In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

E & S

Appellants

and

THE NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")

Intervener

PRINTED CASE ON BEHALF OF LIBERTY

Introduction

1. By order of the Appeal Committee of your Lordships' House dated 14 June 2007, Liberty was given leave to present written and oral submissions in intervention in this appeal.

2. Liberty (the National Council for Civil Liberties) was formed in 1934 and is an independent, non-political body, whose central objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom. It has intervened in over 30 cases before the European Court of Human Rights and the domestic courts, including

Tab 41 *Chahal v UK*[1](which resulted in the creation of the Special Immigration Appeals Commission[2]); *R v Crown Court at Manchester ex p McCann*[3] (concerning anti-social behaviour orders) and *A and others v Secretary of State for the Home Department*[4] (leading to the Prevention of Terrorism Act 2005[5]). Liberty has particular expertise in anti-terrorist legislation and assists Parliamentary Committees in their scrutiny of anti-terrorist and civil emergency policy.

Tab 158

Tab 3

Tab 235

3. This appeal has profound implications for civil liberties and the development of the criminal law. The unprecedented powers in the 2005 Act have serious human rights ramifications for all United Kingdom citizens. The use of purportedly civil restriction orders to control terrorist suspects rather than prosecution or principled changes to the criminal law is a matter of the highest constitutional importance, affecting the rule of law and separation of powers.

4. Liberty seeks to offer an additional perspective drawn from its particular expertise and experience in the area of human rights law. The primary purpose of Liberty's intervention is to submit that non-derogating control orders are incompatible with the European Convention on Human Rights[6]. Liberty has particular concerns, from a civil liberties perspective, about a number of aspects of the 2005 Act.

SUBMISSIONS

Non-derogating scheme incompatible with Art. 6

5. The Joint Committee on Human Rights ("JCHR") considered that a regime of preventative measures, designed to prevent crimes being committed in the future is not in itself incompatible with the Convention.[7] It retains, however, continued and serious concerns that

Tab 41 [1] (1997) 23 EHRR 413.

[2] "SIAC".

Tab 158 [3] [2003] 1 AC 787.

Tab 3 [4] [2005] 2 AC 68 "*A (No. 1)*".

[5] "The 2005 Act".

[6] "The Convention".

Tab 270 [7] JCHR 12th Report of 2005-06 (HL 122, HC 915) at [27].

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the control order scheme in the 2005 Act does not comply with the rule of law and is not Convention compatible in key respects.[8]

6. Despite the clear statements made by the Secretary of State when introducing the Prevention of Terrorism Bill 2005[9] (shortly after the decision of your Lordships' House in *A(No. 1)*), there is currently uncertainty as to whether it is the Government's position that there exists a continuing Art. 15 public emergency threatening the life of the nation. Accordingly, the JCHR has recently written to the Home Office to clarify the Government's position.[10] The Government has not sought to derogate from any aspect of Art. 6 which continues to apply with full force. In those circumstances, it is necessary to consider the autonomous Convention classification of control orders and whether the applicable Art. 6 guarantees are met. Tab 3

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7. The European Court has not considered any legislative measures directly equivalent to control orders[11] and to an extent they "break new legal ground"[12].

Determination of a criminal charge

D

Preliminary – previous decision of the Court of Appeal on "determination of criminal charge"

8. A core issue is whether a finding that a person is suspected of involvement in terrorism-related activity (under s.2(1)(a) of the 2005 Act) necessarily involves the determination of a criminal charge. Part 4 of the Anti-terrorism Crime and Security Act 2001[13] is not relevantly different to the 2005 Act for the purposes of determining this issue. [14] Tab 235

E Tab 228

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[8] See JCHR 8th Report of 2006-7 (HL 60, HC 365); JCHR 12th Report of 2005-6; JCHR 3rd Report of 2005-6 (HL 75, HC 561); JCHR 10th Report of 2004-5 (HL 68, HC 334); JCHR 9th Report of 2004-5 (HL 61, HC 389). Tabs 329, 270, 328, 327 & 326

[9] Hansard, House of Commons, 26 January 2005, Statement on Measures to Combat Terrorism, Charles Clarke, Secretary of State for the Home Department, (cols 306-307): Tab 322

"In these circumstances, I repeat that my judgment is that there remains a public emergency threatening the life of the nation. The absence of the part 4 powers would present us with real difficulties, so I now set out the ways in which we can meet this threat. The Government believe that the answer lies in a twin-track approach: specifically, deportation with assurances for foreign nationals whom we can and should deport, and a new mechanism - control orders - for containing and disrupting those whom we cannot prosecute or deport."

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[10] See JCHR Press Notice No. 42 of 2006-7, 25 May 2007. Tab 331

[11] c.f. *Guzzardi v Italy* (1980) 3 EHRR 333; *Raimondo v Italy* (1994) 18 EHRR 237 at [39]; *Labita v Italy* (App. No.26772/95, 6 April 2000) at [193]-[197]. Tabs 79, 191 & 105

[12] Commissioner for Human Rights, *Council of Europe Report* (CommDH (2005)6) "CoE report" at [17]. Tab 258

[13] "the 2001 Act".

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[14] Sullivan J in *Re: MB* [2006] EWHC 1000 (Admin) at [38]. Tab 243

Tab 2 The Court of Appeal's previous reasoning on the point in *A (No. 1)*[15], however, amounted to a single sentence in the judgment ([57]).

Tab 3 9. In the light of the subsequent decision of the House of Lords in *A (No.1)*, the status of [57] is now most unclear. Baroness Hale, for example, held that the acts within s.21 of the 2001 Act "are all likely to be criminal offences"[16]. Lord Bingham expressed no opinion on the issue[17]. The Council of Europe Commissioner for Human Rights ("the CoE Commissioner") has rightly observed that the question of criminal/civil classification goes to "the heart of control orders"[18]. The Court of Appeal in MB held that "We can see no point in considering at length a point which will only be open for argument before the House of Lords. We shall simply state our view that proceedings under section 3 of the PTA do not involve determination of a criminal charge."[19]. In the circumstances, the issue needs to be definitively ruled upon by your Lordships' House.

Tab 258

Tab 244

Substantive submissions on "determination of criminal charge"

Introduction

10. The Convention requires consideration of substance and not form. Accordingly, Liberty submits that, although their stated purpose is preventative and notwithstanding their domestic classification, control orders are actually punitive and involve the "determination of a criminal charge" within the autonomous meaning of Art. 6.[20] The object and purpose of Art. 6 is to enshrine the fundamental principle of the rule of law and accordingly it must be given a broad and purposive interpretation.

11. The CoE Commissioner concluded that:

Tab 258 "Substituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended

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[15] [2004] QB 335.

Tab 3 [16] at [223].

[17] at [71].

Tab 258 [18] CoE report at [19].

Tab 244 [19] [2006] 3 WLR 839 at [53].

