THE GOVERNMENT REPLY TO
THE NINTH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2009-10 HL PAPER 64, HC 395

Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010

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

March 2010

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25 MAR 2010

Dear Andrew

REPORT ON THE RENEWAL OF THE CONTROL ORDERS LEGISLATION

Thank you for the Joint Committee on Human Rights' report on the 2010 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.

Yours

ALAN JOHNSON

GOVERNMENT REPLY TO THE REPORT BY THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE ANNUAL RENEWAL OF CONTROL ORDER LEGISLATION 2010

Parliamentary scrutiny

We welcome the timely publication of the statutory reviewer's report, in accordance with our previous recommendation that such reports should be published at least a month before the debate in Parliament to which they are relevant in order to facilitate proper parliamentary scrutiny. (Paragraph 10)

We welcome the JCHR's comments. The reports of the independent reviewer are published as soon as reasonably practicable.

We recommend that in future, where the Secretary of State is required by statute to consult certain officers before renewing a counter-terrorism power, at least a summary of the consultee's response be published in order to facilitate parliamentary scrutiny of the justification for the renewal. (Paragraph 13)

It would not be appropriate to publish the responses of the statutory consultees in full where these are classified. Confirmation that all the statutory consultees are content with the proposal to renew the powers in the Prevention of Terrorism Act 2005 (2005 Act) is already included in the Explanatory Memorandum that accompanies the laying of the draft renewal Order. The report by the independent reviewer of terrorism legislation, Lord Carlile, on the operation of the 2005 Act – which acts as his formal response to the statutory consultation – is already published in full.

We recommend that, in future, counter-terrorism powers as extraordinary a departure from principle as those contained in sections 1-9 PTA 2005 be made subject to a proper sunset clause, requiring them to be renewed by primary legislation. (Paragraph 14)

The Government considers that the current arrangement for renewal of the control order powers, which requires an Order to be approved by resolution in both Houses of Parliament, remains appropriate. The threat to the UK from terrorism is expected to remain serious and no viable alternatives to control orders that offer similar levels of assurance against risk have been identified.

The impact of control orders on controlees, their families and communities

We remain extremely concerned about the impact of control orders on the subject of the orders, their families and their communities. There can be no doubt that the degree of control over the minutiae of controlees' daily lives, together with the length of time spent living under such restrictions and their apparently indefinite duration, have combined to exact a heavy price on the mental health of those subjected to control orders. The severe impact on the female partners and children of the controlees, including on their enjoyment of their basic economic and social rights as well as their right to family life, is an example of the "collateral impact" of counterterrorism measures recently identified by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

These concerns grow more acute the longer a control order against the same individual subsists. (Paragraph 44)

In determining the obligations that should be imposed on an individual and in managing the control order once imposed, the impact on the individual and his family, including on their physical and mental health, is taken extremely seriously by the Government. The protection of the public is weighed against the impact of the restrictions, both individually and collectively, on the individual and his family.

However, an individual's health or family situation does not automatically outweigh the national security case against him and the right of the public to be protected from a risk of terrorism. As the High Court noted in its judgment in *Secretary of State for the Home Department v Abu Rideh [2007] EWHC 804 (Admin)* in 2007:

> '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.'

The Home Office monitors the impact of the control order on the physical and mental health of the individual and his family; regularly seeks representations from the individual on the impact of the control order; and regularly reviews the control order and its constituent obligations in the light of the order's impact on the individual's personal circumstances. The Government also takes account of lay assessments made by those who meet with controlled individuals on a regular basis (e.g. police officers), and where appropriate, we arrange for our own independent medical assessment of an individual's mental and physical health. These matters are formally considered when the control order is imposed and every quarter from then on by the Control Order Review Group (CORG).

Where there is a concern over the mental or physical wellbeing of a controlled individual the Home Office works closely with the police to ensure the individual receives whatever care and/or attention he needs. Control orders do not prevent access to health or medical care and indeed the Home Office makes necessary modifications to control orders to allow individuals to attend medical appointments.

The impact of the control order on the individual and his family is considered during each mandatory High Court review of the control order by the judge. The judge must determine whether the decision of the Secretary of State to impose a control order and its constituent obligations is flawed, and as part of that the judge will consider whether they are proportionate in light of the impact of the control order on the individual and his family. In addition, individuals subject to control orders can request modifications of their control order to reduce the impact on themselves and their families. If the Home Office refuses to make a modification, the individual can appeal against the decision. These judicial safeguards were provided for by Parliament, and provide an appropriate check and balance on Government decision-making in this regard.

