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CASE AND COMMENT

CONTROL ORDERS, CONDITIONS PRECEDENT AND COMPLIANCE WITH ARTICLE 6(1)

THE Prevention of Terrorism Act 2005 empowers the Home Secretary to make a "control order" against any individual. A control order will specify and impose a range of obligations upon that individual. These may be very various but will generally specify the individual's residence, impose a curfew requirement, and restrict his communications with others. It is a criminal offence to contravene any obligation (section 9(1)). But the Home Secretary cannot make a control order "imposing obligations that are incompatible with the individual's right to liberty under Article 5 of the Human Rights Convention" (section 1(2)(a)). Furthermore, the Home Secretary may only make a control order "if [she] (a) has reasonable grounds for suspecting that the individual is…involved in terrorism-related activity; and (b) considers that it is necessary, [to protect] …the public from a risk of terrorism, to make a control order imposing obligations on that individual" (section 2).

The making of a control order is subject to automatic judicial supervision (prior to the making of the order, save in urgent cases) with the "function of the court [being] to consider whether the Secretary of State's decision that there are grounds to make that order is obviously flawed" (section 3(2)). Several of the control orders made by the Home Secretary have been subject to challenge in the courts. This culminated in three cases from the House of Lords in November 2007 dealing with a range of different issues.

The first case is *Secretary of State for the Home Department* v. *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 in which the crucial issue was

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whether the severe obligations (including an 18 hour curfew) imposed upon JJ amounted to a deprivation of liberty in breach of Article 5. The House of Lords held by a majority that they did. This question, as well as the application of *JJ* in other cases, is discussed below (Professor David Feldman, p. 4, below). In the two other judgments, *Secretary of State for the Home Department* v. *MB* [2007] UKHL 46; [2007] 3 W.L.R. 681 and *Secretary of State for the Home Department* v. *E* [2007] UKHL 47; [2007] 3 W.L.R. 720, the challenges to the validity of the control orders were on different grounds and these are considered here.

Everyone involved accepted that it would be wholly inappropriate, if the necessary evidence were available, for a suspect to be restricted under a control order instead of being prosecuted before the courts. Thus the Act requires the Home Secretary to consult (generally before making the order) with the relevant Chief Officer of Police about whether on the evidence available there is a realistic prospect of prosecution for a terrorism offence (section 8(2)). And the Chief Officer has a duty to keep under review the investigation and prosecution of that individual (section 8(4)).

E now argued a classic point of administrative law: compliance by the Home Secretary with her section 8(2) duty to consult was a condition precedent to her power to make a control order; thus a failure to consult meant that any consequent control order was invalid and a nullity. Using the more familiar jargon, the question was whether the requirement to consult was ''mandatory'' (so that nullity followed from non-compliance) or was the duty merely ''directory'' (so that the control order stood even if there had been no consultation). See Wade and Forsyth, *Administrative Law*, (9th ed, 2004) at 221–228. Lord Bingham, speaking for a unanimous House of Lords, held that ''the conditions precedent to the making of a control order are set out in section 2(1) [quoted above]…and compliance with the section 8(2) duty is not a qualifying condition'' (at [15]), i.e. that it was ''merely directory''. Although not spelt out by the court, the duty to consult would be enforced by the issue of a mandatory order ordering consultation. Their Lordships similarly rejected the submission that the absence of a reasonable prospect of prosecution was a condition precedent. Consultation was one thing but reaching a clear answer on whether to prosecute before a control order could be made ''would have the potential to emasculate what is clearly intended [by Parliament] to be an effective procedure'' (at [16]).

E came closer to success with her next argument. This was that there was an implied continuing duty under the Act for the Home Secretary to assist the Chief Officer with his duty to keep the decision to prosecute under review. The House of Lords held there was such an

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implied duty. Thus the Home Secretary should have passed on to the Chief Officer information about certain Belgian court judgments which implicated E in terrorist related activity. The Home Secretary had failed to do this and thus, said E, the control order was invalid. But as the Court of Appeal in *E*'s case accepted ([2007] EWCA Civ 459; para 104) the Home Secretary's implied duty to assist was not a condition precedent. Lord Bingham said that the Court of Appeal's reasoning could not be faulted (at [21]). So this argument must be taken to founder on the same rock as his first argument.