Tab 65 Tab 25 Tab 158 [20] *Engel v Netherlands* (1979-80) EHRR 647, 678-679 at [81]-[82]. The *Engel* criteria are: (a) the domestic classification (only a starting point where the classification is not criminal); (b) the nature of the offence – more important (*Benham v UK* (1996) 22 EHRR 293 at [56]); (c) the severity of the penalty – the most important consideration (*McCann* at [30]).

Tabs 141, 74 & 55 See also *Öztürk v Germany* (1984) 6 EHRR 409 at [55]; *Foti v Italy* (1982) 5 EHRR 313 at [52] and *De Weer v Belgium* (1980) 2 EHRR 439.

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> to substitute the ordinary criminal justice system with a parallel system run by the executive. Under normal circumstances such a step would not even be contemplated. But these are not, the argument runs, normal times. Both the risk, and the likely damage, of terrorist attacks are great; sufficiently great to justify exceptional measures."[21]

12. It is therefore particularly significant that the Government did not seek to derogate from any aspect of Art. 6. Liberty endorses the Secretary of State's reliance on the need to respect Convention rights in any counter-terrorism measures.[22] Whatever the current level of the terrorism threat is adjudged to be, in the absence of a derogation from the Convention, Art. 6 applies with full force. Thus, for example, to the extent that the Secretary of State appears to suggest that *Lawless v Ireland (No 3)*[23] somehow authorises the modification of the appropriate criminal guarantees, this is mistaken – the lawfulness of the derogation was upheld in *Lawless*, which limits its relevance accordingly. President Barak of the Israel Supreme Court has described the role of the courts in such situations as follows:

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Tab 109

> "Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism, a democratic state acts within the framework of the law and according to the law."[24]

Tab 319

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13. Liberty submits that in considering "the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention"[25], the Court must be astute to ensure that there is no "disguised derogation" from Art. 6. If not, Art. 15 and all the critical protections it provides are undermined.

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14. The JCHR was of the view that the "extraordinary exceptions to traditional English principles of due process" contained in the Act amounted to a "*de facto* derogation" from Arts. 5(4) and 6(1) of the Convention and was particularly concerned that Parliament had never properly considered the "exigencies of the situation" in this context.[26] The JCHR has "… consistently taken the view that control orders under

Tab 270

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[21] CoE report at [22]. See also *Security and Rights*, public lecture to the Criminal Bar Association by Sir Ken Macdonald QC, DPP (23 Jan. 2007): "one of the worst manifestations of this approach around the world has been the increasing resort to parallel jurisdictions". Tabs 258 & 281

[22] Secretary of State's Case at [10].

[23] (1961)1 EHRR 15 – see Secretary of State's Case at [23]. Tab 109

[24] Foreword: *A Judge on Judging - The Role of a Supreme Court in a Democracy* by Aharon Barak - President of the Israel Supreme Court. Harvard Law Review, November, 2002. Tab 319

[25] *per* Lord Bingham in *Brown v Stott* [2003] 1 AC 681, 704. Tab 32

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[26] JCHR 12th Report of 2005-6 at [78]. Tab 270

the Prevention of Terrorism Act 2005 are likely to involve the determination of a criminal charge because they are premised on the view that the subject of the order has been involved in serious criminal behaviour and because of the severity of the restrictions such orders impose."[27]

"Criminal charge"

15. The Secretary of State places particular emphasis on his submission that control order proceedings do not involve the laying of any charge against the controlee.[28] The Secretary of State relies on the reasoning of the SIAC in *A(No.1)*[29], upon which the Court of Appeal in *A(No.1)* relied entirely. Furthermore, the Secretary of State contends that "there is nothing in the speeches [of your Lordships in *A(No.1)*] to indicate that any contrary view to that of the Court of Appeal would have been taken"[30].

Tab 1
Tab 2
Tab 3

16. Liberty submits that your Lordships' decision in *A(No.1)* did not impliedly approve the Court of Appeal's decision in this respect.

Tab 63

17. In *Eckle v Germany*[31], the European Court confirmed that the term "charge" has an autonomous Convention meaning:

> "[T]he official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, a definition that also corresponds to the test whether the situation of the [suspect] has been substantially affected."

18. The focus is on substance rather than form:

Tab 55

> "The prominent place held in a democratic society by the right to a fair trial favours a 'substantive' rather than a 'formal' conception of the 'charge' referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a 'charge' within the meaning of Article 6."[32]

19. Consistent with the Convention's "living instrument" status, the approach adopted in earlier cases is not necessarily instructive. *Lawless*

Tab 109

Tabs 330, 270, 329 & 326

[27] JCHR 12th report of 2006-7 (HL 91, HC 490) at [1.12]; JCHR 12th Report of 2005-6 at [50]-[52]; JCHR 8th Report of 2006-7 at [30]; JCHR 9th Report of 2004-5 at [14].

[28] Secretary of State's Case at [141]-[144].

Tab 1

[29] [2002] HRLR 45 at [72]-[76].

[30] Secretary of State's Case at [135].

Tab 63

[31] (1983) 5 EHRR 1 at [73].

Tab 55

[32] *De Weer v Belgium* (op cit.) at [46].

v Ireland (No. 3), for example, upon which the Secretary of State relies[33], was decided over 40 years ago and almost 20 years before *Engel*. Tab 65

20. A criminal charge has now been interpreted as follows:

> "[it] may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect"[34]. Tab 74

21. Liberty submits that the making of a control order exactly meets that test.

22. In *Attorney General's Reference (No.2 of 2001)*[35], your Lordships' House summarised the European Court's reasoning and held that (for the purposes of the reasonable time guarantee) a person became subject to a criminal charge at the earliest time when he was officially alerted to the likelihood of criminal proceedings against him. Tab 20

23. Following that approach, Liberty submits that the conclusions of SIAC and the Court of Appeal were fundamentally flawed in this regard. SIAC reasoned that the certification of a person as a suspected international terrorist did not constitute or determine a charge, rather it was a "statement of suspicion". This was an overly formalistic approach and does not accord with the substantive interpretation required by Art. 6. By comparison, in *R(R) v Durham Constabulary*[36] your Lordships' House applied *Attorney General's Reference (No.2 of 2001)* and accepted the parties' concession (albeit with some reservation) that a reprimand or warning commenced with a "criminal charge" since it is triggered by suspicion that the person has committed criminal conduct. Accordingly, Liberty submits that, contrary to the Secretary of State's submissions, the "laying of a charge element", which precedes the second and third *Engel* criteria, is made out by the making of a control order. Tab 161 Tab 20

Engel criteria

24. Liberty does not submit that control orders have a criminal classification in domestic law (the first *Engel* criterion).

25. Since "nature and severity of the offence" and "nature and severity of the penalty" are somewhat question-begging terms, Liberty submits that the second and third *Engel* criteria require consideration of "the nature

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[33] (1961) 1 EHRR 15; Secretary of State's Case at [152]. Tab 109

[34] *Foti v Italy* (1983) 5 EHRR 313 at [52]. Tab 34

[35] [2004] 2 AC 72 at [26]-[28], [31], [43]-[45], [128]-[129], [140] and [141]. Tab 20

[36] [2005] 1 WLR 1184 at [11]. Tab 161

of the conduct in question" and "the nature and severity of the consequences".