The Government also considers the community impact of a control order both at the point of imposition of the order and during the lifespan of the order. Alongside this, there is a wider programme of ongoing engagement with key opinion formers and community leaders which seeks to address, amongst other

concerns, the impact of counter-terrorism legislation, including the use of control orders.

Control orders are not of 'indefinite duration'. There are strict time limits of one year for each control order, though they can be renewed. Control orders are imposed for as short a time as possible, commensurate with the risk posed. The statutory test in control orders legislation already ensures that the Government can only renew a control order if it is necessary to do so for purposes connected with protecting members of the public from a risk of terrorism, and considers the obligations imposed by the renewed order are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity. 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 judicial scrutiny of the necessity of the control order and its constituent obligations continues throughout the duration of the order. The Government continues to work hard to identify exit strategies for every controlled individual, whilst ensuring that implementation of an exit strategy is not to the detriment of protecting the public from a risk of terrorism. This is an integral and significant part of the CORG's formal quarterly review of each control order.

We are particularly concerned about the apparent increase in resort to conditions in control orders which amount to internal exile, banishing an individual and, effectively, his family, from his and their community. We have very grave reservations about the use of such historically despotic executive orders, and the contribution they undoubtedly make to "the folklore of injustice." (Paragraph 45)

Moreover, the UK has not ratified the Protocol to the ECHR which recognises freedom of movement as a fundamental human right in the ECHR system, but it is already recognised as such within the legal order of the European Union. It seems to us likely that it is only a matter of time before executive "requirements to relocate" in control orders are found to be incompatible with the fundamental right of a citizen to move freely within the territory of one's state. (Paragraph 46)

The Government may require a controlled person to relocate for national security reasons, usually connected with removing an individual from his network of extremist contacts. The impact on the controlled person and his family of a requirement for the controlled person to relocate is carefully considered by the Government in making such a decision, and the impact of the relocation on the individual and his family is kept under review. The Government also takes steps to minimise the impact of relocation on an individual. For example, a furnished property will be provided that is large enough to accommodate the individual and his family and the individual will be provided with information about the local area such as the location of schools and places of worship. The individual will usually be given up to seven days notice of the relocation, provided that national security concerns do not require a shorter notice period.

The necessity and proportionality of that decision is also considered by the courts, either as part of the substantive court review of the control order or as part of an appeal against the modification of the order. The courts can quash or direct the revocation of such a requirement if they disagree with the Government's conclusions. The Courts have done so in a number of cases – but in five other cases, far from finding that the requirement to relocate was incompatible with

the right to move freely, the courts have upheld a requirement for a controlled individual to relocate as both necessary and proportionate. The key point is that such matters are considered carefully by the Government – and the courts – on a case by case basis. Following the Law Lords' June 2009 judgment in *Secretary of State for the Home Department v AF & Others [2009] UKHL 28 (AF & Others)* on compliance of the stringent control orders before them with Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR), as part of the court review of decisions to require individuals to relocate, sufficient disclosure must be made to the individuals of the reasons for the decision to enable them to give effective instructions to the special advocates – see *BM v Secretary of State for the Home Department [2009] EWHC 1572 (Admin)*.

In such circumstances, the Government rejects the reference to 'historically despotic executive orders' as misplaced.

While some Articles of the ECHR are absolute, others are qualified, meaning that interference with them is permitted where necessary for a legitimate aim and proportionate. The right to freedom of movement, like Article 8 (right to respect for private and family life), is a qualified right. The Government therefore disagrees with the suggestion that it is inevitable that a requirement to relocate will be considered incompatible with the right to freedom of movement as a matter of principle.

Basic fairness of control orders

By requiring, in effect, the disclosure to a controlled person of the gist of the allegations against him, the decision in AF has gone some way to addressing one of the main sources of unfairness of the control order regime. However, it appears that the impact of the decision on improving fairness in practice may have been limited by the Government's passive and minimalist approach to compliance, and the approach of some lower court judges of requiring only a little further disclosure at a time. We recommend that the Government conduct a more thoroughgoing and proactive review of the material on which it relies to sustain existing control orders with a view to deciding in each case whether more disclosure is required in the light of AF, rather than leave that task to the special advocates in ongoing proceedings. (Paragraph 53)

The Government disagrees. It is not true to suggest that the Government has taken a passive and minimalist approach in responding to *AF & Others*.

After that judgment was handed down, the Government instructed Counsel to carry out a thorough review of all control order cases current at that time to see what further disclosure was likely to be required in the light of the judgment. As a result of that review, the Government considered that some control orders would not require further disclosure as a result of the judgment. But the Government recognised that the judgment would require a greater degree of disclosure to be made in many control order cases. The Government therefore set about determining whether that disclosure could be made.

