end of the order at some point, in every case. Some of the controlees have already been the subject of their orders for a considerable time. Their orders cannot be continued indefinitely – that was never intended and would likely not be permitted by the courts. I am satisfied that in every case there is an ongoing search for a strategy for the ending of the order. (Paragraph 57)**

**My view is that it is only in a few cases that control orders can be justified for more than two years. After that time, at least the immediate utility of even a dedicated terrorist will seriously have been disrupted. The terrorist will know that the authorities will retain an interest in his or her activities and contacts, and will be likely to scrutinise them in the future. For those organising terrorism, a person who has been subject to a control order for up to two years is an unattractive operator, who may be assumed to have the eyes and ears of the State upon him/her. 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. (Paragraph 58)**

**The government has rejected my view expressed last year that there should be a recognised and possibly statutory presumption against a control order being extended beyond two years, save in genuinely exceptional circumstances. Nevertheless, I believe that it is fully recognised that extended periods under control orders are likely to be reviewed with especial care by the courts. (Paragraph 59)**

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.

As you acknowledge, the possibility that some individuals remain a risk to the public after two years subject to a control order is not just a theoretical matter. This is within an overall context in which, as you conclude, 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 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.

The Government welcomes your acknowledgement that we consider and pursue exit strategies for all individuals subject to control orders, whilst ensuring that implementation of an exit strategy is not to the detriment of protecting the public from a risk of terrorism.

We also welcome your observations on the efficacy of the Control Order Review Group, which we established as a result of recommendations from your first report on control orders. As you know, the matters you highlight in paragraph 55 of your report are routinely considered at Control Order Review Group meetings. 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.

**Operation of the special advocates procedure**

**I have received no complaints from controlees or those representing them to the effect that court procedures are not working satisfactorily… (Paragraph 64)**

**Once again this year I have received no complaints about the special advocate procedure in control order cases… The special advocates are skilled and conscientious, and certainly useful. They have had an effect on the outcome of cases, and in all cases have been of great assistance to the Court. Their use has been studied, with favourable comment, by other jurisdictions. (Paragraph 65)**

We agree that court procedures for reviewing control orders are effective and that special advocates are of great assistance to the court. It is our strong view that there are robust safeguards in place, including the use of special advocates, to protect the right to a fair trial of individuals subject to control orders.

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 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 in 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.

**Consultation on the prospects of prosecution and ongoing review of the possibility of prosecution**

**I have seen letters from chief officers of police in relation to each controlee certifying that there was no realistic prospect of prosecution. In 2006 and again in 2007 I urged that there should be more detail in those letters – for example, and if necessary in a closed version, an explanation of the sensitivity of material that could not be placed before a court of trial. The decision whether to prosecute should be taken following detailed and documented consultation in every case between the CPS, the police, the Security Service and the Home Office, on the basis of full consideration of the evidence and intelligence. My experience of CORG meetings leaves me in no doubt that the process is followed. For example, in the case of one controlee there was repeated discussion of whether what might well be a provable crime had occurred within a UK jurisdiction, with a view to prosecution if at all possible. (Paragraph 77)**

**The quality of the letters concerning possible prosecution has continued to improve, in the sense that some reasons are now given. As much detail as possible should be given to the Home Secretary in every case as to why**

**additional investigation, or different forms of evidence gathering, might not enable a criminal investigation to take place. It is a given that it would be far better for prosecutions to occur, of course provided they pass the usual threshold standards for prosecution (evidential and public interest, respectively) applied in all cases by the CPS. Very recently I have reviewed one case for which the possibility of a successful prosecution is currently being considered, and I shall be re-examining the case in due course… (Paragraph 78)**

As stated in previous Government formal responses to your reports on control orders, a decision on whether to prosecute a particular individual is an operational matter for the police and the Crown Prosecution Service.