26. Importantly, the Grand Chamber has reaffirmed that the second and third *Engel* criteria are alternative and not necessarily cumulative: Art. 6 will be applicable if either criterion is satisfied.[37] This, however, does not exclude the possibility that a cumulative approach may be adopted where a separate analysis of each criterion does not yield a clear conclusion as to the existence of a criminal charge. [38]

Nature of conduct

27. Following that approach, in relation to the nature of the conduct in question, Liberty submits that a finding that a person is suspected of involvement in terrorism-related activity necessarily involves the determination of a criminal charge.[39] Sections 1(9) and 15 necessarily involve a finding that the suspect may have committed an offence under the existing criminal law or committed conduct which is capable of properly constituting a criminal offence. Liberty submits that there is a "punitive and deterrent element" [40] involved in the process of making a control order.

28. Liberty submits that the correct approach is that explained by Simon Brown LJ (as he then was) in *International Transport Roth GmbH v Secretary of State for the Home Department*[41]:

Tab 93

> "All these considerations [the application of the second and third *Engel* criteria], however, necessarily raise the question whether liability involves blameworthiness. If it does, then by its very nature it may be thought to include a punitive (in the sense of retributive) element."

29. Liberty submits that:

(a) The conduct forming the basis of a non-derogating control order (terrorism-related activity) is, on any view, an allegation of the utmost gravity.

(b) s.1(9)(a)-(d) of the 2005 Act effectively defines "involvement in terrorism activity" as "being concerned in the commission, preparation or instigation of acts of terrorism". As Lord Carlile

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Tab 141 [37] e.g. where an offence is plainly criminal in character, the relative lack of seriousness of the penalty actually imposed cannot deprive it of its inherently criminal character: *Öztürk v Germany* (*op cit.*) at [54].

Tab 69 Tabs 303 & 298 [38] *Ezeh and Connors v UK* (2004) 39 EHRR 1 at [86].

[39] See *Ireland v UK* (1978) 2 EHRR 25 at [85]-[88] and [196]; *Brogan v UK* (1988) 11 EHRR 117 at [51].

Tabs 141 & 25 [40] *Öztürk v Germany* (op cit.) at [53]; *Benham v United Kingdom* (1996) 22 EHRR 293 at [56].

Tab 93 [41] [2003] QB 728 at [38].

in his *Report on the Operation in 2001 of the Terrorism Act 2000* concluded, the latter conduct "falls comfortably within any empirical and logical category of criminality"[42]. A finding of suspected involvement in terrorism-related activity necessarily involves "blameworthiness". Tab 278

(c) Conduct under s.1(9) is highly likely to fall within offences which existed prior to the Terrorism Act 2006 ("the 2006 Act"). For example the conduct in s.1(9)(a)-(d) is likely to involve offences under sections ss.11-18[43], 38B[44] or 54-59[45] of the 2000 Act. Inciting, soliciting, attempting to commit, aiding, abetting, counselling or procuring any of these offences is also an offence. Inciting terrorism overseas is also a criminal offence under s.59 of the 2000 Act. Terrorist attacks abroad by or on UK nationals or residents are also criminal offences triable in the UK under s.63B-C of the 2000 Act. Assisting after the fact is also an offence under s.4 of the Criminal Law Act 1967. The 2000 Act was "amongst the toughest and most comprehensive anti-terror legislation in Europe"[46] and "was a "substantial measure intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism."[47] It contains a far-reaching definition of terrorism in s.1 which includes any threat of violence (including damage to property) designed to influence the policy of any government[48] anywhere in the world and has wide extra-territoriality provisions. "Terrorist" is defined in s.40, to mean a person who has committed an offence under certain specified sections of the Act, or who "is or has been concerned in the commission, preparation or instigation of acts of terrorism". Tab 235 Tab 237 Tab 236 Tab 258 Tab 154 Tab 315

(d) In so far as it may be contended that a relevant difference between s.1(9) and domestic criminal offences is the lack of any *mens rea* in the former, it is submitted that the words "commission"; "preparation"; "instigation"; "facilitates";

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[42] (April 2004) at p27, [5.4]. c.f. s.40 of the 2000 Act.

[43] i.e. inviting support or professing membership of a proscribed organization; possessing, receiving or providing property (or inviting the same) or being concerned in property with reasonable cause to suspected that it may be used for terrorist purposes. Action taken for the benefit of proscribed groups is deemed to be an act of terrorism by s.15 of the 2005 Act and s.1(5) of the 2000 Act. Tabs 278 & 235

[44] i.e. failure to disclose material information which might be of use in preventing terrorist acts or in securing the apprehension, prosecution or conviction of terrorists.

[45] i.e. providing or receiving instruction or training in the making of explosives or similar (or inviting the same); possessing a document containing information of a kind useful to a person committing or preparing an act of terrorism; possession of any article in circumstances which give rise to a reasonable suspicion that it is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

[46] CoE report at [6]. Tab 258

[47] *per* Lord Bingham in *R(Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307 at [4]. Tab 154

[48] See *R v F* [2007] EWCA Crim 243. Tab 315

"encouragement"; "support" and "assistance" in s.1(9)(a)-(d) can and should each be read as impliedly including a requirement of some mental element consistent with their classification as criminal offences e.g. not including conduct which has the wholly unintended consequences there set out.[49] In any event, some existing terrorism offences ostensibly require very little *mens rea*: e.g. s.57 of the 2000 Act apparently requires no proof of a terrorist purpose in the mind of the possessor. c.f. *Attorney General's Reference (No 4 of 2002)*[50]. Likewise, many of the new offences in the 2006 Act do not require intent.[51] Irrespective of the precise mental element which s.1(9) requires or ought to require, "[l]iability under this scheme is indeed targeted at those truly regarded as in some degree culpable"[52].

Tab 311

Tab 93

(e) Alternatively, the conduct under s.1(9) will constitute one of the new inchoate offences in the 2006 Act. For example, "encouraging acts of terrorism" (s.1) includes making statements[53] which are a "direct or indirect encouragement or other inducement to persons to the commission, preparation or instigation of acts of terrorism". "Preparation of terrorist acts" (s.5) includes "any conduct in preparation for committing acts of terrorism and any conduct in preparation for assisting another to commit acts of terrorism". Furthermore, the offences in the 2006 Act do not require proof of conduct relating to specific acts of terrorism – acts of terrorism generally will suffice.[54] These new offences would therefore appear to be broad enough to encompass including all the conduct falling within s.1(9)(a)-(d) of the 2005 Act which did not already constitute a pre-existing criminal offence. The enactment of the 2006 Act may post-date some of the allegations forming the basis of particular control orders. However, this does not affect the significance of the fact that conduct within s.1(9) was subsequently made a domestic criminal offence.

Tab 236

(f) Indeed, prior to the enactment of the 2006 Act, it was the perceived lacuna of the criminal law in respect of inchoate offences which was a prime justification for the 2005 Act. That inadequacy has now been rectified. Foreseeing such a change,

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Tab 158 [49] c.f. e.g. Lord Hope in *McCann* at [71].