In two cases, the Government reached the view that it was not possible to make the required further disclosure because of the serious damage that would be caused to the public interest and so revoked the orders without replacing them with new orders. In two further cases, control orders have been revoked on Article 6 grounds and new control orders with significantly reduced obligations imposed in their place. The Secretary of State unsuccessfully argued before the High Court

in *Secretary of State for the Home Department v BB & BC [2009] EWHC 2927 (Admin) (BB & BC)* that in such cases Article 6 was not engaged – or, even if it was, the level of disclosure required in *AF & Others* did not apply. The Secretary of State is appealing the judgment; the control orders remain in force – and the effect of the judgment has been stayed – pending the outcome of that appeal. However, in the remaining cases, the Government took the view that sufficient disclosure could be made, despite the damage that disclosure would cause to the public interest, to maintain the control orders in force. Indeed, in substantive control order review judgments that have been handed down since June 2009, the High Court has upheld four control orders following proceedings that have complied with the test laid down in *AF & Others*. The Government considers that this review met both the letter and the spirit of the JCHR's recommendation.

In determining what disclosure is necessary to comply with Article 6, the Government engages with the special advocates in the High Court proceedings relating to the cases. It is normal procedure for both the Secretary of State and the special advocates to provide written and oral submissions to the court on what further disclosure is necessary for the proceedings to be compliant with Article 6, and where there is disagreement the court rules on the matter. The Government, therefore, rejects the assertion that it is left to the special advocates alone to determine what further disclosure is necessary and that it takes a passive and minimalist approach to disclosure.

These matters are highly dependent on the facts of each individual case – and determining the disclosure necessary to comply with Article 6 is an ongoing process. For example, whether or not fairness requires the specifics of an allegation to be provided to an individual may depend on the evidence that he has provided himself. If an individual provides more evidence late in the proceedings it may be necessary for the court to revisit the specificity with which the allegation has been gisted. The courts have also accepted that the disclosure process in control order proceedings is a two way street. The controlled person can be expected to engage with the evidence deployed by Secretary of State and the iterative process is a consequence of that (see *Secretary of State for the Home Department v AS [2009] EWHC 2564 (Admin)*).

As the Government has previously made clear and some of the Law Lords acknowledged, the judgment in *AF & Others* in particular puts the Government in an invidious position. We are forced to balance the importance of protecting the public from the risk of terrorism posed by an individual against the risk of making disclosure that is damaging to the public interest. The Secretary of State will only make damaging disclosure where it is necessary to do so and where it considers that the importance of protecting the public from the risk of terrorism posed by the individual through maintaining the imposition of a control order outweighs the risk posed by disclosing sensitive material. Disclosing this material potentially reduces the Government's ability to protect the public from a risk of terrorism. Where the disclosure required by the court cannot be made because the potential damage to the public interest is too high (for example if disclosure could put the life of an informant at risk), we will withdraw the material from the case – with the possible result that we may be forced to revoke control orders even where we consider those orders to be necessary to protect the public from a risk of terrorism.

Notwithstanding the rule change which permits special advocates to adduce evidence, it remains the case that special advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the

expert assessments of the Security Service, assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary. The unfairness identified by the Constitutional Affairs Committee as long ago as 2005 therefore still persists: in practice, special advocates have no means of adducing any evidence which contradicts the evidence relied on by the Secretary of State in closed proceedings, which gives rise to a serious inequality of arms in those proceedings. (Paragraph 59)

As the Committee acknowledges, the Government changed the rules governing control order proceedings in 2009 to make clear that special advocates can call expert witnesses and adduce evidence. While it was already open to the special advocates to do so, the change brought this element of the control order rules in line with those for Special Immigration Appeals Commission (SIAC) proceedings.

The Government considers that there are significant practical difficulties to overcome in relation to special advocates questioning an expert specifically on closed material. It is hard to see who the expert witnesses on closed material would be and what value they would be able to add to the proceedings. It would not be appropriate for serving or former security and intelligence agencies employees to take on such a role – they owe duties of confidence and loyalty to their employer. These duties remain for former employees, whose expertise would in addition rapidly diminish with the passage of time. And special advocates may not view former or current agency employees as impartial.

Even if appropriate people could be found, the Government would need to be confident that their function could be performed securely – that is, they could only receive, read, store and produce closed material in accordance with current security guidelines for handling that material. Either the expert would need Developed Vetting security clearance – an expensive, time consuming process which would also broaden the closed environment and thus make it harder to obtain consent to use the closed material – or the questions would need to be in open but posed after notification of the Secretary of State.