Before making a control order, the Home Office routinely consults the police about the possibility of prosecution, as required by the Prevention of Terrorism Act 2005. The Act also requires the police to consult the Crown Prosecution Service. In every case, an advice file is prepared by the police and examined – along with any available primary evidence – by the Crown Prosecution Service. The Crown Prosecution Service returns that file to the police, along with their recorded advice; the police subsequently write a letter to the Home Office advising on the prospect of prosecution, as required by section 8 of the 2005 Act. The letter from the police to the Home Office will explain the conclusion the police have reached and how it was arrived at.

The making of a control order does not preclude further investigation of the prospects for prosecution. Indeed, the police are under a duty to keep the possibility of prosecuting individuals subject to control orders under review. The police review any new material brought to their attention and, where it is necessary to do so, update the existing police file and consult the Crown Prosecution Service on the prospects of prosecution for a terrorism-related offence. Where prosecution does not result, this is because the case has not passed the prosecution tests set out in the Code of Crown Prosecutors, and to which you refer. Clearly, it is not appropriate for the Government to comment on any individual cases.

The possibility of prosecution is considered on an ongoing basis by the police and formally captured quarterly through the Control Order Review Group.

We welcome your acknowledgment in this year's report that the prospects of prosecution are always considered, and that the letters regarding the prospects of prosecution include more detail than previously. We do not consider it appropriate for any further detail to be included in the letters.

## Review of non-derogating control orders by the courts

***Sections 10* and *11* provide the system of appeals against control orders, control order court decisions and derogation matters. (Paragraph 82)**

***Section 10(4), (5)* and *(6)* make it clear that the principles applicable in non-derogating control order appeals are those applicable on an application for judicial review. (Paragraph 83)**

**This means that such appeals are not analogous to a criminal trial. Indeed, as some of the 2008 cases have reminded us, control order cases are civil proceedings, in the form of administrative court hearings. In lay language, the decision of the Secretary of State will be upheld unless shown to be founded on a mistake of law, or on a disproportionate assessment of the facts in their legal context, or perverse. (Paragraph 84)**

When making a non-derogating control order, the Secretary of State must first have reasonable grounds for suspecting that the controlled person is or has been involved in terrorism-related activity, and second must consider that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make the order. The High Court considers whether these decisions, and the decisions to impose individual obligations within the order, are flawed.

While the 2005 Act uses the language applicable to judicial review in reviews of non-derogating control orders by the High Court, subsequent case law has made clear that what is expected of the courts goes beyond this. In relation to the reasonable suspicion limb of the test, the Court of Appeal's August 2006 decision in MB confirmed that 'the court must make up its own mind as to whether there are reasonable grounds for the necessary suspicion'. In relation to the necessity limb of the test, the Court of Appeal concluded that:

> 'The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State…. Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so…. The provision of section 7(2) for modification of a control order 'with the consent of the controlled person' envisages dialogue between those acting for the Secretary of State and the controlled person, and this is likely to be appropriate, with the assistance of the court, at the stage that the court is considering the necessity for the individual obligations.'

The Court of Appeal also made clear that 'section 3(10) can and should be 'read down' so as to require the court to consider whether the decisions of the Secretary of State in relation to the control order ***are flawed*** as at the time of the court's determination' [rather than ***were flawed*** at the time the order was made by the Secretary of State].

There is thus no doubt that the courts are reviewing control order cases in great detail and with great care, taking account of all the information available to them at the date of the hearing. Two control orders were quashed by the High Court on the basis that the test in the 2005 Act was no longer met, even though the Court recognised that the original decisions to make the control orders were not flawed. In a third case, the High Court directed the Secretary of State to revoke the order on the basis that recent events pertinent to the case meant the order was no longer necessary, although again the High Court was satisfied that that the decisions to make the original control order and the renewed control order were necessary and not flawed.

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID6147163 05/09 428221 19585

Printed on Paper containing 75% recycled fibre content minimum.

information & publishing solutions

Published by TSO (The Stationery Office) and available from:

**Online**
**www.tsoshop.co.uk**

**Mail, Telephone, Fax & E-mail**
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

**The Parliamentary Bookshop**
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

**TSO@Blackwell and other Accredited Agents**

**Customers can also order publications from:**
TSO Ireland
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451  Fax 028 9023 5401

ISBN 978-0-10-176242-7