Tab 311 [50] [2005] 1 AC 264 at [52].

Tab 237 [51] See e.g. s.1(2)(ii) and 2(1)(c) of the 2006 Act.

Tab 93 [52] *per* Simon Brown LJ (as he then was) in *International Transport Roth GmbH v Secretary of State for the Home Department* (op cit.) at [42].

Tab 236 [53] A "statement" includes a communication of any description, including a communication without words consisting of sounds or images or both: s.20(6).

Tab 236 [54] See ss.1(5)(a), 2(4)(a), 2(7), 3(8)(a), 5(2), 6(4)(b), 8(3)(b) and 9(2).

Lord Carlile in his *Report on the Operation in 2004 of the 2000 Act* predicted that a new, widened offence of acts preparatory to terrorism "would provide for some cases a way of dealing with suspects probably more acceptable in perceptual terms than control orders."[55] Tab 336

(g) Baroness Hale in *A (No. 1)* held that all the acts in s.21 of the 2001 Act were "likely to be criminal offences". Section 21(a) defines a terrorist for the purposes of that Act as including "a person who is or has been concerned in the commission, preparation or instigation of acts of international terrorism" – which corresponds to the definition in s.40(1)(b) of the 2000 Act. Lord Carlile in his *2002 Report on the Operation of the 2001 Act* thought that s.21 conduct would fall within a "broadly-drawn offence of acts preparatory to terrorism"[56]. There is no relevant distinction between Part 4 of the 2001 Act and s.3 of the 2005 in determining this question.[57] Tab 3 Tab 228 Tab 236 Tab 335

(h) In determining the true nature of the conduct forming the basis of a control order, it is relevant that the DPP himself has said that removal of the prohibition on the admissibility in criminal proceedings of evidence obtained from intercepted communications "would overcome one of the main obstacles to prosecuting terrorist suspects".[58] There is no human rights prohibition on the use of such evidence in a prosecution[59] and such evidence is currently admissible if the interception took place abroad.[60] In any event, the self-imposed ban fails to meet the requirements of proportionality.[61] It is not the case that the Government contends that the conduct forming the basis of the control order is *incapable* of properly amounting to a criminal offence. The seriousness of the Government's professed Tab 281

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[55] (May 2005) at [29]. Tab 336

[56] (Jan 2003) at [6.5]. Tab 335

[57] *Re: MB* [2006] EWHC 1000 (Admin) at [38]. Tab 243

[58] *Security and Rights* (op cit). c.f. Lord Carlile in the *Second Report of the Independent Reviewer pursuant to s.14(3) of the Prevention of Terrorism Act 2005* (19/2/07) at [35]; *First Report of the Independent Reviewer pursuant to s.14(3) of the Prevention of Terrorism Act 2005* (2/2/06) at [37]. Tabs 281, 280 & 255

[59] The United Kingdom is the only common law country in the world which entirely prohibits the use of intercept evidence in criminal proceedings. Six common law countries (with adversarial systems) permit the use of intercepted telecommunications in criminal proceedings. Arguments for the retention of the blanket ban have been variously rejected by senior police officers, the current and former Directors of Public Prosecutions, the Joint Committee on Human Rights, the House of Commons Home Affairs Committee, the Bar Council, the Law Society, various highly regarded and independent reviewers of terrorism legislation and the Attorney-General: see further *Intercept Evidence: Lifting the ban* (Justice, October 2006) at Part 3, Appendix A. Tab 268

[60] *R v P* [2002] 1 AC 146. Tab 179

[61] The JCHR concluded that "the case for relaxing the absolute ban on the use of intercept evidence is overwhelming. It is in our view a disproportionate and unsophisticated response to the legitimate aim of protecting intelligence sources and methods.": JCHR 18th Report of 2003-4 (HL 158, HC 713) at [56]. In his evidence to the JCHR, Lord Carlile described the ban as "a nonsense". Tab 271

commitment to criminal prosecution as its first resort has, however, been called into question by independent bodies.[62]

(i) The s.8(2) obligation on the Secretary of State to consult the police about the possibility of prosecution does not automatically render control orders non-criminal: the section still permits prosecution for precisely the same conduct as forms the basis of the control order.[63] In any event, the duty to consult under s.8 is not a condition precedent to the making of a control order.[64] Likewise, the fact that prosecution may be an "implicit"[65] preference to the use of control orders does not affect the true nature of the scheme in the 2005 Act.

Tab 258

30. The CoE Commissioner thought there was "some strength in the argument that non-derogating orders are brought in respect of an essentially criminal deed, namely involvement in a terrorism-related activity".[66] Liberty submits that, on a careful analysis of s.1(9), the situation resembles that in *Öztürk v Germany*[67], where, although the legislation undoubtedly had the object of decriminalisation, its principal effect was to alter the procedural rules and the applicable penalties. The essence of the offence itself had "undergone no change in content" and was accordingly held to be criminal. By comparison, the criminal offences encapsulated by s.1(9) have had their procedural rules and penalties changed in becoming the basis for control orders but in essence remain criminal in content.

Tab 141

Tab 312

31. The overlap between s.1(9) and existing domestic criminal offences is particularly significant, as is the extremely serious nature of the conduct alleged under s.1(9). In *Campbell and Fell v UK*, for example, the European Court, when finding that the prison disciplinary proceedings in question were criminal, was strongly influenced by the fact that the particular allegations were of an "especially grave character" and had a certain criminal "colouring"[68].

Nature of consequences

Tab 329 [62] JCHR 8th Report of 2006-7 at [44], [54].

Tab 175 [63] c.f. *R v IK, AB and KA* [2007] EWCA Crim 971 at [44]-[57].

Tab 240
Tab 3 [64] c.f. *Secretary of State for the Home Department v E & S* [2007] EWCA Civ 459 at [85]-[87] in which it also emerged that the Secretary of State had not referred the cases of any of the 17 individuals detained under Part 4 of the 2001 Act to the Crown Prosecution Service for a decision on prosecution for terrorism offences at any stage between the commencement of their Part 4 detention in December 2001 and the decision, three years later, in *A (No. 1)*.

Tab 244 [65] *MB* at [53].

Tab 258 [66] CoE report at [20].

Tab 141 [67] (op cit.) at [55].

Tab 312 [68] (1984) 7 EHRR 165 at [71] and [73] respectively.

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32. Concerning the nature and severity of the consequences, Liberty submits that notwithstanding their stated preventative purpose, control orders are in fact punitive. As Neuberger LJ (as he then was) observed in *A (No. 2)*[69]: Tab 4

> "While appeals to SIAC under s.25 [of the 2001 Act] are, technically, civil proceedings, they are, from the point of view of an appellant, *in many ways as penal as criminal proceedings*, and, in light of the nature of the evidence which is sufficient to justify an appellant's indefinite imprisonment, in some ways more penal than criminal proceedings".