For similar reasons, the Government does not consider that the provision of independent expert support to special advocates would be an improvement to the special advocate system.

But the Government has taken other significant measures to ensure special advocates have adequate help and support to work effectively – including understanding and analysing intelligence product. In particular, the Security Service provides a training course for special advocates that is designed specifically to address any concerns special advocates may have about their lack of expertise in intelligence and security matters. It is our view that this is a far better way for special advocates to have access to those with the requisite, current expertise and receive overall training on the way that the Security Service works. The course enables special advocates to understand and analyse the closed evidence that is disclosed to them and thus to make arguments of the kind that would ordinarily be assisted by expert evidence. In addition, the security and intelligence agencies remain willing to help special advocates with specific enquiries or more generally to understand the nature of intelligence material. Special advocates are also provided with written training pack (with both open and closed manuals). They also have access to a library of case law, and can access closed judgments in other cases provided that they have the permission of the Special Advocates Support Office. The Home Office has undertaken to hold discussions with the Ministry of Justice regarding the law reporting of closed judgments.

The Security Service remains willing to listen to suggestions as to how the content of the courses it runs for special advocates might be altered to provide the further help that the special advocates perceive to be currently lacking. It is engaged in discussions with the Special Advocates Support Office to ensure that the training remains fit for purpose.

Moreover, during hearings both the special advocates and the judge always have an opportunity to cross examine extensively a Security Service officer, who is always made available to give live evidence in such cases.

As a result of *AF & Others*, the circumstances in which special advocates may need to call their own expert witnesses are much reduced. If the individual can give effective instructions to his special advocate, there is less likely to be a closed issue on which the special advocate needs such an expert.

The special advocates have no means of gainsaying the Government's assessment that disclosure would cause harm to the public interest, and Government assessments about what can and cannot be disclosed are effectively unchallengeable and almost always upheld by the court. (Paragraph 62)

Courts inevitably "accord great weight to views on matters of national security expressed by the agencies who are particularly charged with protecting national security." (Paragraph 62)

The Government considers it unsurprising that the courts accord weight to the security agencies on matters of national security, as the agencies are the experts on these matters. Indeed both the UK courts and the European Court of Human Rights have long recognised that it is appropriate for the courts to accord a degree of deference to the state in national security matters. In *Secretary of State for the Home Department v MB [2006] EWCA Civ 1140*, the Court of Appeal stated:

> 'Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.
>
> '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. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for instance: *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] AC 153; *The Republic of Ireland v the United Kingdom* (1978) 2 EHRR 25.'

The Court went on to state that, notwithstanding this deference, the court must give 'intense scrutiny' to the necessity for each of the obligations in a control order.

The Government would also argue that it is unsurprising that Government assessments are in many cases upheld by the courts. The starting point for all hearings is that the individual is given as much material as possible, subject only to legitimate public interest concerns. The disclosure process set down in Part 76 of the Civil Procedure Rules is designed to achieve this. The Government only seeks to withhold information where it would be damaging to the public interest for that information to be disclosed.

Nonetheless, part of the function of special advocates is to ensure that the closed material is subject to independent scrutiny and adversarial challenge – including making submissions (in closed session) on whether or not the closed material should in fact be disclosed to the individual because it is not damaging to the public interest. The Government does not accept the JCHR's assertion that the Government assessments on what can and cannot be disclosed are effectively unchallengeable. The special advocates have successfully challenged such assessments.

The judge reviewing each control order will consider the submissions of the special advocate and of the Secretary of State as to the disclosure required. The High Court must grant permission for material to be withheld so the decision is not ultimately for the Secretary of State. The Secretary of State may elect not to make the required disclosure but in such circumstances he can no longer rely on that part of the case.

Of course, since hand down of the judgment in *AF & Others*, the court in control order hearings can determine that disclosure must be made to an individual on grounds of fairness, even though that disclosure would be damaging to the public interest – and the special advocates can and do make explicit argument to that effect. If the court determines that damaging disclosure must be made on grounds of fairness, the Secretary of State will be given the choice of either disclosing the allegation or withdrawing the material from the case. The Secretary of State will consider whether the balance of the public interest lies in making the disclosure in order to sustain the control order or withdrawing it. If the latter, the case then proceeds without reliance on that material, or the Secretary of State (or the court) may decide that there is no longer sufficient material on which to uphold the control order.