But both the Court of Appeal and the House of Lords also found that the failure to assist made no difference since the Belgian judgments would not have justified a prosecution. There is a need for conceptual clarity here. If the implied duty to assist is not a condition precedent, then a breach of that duty (whether it would have made a difference or not) does not imply the invalidity of the control order. Of course the breach might provide grounds from which to infer some other flaw in the decision, *e.g.* that the Home Secretary was acting for an improper purpose or was acting irrationally. But if the breach does not provide such grounds, then the control order is valid even if, but for the breach, there might have been a prosecution. Any other conclusion suggests that the implied duty, if it was significant, was a condition precedent.

Secretary of State for the Home Department v. *MB* [2007] UKHL 46; [2007] 3 W.L.R. 681 also raised a classic point of administrative law in the context of Article 6(1) of the Human Rights Convention. Elementarily, for the review of a control order to be fair the controlled person must have the full case against them disclosed. (See Wade and Forsyth, pp. 512–7.) But much of the evidence on which the Home Secretary relies will be derived from intelligence sources; and the public interest will not be served if these are disclosed. The common law has long wrestled with this dilemma, generally requiring the gist of the case to be disclosed (see *R* v. *Gaming Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 Q.B. 417 (CA)). Express provision is made for this dilemma in the 2005 Act. (For the detail see the Schedule to the Act and Lord Bingham (at [26])). In brief the Home Secretary may apply to court, in the absence of the controlled person or his representative, not to disclose "all relevant material" and the court must grant this if it considers that disclosure "would be contrary to the public interest". Instead disclosure is made to a "special advocate", *i.e.* a representative of the controlled person (appointed by the Attorney General) who represents the controlled person at a closed session of the court (in the absence of the controlled person) when the non-disclosed material is considered. That this procedure falls short of an ideal standard of fairness is obvious; but it is equally obvious that it is

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a serious attempt to resolve the clash between fairness to the individual and the public interest in protecting intelligence sources.

The House of Lords held that control order proceedings were not criminal since there was "no assertion of criminal conduct" (Lord Bingham, at [24]). Thus the extensive protections of Article 6(3) were not applicable. But Article 6(1) was applicable and it required "the disclosure of relevant evidence" to the persons affected (*R (Roberts)* v. *Parole Board* [2005] 2 A.C. 738 at [17] (Lord Bingham)). In *MB* the decision to make the control order was justified only on "closed material" not shown to MB. Could this procedure comply with Article 6(1)?

The majority of the House of Lords did not answer this question crisply. Instead they applied section 3 of the Human Rights Act 1998 holding that the "special advocate" provisions should be read as having effect "except where to do so would be incompatible with the right of the controlled person to a fair trial" (Baroness Hale, at [72]). "[W]ith strenuous efforts from all" said Baroness Hale "… it should usually be possible to accord the controlled person a substantial measure of procedural justice" (at [66]). These "strenuous efforts" would lead in most cases to the disclosure of something akin to the common law gist. Thus their Lordships referred *MB* back to the first instance judge for these efforts to be made.

Lord Hoffmann, dissenting, took the view that the special advocate procedure did have sufficient safeguards to satisfy Article 6(1). This conclusion has the advantage of certainty while that of the majority promises many future challenges. No matter how strenuous the efforts to achieve fairness maybe, there will be cases in which there is an irreconcilable clash between fairness to the controlled person and the protection of intelligence sources. The House of Lords has not yet decided which of these prevails over the other.

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DEPRIVATION OF LIBERTY IN ANTI-TERRORISM LAW

THE Prevention of Terrorism Act 2005 permits an order to be made imposing draconian obligations or restrictions on an individual for the purpose of protecting members of the public from a risk of terrorism (a "control order": section 1(1)). If the obligations amount to a deprivation of liberty violating Article 5 of the ECHR, the order may be made only by a court, and must be preceded by a "designated derogation" from Article 5 made by a derogation order under section 14 of the Human Rights Act 1998. There can currently be no such

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