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33. Likewise, Baroness Hale in *R(R) v Durham Constabulary*[70] held that the perception of the affected person's family that he is being punished is not irrelevant to the interpretation of the autonomous Convention classification. Tab 161

C

34. Although in MB's case, for example, he was not imprisoned nor did the particular restrictions imposed upon him engage Art. 5, Liberty submits that the third *Engel* criterion requires the court to "take into consideration the degree of severity of the penalty that the person concerned *risks* incurring"[71]. "[T]he final outcome of the appeal cannot diminish the importance of what was initially at stake".[72] As Lord Bingham explained in *R(R) v Durham Constabulary*: Tab 65 Tab 161

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> "…the determination of a criminal charge, to be properly so regarded, must expose the subject of the charge to the possibility of punishment, *whether in the event punishment is imposed or not*. A process which can only culminate in measures of a preventative, curative, rehabilitative or welfare promoting kind will not *ordinarily* be the determination of a criminal charge."[73]

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35. It is highly relevant that there is no legislative limit whatsoever upon the obligations that a non-derogating order can impose and that any order is indefinitely renewable. They are, therefore, of a sufficient duration to make them tantamount to a criminal sanction.[74] Such powers are unprecedented in a peacetime statute. As the CoE Commissioner noted: Tab 258

> "It would be curious if at least immediately below this most extreme sanction [a non-derogating control order amounting to a deprivation of liberty within Art. 5], there were not other limitations or restrictions of

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[69] [2005] 1 WLR 414 at [404], emphasis added. Tab 4

[70] (op cit.) at [45]. Tab 161

[71] *Engel* at [82], emphasis added. Tab 65

[72] *Engel* at [85].

[73] (op cit.) at [14], emphasis added. Tab 161

G

[74] See *Engel* at [85]. Tab 65

sufficient severity to warrant the classification of the obligations as tantamount to a criminal penalty."[75]

36. Liberty submits that it would be wrong in principle if criminal law safeguards can be circumvented by the imposition of a civil restriction order for conduct which could properly constitute a criminal offence in domestic law. As Sullivan J posed the question in MB:

Tab 243

> "…is there no limit to the severity of sanctions that may be imposed in civil proceedings without the safeguards afforded by Article 6.2 to 6.3 of the Convention if the purpose of the sanction is said to be prevention, not punishment?"[76]

37. In those circumstances, Liberty submits that control orders create a parallel scheme of "executive criminal justice" because, in particular, section 2(9) provides that there need be no connection between the terrorism-related activity to be prevented by the order and the matters which form the basis of the suspicion giving rise to the order. Notwithstanding the attempt in s.2(9) to oust proportionality, it is necessary to look behind the stated preventative purpose of the 2005 Act and assess the real effect of its provisions. The 2005 Act applies to everyone[77] but only penalises (by imposing upon them potentially unlimited restrictions) those persons whom the Secretary of State considers present a future risk and whom he suspects are/were involved in terrorist-related activity. The fact that those restrictions also have a preventative element does not nullify their punitive and retributive effect. Indeed many domestic criminal penalties expressly include preventative elements[78] e.g. extended, indeterminate and life sentences for public protection. Accordingly, Liberty submits that the situation is qualitatively different from recall to prison on licence – which your Lordships' House held was purely for preventative purposes and accordingly did not involve the determination of a criminal charge: *R(Smith) v Parole Board; R(West) v Parole Board*[79].

Tab 235

Tab 163

38. The conclusion that a control order is punitive is re-enforced by the fact that under the 2005 Act the Secretary of State is powerless to impose restrictions upon a person against whom there is compelling evidence that s/he represents a serious terrorist threat unless there are also grounds for suspecting that the person is/was involved in terrorist-related activity. The preventative restrictions are, in substance,

Tab 235

Tab 258 [75] CoE report at [20].

Tab 243 [76] at [41].

Tab 221 [77] In deciding whether the criminal limb of Art. 6 applies, the European Court assesses whether the relevant rule applies to a specific group or is of a generally binding character: *Weber v Switzerland* (1990) 12 EHRR 508 at [33].

Tab 78 [78] c.f. Laws LJ in *Gough v Chief Constable of Derbyshire*, DC [2002] QB 459 at [37]: "…many court orders may serve both a punitive and a preventive or protective purpose".

Tab 163 [79] [2005] 1 WLR 350, HL at [40], [56]-[60] and [76].

punishment for the earlier conduct and are wholly dependent upon a finding of culpability.[80] "The distinguishing feature of a criminal charge is that it may lead to punishment."[81] Self evidently all punishment, by its imposition, also seeks to deter and prevent future wrongful conduct. Liberty submits that a proper analysis of s.2(9) demonstrates that, at the very least, the "*predominant* purpose of the measure under scrutiny is punitive"[82] and that "the true nature of the scheme is dictated by the conduct which the legislation is seeking to deter"[83]. Tab 163 Tab 78 Tab 93

39. The Secretary of State places considerable reliance on *McCann*[84], in particular Lord Steyn's observation that a comparison of the existing criminal law with the conduct forming the basis of an anti-social behaviour order was a "barren exercise". However, Lord Steyn went on to explain that this was because, in his view, an anti-social behaviour order imposed no penalty. Liberty's submission is that a control order is punitive and therefore Lord Steyn's analysis does not take matter any further, pending determination of whether a control order imposes a penal sanction. Furthermore, as noted above, the European Court in *Campbell and Fell v UK* considered the overlap with existing domestic offences to be relevant in determining the autonomous definition of the proceedings in question. Tab 158 Tab 312

40. In any event, Liberty submits that, in relation to the determination of a criminal charge, the decision in *McCann* is distinguishable. Critical to the reasoning in *McCann* (including that of Lord Steyn) was the inadequacy of the ordinary criminal law to deal with "sub-criminal", "relatively trivial"[85] anti-social behaviour (which fell short of criminal conduct) and the objectively justifiable need for non-criminal preventative measures.[86] By contrast, the contention that the criminal law is inadequate or inappropriate for dealing with serious terrorist activity is fundamentally flawed. Tab 158

41. Liberty submits that football banning orders (held by the Court of Appeal to be civil[87]) are also distinguishable, since, in particular they do not necessarily require proof that criminal conduct has been Tab 77

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[80] See further *Benham v UK* (op cit.) at [56]. Tab 25

[81] *per* Lord Bingham in *R(Smith) v Parole Board; R(West) v Parole Board* (op cit.) at [40]. Tab 163

[82] *per* Laws LJ in *Gough v Chief Constable of Derbyshire*, DC (op cit.) at [37], emphasis added. Tab 78

[83] *per* Simon Brown LJ (as he then was) in *International Transport Roth GmbH v Secretary of State for the Home Department* (op cit.) at [35]. Tab 93

[84] Secretary of State's Case at [143]-[144].

[85] *McCann* at [42]. Tab 158

[86] See *McCann* at [16]-[18]; [42]-[44].