The effect of late disclosure of the closed material to the special advocates is seriously to compromise their ability to discharge their important function, because it leaves them with insufficient time to scrutinise the closed material and to challenge the Government's reasons for the material being closed. (Paragraph 65)

By seriously hampering special advocates in their performance of the role they are intended to perform, it creates the risk of serious miscarriages of justice. (Paragraph 65)

The Government understands that the service of evidence immediately before a hearing causes difficulties to the court and to all parties. It is accepted that both sides should serve open and closed material used in court hearings in a timely manner. The Government endeavours to do so in all cases, and keeps under review the practical steps necessary for preparing for control order hearings.

However, it is important to understand why the Secretary of State may sometimes have little choice but to serve evidence close to the hearing date. As a result of

the judgment in *AF & Others*, the Secretary of State must choose in many cases between making damaging disclosure and withdrawing part of the case against an individual in order to comply with Article 6. The court rules on what disclosure is necessary to comply with Article 6 only after both the controlled person and the Secretary of State have served their initial evidence and Counsel for the Secretary of State has conducted a full exculpatory review of the files. (The exculpatory review is a crucial part of the process in which Counsel reviews the Secretary of State's files to determine whether they contain any material which undermines the Secretary of State's case). Once the court has ruled on the disclosure necessary, the Secretary of State will decide whether or not to make it. If disclosure is made, the controlled person may provide further evidence in response, to which in turn the Secretary of State may need to respond (possibly because the controlled person's evidence means that further material that was not previously exculpatory becomes exculpatory and thus must be disclosed). This is a complex and iterative process that can sometimes lead to further evidence or disclosure being given close to the hearing date.

Nonetheless, the Secretary of State seeks to avoid unnecessary delays in service of material where at all possible.

The inability of special advocates to communicate with the controlee after seeing the closed material, identified as a source of unfairness by the Constitutional Affairs Committee in 2005, remains unchanged, notwithstanding the clear evidence that it seriously affects the special advocates' ability to discharge their function of representing the controlee's interests in the closed proceedings. Lord Carlile's report fails to address the systemic nature of these concerns about the limitation on the special advocates' ability to perform their function: it is a limitation inherent in the current rules, not something which can be overcome by improved training or cooperation. So long as the rules remain unchanged, this inability of special advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person and therefore the extent to which they are capable of mitigating the unfairness to the controlled person in the closed proceedings. (Paragraph 72)

This is a matter of long standing debate.

As the Government has previously explained to the JCHR, there is no absolute prohibition on communication between the special advocate and the controlled person after service of the closed material. A special advocate may take instructions from the individual before he has seen the closed material. And the special advocate can receive written instructions from the individual after he has seen the closed material. A special advocate can also communicate with the individual after he has seen the material, provided it is with the permission of the High Court. The special advocate must notify the Secretary of State when seeking permission, giving the Secretary of State time to object to the communication if he thinks it necessary in the public interest, although the final decision is that of the court.

The restrictions, including notice to the Secretary of State, enable the Secretary of State to take detailed instructions from the experts (in these cases the security and intelligence agencies) as to whether such communications are possible without causing damage to the public interest. The restrictions are essential to ensure that the sensitive material that is contained within the closed case is protected from inadvertent disclosure. The task of obtaining instructions from a controlled

person on one or more facts contained within the closed case would be difficult to manage without running the risk of inadvertent disclosure. The reason for the requirement to provide notice to the Secretary of State is that there may be a range of factors not apparent from the closed material that would make communication between special advocates and the controlled person one that runs the clear risk of leading to the inadvertent disclosure of sensitive material. For example, a fact in the closed case may have come from a covert human intelligence source and it may be a fact only known to the source and the controlled person – in this example, even an allusion, no matter how circumlocutory, to the fact in issue runs the risk of causing damage (including potentially putting the source's life in danger).

Nick Blake QC, now a High Court judge but who gave evidence to the JCHR in 2007 while a special advocate, acknowledged in that evidence session that changing the rules to allow communication after service of the closed material would put 'enormous responsibilities' on special advocates not to disclose classified information inadvertently, and that a 'difficult problem' would be 'how far you could engage in a conversation which directs someone's mind to a topic or an area without crossing the line that would give something away which might endanger the public interest or public security. That is a very difficult judgment for a special advocate to be called upon to be made…'

If the communications between special advocate and controlled person do not relate to the facts within the closed material the risk of inadvertent disclosure is smaller and consequently in a number of cases the special advocate has obtained permission to communicate legal points and factual matters to the controlled person and take instructions from the controlled person on specific issues. In addition, during the course of hearings, the issue of whether any information can be given in open is constantly reviewed and if the special advocates consider that information given in evidence in closed session could be put to the controlled person in open, this will be considered by the Secretary of State and the court.