[87] *Gough v Chief Constable of Derbyshire* [2002] QB 1213. Tab 77

committed[88]. Control orders, however, by virtue of the nature of the conduct in s.1(9), require "proof" (albeit only to reasonable suspicion) of criminal conduct or conduct which may properly regarded as criminal. Likewise, sex offender orders (held by the Divisional Court to be civil[89]) are also qualitatively different from control orders because they (a) can only be made against a limited class of persons (convicted sex offenders)[90] (b) do not depend upon proof of criminal conduct and (c) do not impose any penalty[91]. Control orders apply to the whole population and, for the reasons given above, Liberty submits that they require proof of criminal conduct and are punitive.

42. The Secretary of State also relies considerably on the Italian anti-Mafia cases.[92] Liberty submits, however, that these are of somewhat limited assistance. In *Labita* and *Raimondo*, for example, the European Court did not expressly consider the *Engel* criteria. Whilst the Court did consider that the measures in question were purely preventative and therefore not truly criminal[93], it referred in both cases to *Guzzardi* as the authority for this proposition. In *Guzzardi*, the Court held that the proceedings in question did not involve the determination of a criminal charge. It referred to *Engel* but did not give reasons as to why the *Engel* criteria were not satisfied.[94] As Lord Bingham has noted in a different context: "The Strasbourg jurisprudence is closely focused on the facts of particular cases, and this makes it perilous to transpose the outcome of one case to another where the facts are different."[95] Liberty submits that, whilst your Lordships' House is required, under s.2 of the Human Rights Act, to take these decisions into account, they are of less value than otherwise on the Art. 6 criminal issue in the absence of detailed reasoning or clear explanation of how the relevant law applied to the particular facts. Furthermore, the restrictions imposed in the Italian cases were so vague that any direct comparison with control orders (for the purpose of assessing whether they amount to a penal sanction) is very difficult: "to lead an honest and law-abiding life and not give cause for suspicion" (*Guzzardi*); "to live an honest life and not to arouse suspicion" (*Labita*). Finally, Liberty notes that under the various Italian anti-mafia legislation under consideration, the power to make the orders in question was vested in the courts, not the executive.

Tabs 105 & 191

Tab 79

Tab 65

Tab 154

Tab 79
Tab 105

Tab 77 [88] See s.14B(2) of the Football Spectators Act 1989 and *Gough* at [89] & [90].

Tab 21 [89] *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, DC – applied in *McCann*.

Tab 211 [90] In deciding whether the criminal limb of Art. 6 applies, the European Court assesses whether the relevant rule applies to a specific group or is of a generally binding character: *Weber v Switzerland* (1990) 12 EHRR 508 at [33].

Tabs 21 & 158 [91] *B v Chief Constable of Avon and Somerset Constabulary* at [28]; *McCann* at [69].

[92] Secretary of State's Case at [150]-[154].

Tabs 105 &191 [93] *Labita* at [195]; *Raimondo* at [43] and Commission at [112].

Tab 79 [94] *Guzzardi* at [108].

Tab 154 [95] *Gillan* at [23].

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43. The potential severity of the consequences of a non-derogating control order (e.g. indefinitely renewable and extensive restrictions on a suspect's Art. 5, 8, 10 and 11 rights for at least 12 months without any legislative limits) exceeds that of many non-imprisonable criminal offences and distinguishes it from the examples given by Lord Bingham in *R(R) v Durham Constabulary* at [14]. Furthermore it is the *cumulative* effect of the restrictions which must be considered in determining whether they are punitive: see Baroness Hale in *R(R) v Durham Constabulary* at [45]. Tab 161

B

44. The severity of the penalty which may be imposed is often the decisive *Engel* criterion. Liberty submits that deprivation of liberty cannot be the decisive criterion, since this would render derogating control orders punitive and therefore criminal but non-derogating orders non-criminal. However, since there are no criteria within the Act itself for determining what constitutes a derogating order, such a conclusion would permit the Secretary of State (when making the initial determination of whether the order is derogating or not) effectively to determine what constituted a criminal offence – contrary to the rule of law and the principle of legality. Tab 65

C

45. The consequences of breaching a non-derogating order (a criminal offence with a mandatory custodial sentence[96]) re-enforce the conclusion that it is punitive. No preventative civil injunction carries a mandatory sentence of imprisonment for breach. A criminal penalty may include any penalty contingent on a further act by the applicant[97]. The fact that further proceedings are needed before a controlee may be imprisoned for breach of a control order is therefore entirely consistent with the criminal classification of the making of the control order. Proceedings for tax evasion leading to financial penalties but with no possibility of any deprivation of liberty without separate proceedings have been held to be criminal.[98]

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46. Under the Serious Crime Bill 2007 the directors of the various prosecutorial agencies may apply to the court for a "serious crime prevention order". The court may make such an order if it is "satisfied that a person has been involved in a serious crime" and it must have "reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime". A person "being involved" in serious crime is given a wide meaning to include "facilitating the commission by another person of a serious offence" or "has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious

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[96] Section 9(6). Tab 235

[97] *Steel v United Kingdom* (1998) 28 EHRR 603 at [66] -[68]; *Hooper v United Kingdom* (2005) 41 EHRR 1. Tabs 304 & 314

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[98] *Garyfallou AEBE v Greece* (1997) 28 EHRR 344. Tab 313

offence". The restrictions which can be imposed are not limited to preventing conduct forming part of the particular type of crime which has been proved. The restrictions are defined inclusively. Whilst there are obvious differences between the Serious Crime Bill and the 2005 Act (e.g. the court makes the order and the standard of proof is higher than in the 2005 Act), the structure of the two schemes is strikingly similar. The JCHR was of the view that:

Tab 235

Tab 330

> "…a combination of the implication that a person has been 'involved in' serious crime, the severity of the restrictions to which they may be subject under a SCPO, and the possible duration of such an order (up to 5 years and indefinitely renewable) means that in most cases an application for a SCPO is likely to amount to the determination of a criminal charge for the purposes of Article 6 and therefore to attract all the fair trial guarantees in that Article."[99]

47. Similarly, the House of Lords Select Committee on the Constitution, dealing only with the constitutional implications, concluded that:

Tab 324

> "Whether or not the trend towards greater use of preventative civil orders[100] is constitutionally legitimate (a matter on which we express doubt), we take the view that SCPOs represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction."[101]

48. Liberty submits that *a fortiori* the making of a control order amounts to the determination of a criminal charge.

49. As the CoE Commissioner explained:

Tab 258

> "It is precisely because control orders are considered *by the Act* to be preventive executive decisions of a non-criminal nature, that the fundamental guarantees provided by Art. 6 are excluded, allowing in turn for the otherwise difficult imposition of 'obligations' restricting fundamental rights on the basis of mere suspicion."[102]

50. It is submitted that the *raison d'être* of an autonomous Convention classification of "determination of a criminal charge" is to ensure that

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Tab 330 [99] JCHR 12th report of 2006-7 at [1.13].

[100] In addition to anti-social behaviour orders, see e.g. Company Directors Disqualification Act 1986 (court may prohibit a person from acting as a director; breach has criminal sanctions); Criminal Justice and Public Order Act 1994 (police may request that a local authority make an order to prohibit trespassory assemblies; breach may result in prosecution); Family Law Act 1996 (powers to make residence orders and non-molestation orders; criminal sanctions for disobedience); Protection from Harassment Act 1997 (injunctions to prevent harassment; breach is a criminal offence); Crime and Disorder Act 1998 (court may also make a sex offender order); Football (Disorder) Act 2000 ("banning orders"; breach is subject to criminal penalty); Anti-social Behaviour Act 2003 extended powers to housing authorities to seek ASBOs; Sexual Offences Act 2003 ("sexual offences prevention orders", "foreign travel orders" and "risk of sexual harm orders"). Liberty does not necessarily accept that all of these orders are truly civil in character.

Tab 324 [101] House of Lords Select Committee on the Constitution, 2nd report of 2006-07 at [17].

Tab258 [102] CoE report at [19].

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the State cannot establish a parallel system of "executive criminal justice" which bypasses fundamental human rights guarantees simply by the device of domestic re-classification.

51. Liberty adopts Dicey's classic analysis of the constitutional significance of the creation of a system of "executive criminal justice": Tab 325

B

> "The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England *prima facie* illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it".[103]

C

52. It would be a breach of fundamental constitutional principles were it open to the executive to impose severe restrictions on the liberty of the individual primarily by reason of a suspicion that the person concerned has committed grave criminal acts for which he is not being prosecuted in a criminal court and yet for the actions of the executive not to be treated as amounting in substance to a criminal charge for the purpose of the protection of the rights of such an individual.

D

Criminal guarantees breached

Fair trial

E

53. If the making of a non-derogating control order involves a determination that a suspect has committed a criminal offence, Liberty submits that a number of fair trial rights contained in the criminal limbs of Art. 6 are breached.

54. Liberty contends that the low "reasonable suspicion" threshold, which does not require proof or belief (to any standard), violates the criminal requirements of Art. 6.

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55. Even anti-social behaviour orders (which have been held to be civil, cannot involve deprivations of liberty and impose lesser restrictions than most non-derogating control orders) have a criminal standard of proof.[104] Liberty also notes that the Government *accepts* that in relation

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[103] Introduction to the Study of the Law of the Constitution, (10th ed., Macmillan, 1959), pp 207–08. Tab 325

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[104] *McCann* at [37] and [81]. See further JCHR 8th Report of 2006-7 at [30]-[32]. Tabs 158 & 329

to the first part of the test for a serious crime prevention order[105] (namely whether the court is satisfied that a person has been involved in serious crime), the appropriate standard of proof should be close or identical to "beyond reasonable doubt".[106] That is so even though the Government contends that serious crime prevention orders are civil rather than criminal in nature.

Tab 235

56. Under the 2005 Act, the court does not decide whether the affected person is/was involved in terrorist activity, merely whether the Secretary of State reasonably suspects that is the case. Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true. [107]

Tab 244

57. Liberty submits that these violations are not rectified by the subsequent limited review (even as interpreted by the Court of Appeal in MB) by a court of the Secretary of State's initial decision.

Special advocates and closed evidence

58. Liberty submits that currently, the overall legal status of special advocates is, at best, precarious.

59. Liberty submits that the use of special advocates and closed evidence during non-derogating control order proceedings breaches the fair trial criminal guarantees contained in Art. 6. It is submitted that this issue has not been definitively resolved by your Lordships' House in *R(Roberts) v Parole Board*[108] since Roberts had already been convicted of a serious criminal offence by an Art. 6 compliant court. One member of the majority, Lord Woolf, stated that:

Tab 162

> "…his position [as a convicted prisoner is] significantly different from that of someone who has not been convicted and is awaiting trial. In the latter situation, the predicament has, if necessary, to be resolved in the accused's favour."[109]

60. Concerning the use of special advocates and closed evidence, the Secretary of State places particular emphasis on the margin of appreciation in relation to cases involving national security issues.[110]

[105] See the Serious Crime Bill 2007.

Tab 330 [106] See JCHR 12th report of 2006-7 at [1.19].

Tab 3 [107] *A (No. 1)* at [223], *per* Baroness Hale.

Tab 162 [108] [2005] 2 AC 738.

[109] *per* Lord Woolf at [51].

[110] Secretary of State's Case at [186].

But there can be no "zones of immunity" in which national courts cannot adjudicate – they cannot abdicate responsibility by self-denying constitutional limitations on their powers[111]. Even in cases involving national security issues, courts have more expertise than the executive in issues of due process and proportionality. Moreover, as Lord Bingham noted in *A (No.1)*[112], the Human Rights Act gives the "courts a very specific, wholly democratic, mandate"[113] to determine Convention compatibility of legislation. Liberty submits that the appropriate due process requirements and Convention compatibility of special advocates and closed evidence in the 2005 Act are not examples of the "relative institutional competence" of the different branches of the state nor are they "purely political (in a broad or narrow sense)"[114] questions. A very limited discretionary area of judgment, if any, is therefore appropriate[115]. Tab 3 Tab 235 Tab 3

61. The Secretary of State appears to suggest that because Liberty "drew attention to"[116] the Canadian use of a form of special advocates[117] in its intervention in *Chahal*, Liberty thereby sanctions their use in all contexts.[118] Liberty contended in *Chahal* that the Canadian system was plainly an improvement on the "three wise men" procedure in relation to national security material in deportation cases but did not (and does not) submit that special advocates were therefore necessarily appropriate in other circumstances e.g. (a) criminal proceedings where evidence relied on by the prosecution remains secret (b) proceedings in which the decisive evidence is not seen by the affected person (c) evidence relating to a person's risk of Art. 3 ill-treatment[119]. Furthermore, Liberty's *Chahal* submissions stated: "It is not suggested that the Convention requires the contracting states to adopt the Canadian model". Finally, it may be recalled that the Secretary of State previously relied on Liberty's *Chahal* submissions during oral argument in *A(No.1)* but your Lordships nevertheless expressed grave reservations about the special advocate system in that context.[120] Tab 246 Tab 41

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[111] *RJR McDonald v Canada AG* (1995) 3 SCR 199 at [133]-[137]. Tab 318

[112] at [42]. Tab 3

[113] *per* Lord Bingham in *A(No.1)* at [29].

[114] *ibid.*

[115] See, in particular, Jowell, *Judicial Deference, Servility, Civility or Institutional Capacity?* [2003] PL 592 at 599. Tab 332

[116] Written submissions of Liberty, the AIRE Centre and the Joint Council for the Welfare of Immigrants in *Chahal* at [3.7]. Tab 246

[117] The Canadian Security Intelligence Review Committee developed a "security cleared counsel" procedure when investigating certificates under the former Immigration Act 1976. See further *Charkaoui v Minister of Citizenship and Immigration* [2007] SCC 9 at [80]-[84]. Tab 43

[118] Secretary of State's Case at fn23.

[119] Liberty has been granted permission to intervene in the Court of Appeal in *MT(Algeria) v Secretary of State for the Home Department* on this issue.