The final decision on whether to allow the communication is that of the court. The court will not be in a position properly to make an assessment of the potential damage to national security of such an application without having heard representations from the Secretary of State. Indeed, it would be unprecedented to have a procedure by which matters bearing on national security were to be decided in the absence of the relevant Secretary of State. The difficulty is more immediately obvious when considering circumstances in which judges new to national security matters are presiding – it would be impossible for them sensibly to make a decision without any advice from the Secretary of State. It is also possible that even if the rules were changed, the court would in practice be unwilling to permit such communications without having sought the Secretary of State's views, to ensure it did not breach its duty (notwithstanding *AF & Others*) to ensure information is not disclosed contrary to the public interest.

Moreover, no prejudice is caused by putting the Secretary of State on notice if permission is sought. The suggestion that the Secretary of State is at an advantage in seeing the questions that the special advocates wish to put to the controlled person is overstated. All that the questions will indicate is what will already be apparent to the Secretary of State – that is, areas of the closed case where the special advocates would want further information from the controlled person.

Nor is there any foundation to the claim that the Secretary of State might gain an advantage were a question to be asked without any information received

in response subsequently being deployed in the proceedings. The courts have already made clear that they will not draw a negative inference from a controlled person's silence.

In any event, if the court grants permission, the special advocate's subsequent communications with the controlled person remain confidential. The special advocate will therefore have the opportunity to engage in a frank discussion with the controlled person in confidence providing it is within the parameters set by the court.

In practice special advocates have only rarely sought permission from the court to communicate with the individuals in whose interests they are acting after service of the closed material. The Government respectfully suggests there is a case that greater attempts to use existing mechanisms for communication should be made before it is argued that fundamental change is required. The Government does not consider that the JCHR's assertion that there is 'clear evidence' that the restriction on communications 'seriously affects the special advocates' ability to discharge their function' is accurate.

The arguments both for and against changes in the rules regarding communications between the special advocate and controlled individuals after service of the closed material have been explicitly argued before the courts and it is of note that following consideration of these arguments the courts have never suggested that such a change to the rules is necessary.

The Government maintains its view that the restrictions on communication after service of the closed material are an appropriate safeguard to ensure that sensitive sources are protected and the security of the UK is not compromised. The risk of accidental disclosure is not one that needs to be taken in order to achieve procedural fairness. We therefore disagree with the JCHR's recommendation that a change in the rules governing communications is required, and welcome Lord Carlile's conclusion that improved training and closer cooperation rather than rule changes should address the concerns expressed. As outlined above, the Security Service remains willing to listen to suggestions as to how the content of the training courses it runs for special advocates might be altered to provide the further help that the special advocates perceive to be currently lacking. It is engaged in discussions with the Special Advocates Support Office to ensure that the training remains fit for purpose. The Security Service also remains willing to help special advocates with specific enquiries or more generally to understand the nature of intelligence material.

Even allowing for a degree of advocacy in a Government document setting out the Government's own post-legislative assessment of one of its most important pieces of counter-terrorism legislation, we take a serious view of the mischaracterisation of the House of Lords judgments in MB and AF in the Home Office's Memorandum to the Home Affairs Committee. The law in this area is complex and technical and we regard it as positively misleading to say to parliamentarians, most of whom are not legally trained and do not have ready access to legal advice, that the House of Lords has "confirmed" the way in which the control orders regime operates in a manner fully compliant with the ECHR. That is not, on any view, a fair or accurate characterisation of the effect of the House of Lords judgments. (Paragraph 83)

The Government agrees that the law in this area is complex and technical. The case law on Article 6 was summarised in paragraphs 23 to 27 inclusive of the

Government's memorandum to the Home Affairs Committee on post-legislative scrutiny of the Prevention of Terrorism Act 2005 (Cm 7797), which was laid before Parliament on 1 February 2010. The Government's analysis of that case law was contained in paragraphs 64 to 74 inclusive.

The wording of the sentence to which the JCHR refers ('Various House of Lords judgments have confirmed the way in which the 2005 Act operates in a manner fully compliant with the ECHR.') reflects that the practical effect of the judgments is that the Lords have interpreted the 2005 Act (by reading down relevant provisions under section 3 of the Human Rights Act 1998) so that it is compatible with Article 6 of the ECHR. It has also now laid down a test imported from Strasbourg as to what disclosure requirements apply in stringent control order cases.

With hindsight, the Government accepts that 'confirmed' has an unfortunate potential double meaning here – it was meant to imply 'decided' how the 2005 Act needs to operate in order to result in a hearing that will be compatible with Article 6 in every case (and thus also to reflect the evolving nature of case law), rather than to suggest that the Law Lords reiterated the original interpretation of the Act.

However, the wording is accurate, and the Government rejects the suggestion that it was deliberately misleading or unfair.

The key point remains that control orders legislation is fully compliant with the ECHR. This is borne out by the fact that the Law Lords have never made a declaration of incompatibility in relation to the 2005 Act. In October 2007, 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. This read down was maintained by the Law Lords in June 2009, though they felt obliged to take into account the February 2009 European Court of Human Rights judgment in *A & Others v the United Kingdom (Application no. 3455/05) [2009] ECHR 301* for the stringent control orders before them.

We have considered very carefully whether the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and Article 6 ECHR. We emphasise that in previous reports we have always maintained an open mind about this possibility, even while we have expressed our serious reservations about whether the actual design of the regime made this a practical impossibility. Our assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required. In short, it cannot be operated fairly without fundamental reforms which have so far been resisted. (Paragraph 88)

The Government continues strongly to disagree with the JCHR's analysis and conclusion.

Many of the amendments to the regime proposed by the JCHR have been considered specifically by both Parliament (during debates on the now Counter-Terrorism Act 2008) and the courts (in litigation). Neither Parliament nor the courts agreed that these changes were necessary. The Government does not agree with the JCHR either.

As noted above, control orders legislation is fully compatible with the European Convention on Human Rights (ECHR).

Moreover, as part of the review of each control order, the High Court judge must satisfy himself that each obligation imposed by the order is necessary, and compliant with the ECHR – including Articles 5 (right to liberty) and 8 (right to respect for private and family life). The judge will further ensure that the individual's right to a fair hearing in accordance with Article 6 is protected. This is in addition to the judge determining whether the Secretary of State's decision to make a control order was flawed. In other words, the judge must agree (a) that there is reasonable suspicion that the individual is or has been involved in terrorism-related activity, and (b) that a control order is necessary to protect members of the public from a risk of terrorism. If any of these tests are not met, the judge can quash the order, quash one or more obligations imposed by the order or give directions for the revocation of the order or for the modification of the obligations it imposes.

The Government reviewed the position in the light of *AF & Others*, and has concluded that the control order regime remains viable. Lord Carlile has reached the same conclusion. In his 2010 report, he makes clear that he has 'considered the effects of the Court decisions on disclosure. I do not consider that their effect is to make control orders impossible.'

The view of the Government and Lord Carlile is supported by the fact that since the hand down of *AF & Others*, High Court judgments have been handed down upholding four individual control orders, which were considered in the light of the requirements of Article 6 following *AF & Others*.

We are disappointed by the Government's failure to follow through on its earlier promise to us to arrange a meeting with the special advocates. We regard this failure as symptomatic of the Government's general passivity in the face of widespread concerns about the basic fairness of closed proceedings. We recommend that the Minister responsible meet representatives of the special advocates to discuss their concerns about the fairness of the special advocate system as it currently operates, and specifically to discuss the modifications to the legal framework which we and the special advocates have suggested. We recommend that representatives of the intelligence and security services also attend and participate at this meeting. We recommend that the meeting take place as a matter of urgency, and whatever the fate of the control order regime, as the special advocates' principled concerns are potentially of relevance to all of the growing number of contexts in which special advocates and closed evidence are deployed. (Paragraph 95)

We look forward to receiving from the Minister a detailed account of what was discussed at this meeting and a fully reasoned Government response to the special advocates' concerns. We expect this to be a conscientious political engagement with the persistent demands for changes to the legal framework governing closed proceedings, and not merely a repetition of the legal arguments being made by the Government in the ongoing litigation about the role of special advocates in control order and other proceedings involving closed material. (Paragraph 96)

As above, it is not true to suggest that the Government has taken a passive approach to taking into account the effect of the June 2009 House of Lords judgment in *AF & Others*.

A meeting was in the diary of the then Minister of State, the Rt. Hon. Tony McNulty MP, to meet the special advocates as he had promised. However, he moved to another role within Government before the date of the meeting. This was unfortunate, but his successor remains willing to meet special advocates if they think that would be helpful.

Cost of control orders

The detailed information which is now available about the cost of control orders, and in particular the significant amount of public money being spent on litigating them, raises a serious question about whether the cost of maintaining the system of control orders is out of all proportion to the public benefit which they are said to serve. The Government's response of asserting that their benefits, by disrupting terrorism, outweigh the costs, and that alternatives such as surveillance would be more expensive, is not satisfactory. (Paragraph 104)

On the information currently available, we find it hard to believe that the annual cost of surveillance of the small number of individuals subject to control orders would exceed the amount currently being paid annually to lawyers in the ongoing litigation about control orders. We recommend that more detailed and independently verified information about the costs of surveillance be provided to Parliament in advance of the renewal debates to enable parliamentarians to reach a better informed view on this important question. (Paragraph 105)

The Government disagrees with the JCHR's assertions on costs.

Given the Government's assessment that the control order regime remains a necessary and proportionate tool to protect the public from a risk of terrorism, we continue to devote the necessary resources to upholding the regime. We make no apology for defending decisions to protect the public from the risk of terrorism.

Control orders are used only where considered necessary and proportionate to do so to protect the public from the threat of terrorism. They are a targeted tool of last resort. Nonetheless, the extensive internal and judicial scrutiny relating control orders to ensure that they remain fair and justified, including the automatic review of all control orders by the High Court and the ongoing litigation on the control order regime, means that there are, inevitably, significant legal costs associated with the process.

We continue to work with our stakeholders to minimise the costs of control orders.

The Government does not comment on the details of terrorism-related operational matters. But surveillance would be considerably more expensive than the control order regime. This conclusion was supported by Lord Carlile, in his most recent report on control orders: he considered it would be 'many times greater than of cost of control orders'.

Nor is the cost just financial. Surveillance does not offer the same opportunities for disruption as a control order; we could not, for example, prohibit individuals from using the internet or contacting named associates, and nor could we use curfews or geographical boundaries to restrict their movements. In many cases control orders are the only available option to manage the risk posed by a

suspected terrorist. The reality is that without control orders there would be an unquantifiable increased risk to the public from controlled individuals.

JCHR conclusions

Since the introduction of the control orders regime in March 2005, on all previous annual renewals, we have expressed our very serious reservations about renewal unless the Government was prepared to make the changes to the system we have identified as necessary to render it human rights compatible. We warned that without those changes, the use of control orders would continue to give rise to unnecessary breaches of individuals' rights to liberty and due process. Our warnings have been echoed by other international bodies charged with monitoring compliance with human rights. (Paragraph 108)

The many warnings have not been heeded. As a result, the continued operation of the unreformed system has, as we feared, led to more unfairness in practice, more unjustifiable interferences with people's liberty, more harm to people's mental health and to the lives of their families, even longer periods under indefinite restrictions for some individuals, more resentment in the communities affected by or in fear of control orders, more protracted litigation to which there is no end in sight, more claims for compensation, ever-mounting costs to the public purse, and untold damage to the UK's international reputation as a nation which prizes the value of fairness. (Paragraph 109)

For a combination of these reasons, together with serious reservations about the practical value of control orders in disrupting terrorism compared to other means of achieving the same end, we have reached the clear view that the system of control orders is no longer sustainable. A heavy onus rests on the Government to explain to Parliament why alternatives, such as intensive surveillance of the very small number of suspects currently subject to a control order, and more vigorous pursuit of the possibility of prosecution, are not now to be preferred. (Paragraph 110)

The Government has consistently disagreed with the JCHR's assertions relating to control orders.

The national security reasons for maintaining the regime remain strong. Control orders remain an important tool to deal with suspected terrorists who cannot be prosecuted or deported. Lord Carlile concluded in his 2010 report on control orders that 'it is my view and advice that abandoning the control orders system entirely would have a damaging effect on national security. There is no better means of dealing with the serious and continuing risk posed by some individuals.' The Government agrees.

As outlined above, we reviewed the position in the light of *AF & Others*, and concluded that the control order regime remains viable. Lord Carlile reached the same conclusion in his 2010 report on control orders. The view of the Government and Lord Carlile is supported by the fact that since the hand down of *AF & Others*, High Court judgments have been handed down upholding four individual control orders, which were considered in the light of the requirements of Article 6 following *AF & Others*.

Again as explained above, control orders legislation is fully compatible with the European Convention on Human Rights (ECHR).

The regime does not lead to unwarranted interferences with individuals' ECHR rights. Indeed – and again as noted above – as part of the review of each control order, the High Court judge must satisfy himself that each obligation imposed by the order is necessary, and compliant with the ECHR – and that the individual's right to a fair hearing is protected.

We believe that the 2005 Act strikes the right balance between safeguarding society and safeguarding the rights of the individual. Many of the amendments to the regime proposed by the JCHR have been considered specifically by both Parliament (during debates on the now Counter-Terrorism Act 2008) and the courts (in litigation). Neither Parliament nor the courts agreed that these changes were necessary. The Government does not agree with the JCHR either.

The Government's position on the control order regime was set out in detail in its memorandum to the Home Affairs Committee on post-legislative scrutiny of the 2005 Act.

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