[120] See e.g. [87]; [155] and [223] of the judgment. . Tab 3

62. A fair hearing involves a right to know the case against you and a right to "equality of arms" including the right to effective legal representation by counsel of one's own choice. The "inherently one-sided"[121] closed evidence procedure preserved by the 2005 Act, including the use of special advocates, fails to meet any of those requirements. The right to see the evidence on which a decision against one's interests is made is a "fundamental concept of British justice"[122]. If evidence is withheld, but taken into account by the judge in reaching his decision, the proceedings "cannot be described as judicial"[123]. Lord Jenkins endorsed this view as follows:

> "It seems to be fundamental to any judicial enquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by evidence that it is wrong."[124]

63. Furthermore, since SIAC was exclusively designed to address the *Chahal* judgment, it is significant that the use of special advocates was not directly approved by the European Court in *Chahal*. Indeed, as both the House of Commons Constitutional Affairs Committee and Lord Woolf in *Roberts* noted[125], the European Court has studiously avoided subsequently endorsing anything equivalent:

> "…the European Court of Human Rights has not given a ringing endorsement to the use of Special Advocates at all, but has indicated that their use is a lesser evil than some other systems, <u>but still potentially an impermissible one</u>. In the case of *Al Nashif v Bulgaria*, the court was non-committal on the use of Special Advocates, commenting that:
>
> > 'Without expressing in the present context an opinion on the conformity of the above system [i.e. the use of Special Advocates] with the Convention, the Court notes that, as in the case of *Chahal* cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.' "[126]

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[121] CoE report at [21].

[122] *In re K (infants)* [1963] Ch 381 at 406 *per* Upjohn LJ.

[123] *ibid* (cited by Lord Bingham in *Roberts* at [16]).

[124] *In re K (infants)* [1965] AC 201, 230 (quoting Upjohn LJ in the Court of Appeal: [1963] Ch 381, 405).

[125] *Roberts* at [59].

[126] House of Commons Constitutional Affairs Committee, 7th Report of 2004-5, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (HC 323-I, 22/3/05) at [49] (emphasis added).

64. Contrary to the impression given by the Secretary of State's submissions[127], the JCHR correctly summarised the position as follows: Tab 270

> "The question of the compatibility of the system of closed hearings and special advocates with the Convention's guarantees of a fair hearing, and in particular whether it accords "a substantial measure of procedural justice", therefore remains an open one in Strasbourg."[128]

65. In any event, the European Court has never upheld the use of special advocates where the decisive evidence against the accused was withheld from him.[129] The House of Lords in *R v H*[130] cautiously endorsed the use in criminal proceedings, in exceptional cases, of special advocates during discrete *preliminary* hearings involving *unused* material (i.e. potentially favourable to the defendant) attracting public interest immunity. As Lord Bingham noted in *Roberts*, *R v H* did not explicitly sanction the use of special advocates in relation to prosecution evidence deployed against the accused.[131] Tab 173 Tab 162

66. The Secretary of State also relies on Lord Bingham's endorsement of special advocates in *R v Shayler*[132]. In *Roberts*, however, Lord Bingham confined his reasoning in *Shayler* to its own context[133]: a judicial review of a decision not to publish is equally far removed from the potentially unlimited restrictions which may be imposed by a control order. Tab 188 Tab 162

67. Although your Lordships' House in *A (No.1)* did not decide whether the use of special advocates was Art. 6 compatible in cases involving detention under Part 4 of the 2001 Act, it expressed grave reservations about the system[134] - thereby undermining the suggestion that it had impliedly sanctioned their use in *Secretary of State v Rehman.*[135] Special advocates have themselves recognised that their role is severely limited and many have made it clear that that they do not endorse the system by participating in it. The special advocate is absolutely prohibited from communicating with the controlee after he has seen the closed material, and cannot make inquiries, perform meaningful Tab 3 Tab 228 Tab 207

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[127] Secretary of State's Case at [191]. Tab 270

[128] JCHR 12th Report of 2005-6 (HL 122, HC 915) at [77].

[129] c.f. *Edwards and Lewis v UK* (2005) 40 EHRR 24. Tab 64

[130] [2004] 2 AC 134 – giving judgment before the UK Government's appeal to the Grand Chamber in *Edward and Lewis v UK* could be heard. Tab 173

[131] See *Roberts* at [31]. Tab 162

[132] [2003] 1 AC 247 at [34] – see Secretary of State's Case at [195]. Tab 188

[133] at [31]. Tab 162

[134] See e.g. [87]; [155] and [223] of the judgment. Although the Court of Appeal in *A (No. 1)* concluded that special advocates were compliant with (civil) Art. 6, it did not give detailed reasons: at [57]. Tabs 3 & 2

[135] (op cit.). Lord Bingham also distinguished *Rehman* in *Roberts* at [31]. Tabs 207 & 162

research or call witnesses.[136] Something as straightforward as proving an alibi may be prevented.

Tab 5

68. In *A (No. 2)* in Lord Bingham's view, at [58]-[59]:

> "Lord Woolf CJ was not guilty of overstatement in describing an appellant to SIAC, if denied access to the evidence, as "undoubtedly under a grave disadvantage" ".

Tab 235

69. Liberty submits that an appellant to SIAC under the 2005 Act who is denied access to the evidence but has his interest represented by a special advocate has a right in form but not in substance. The appellant may face no specific charge and is not presented with, nor given the opportunity to refute, all the evidence against him and may remain as ignorant of the evidence against him during the review as he did when the Secretary of State originally made the control order. According to the Privy Counsellor Review Committee on the 2001 Act (which is materially similar to the 2005 Act in this respect), this was a "significant limitation in what is an essentially adversarial legal process and increases the risk of a miscarriage of justice"[137]. SIAC itself has recognised the implications of this limitation:

Tab 334

Tab 310

> "We are conscious that cross-examination of an Appellant proceeds on a basis where he does not know the significance of some of the questions being asked or the extent to which they may seek to lay the groundwork for a contradiction with closed material, with which he cannot deal except to the extent that he may have anticipated the point and provided other material to the special advocates to use as they saw fit."[138]

Tab 128

70. Despite the Secretary of State's contention that special advocates provide "further safeguards" in relation to the use of closed evidence[139], the recent *MK* case in SIAC graphically illustrates the dangers inherent in the use of closed evidence:

> "Had the coincidence of Mr Nicol's [the special advocate] instruction in both cases not occurred, the Commission would have been left to determine the question [detailed] on a false basis."[140]

Tab 323 [136] See e.g. HC CAC, 7th Report of 2004-5 (op cit.) at [40] (interviews with special advocates), [52] (limitations of role).

Tab 334 [137] [187] of the Privy Counsellor Review Committee, *Anti-Terrorism, Crime & Security Act 2001 Review: Report* 18 Dec. 2003 ("the Newton Report").

Tab 310 [138] *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003, generic judgment on appeals SC/1,6,7,9,10/2002) at [117].

[139] Secretary of State's Case at [26].

Tab 128 [140] *MK v Secretary of State for the Home Department*: SIAC appeal SC/29/2004, 5/9/06 at [4].

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71. Likewise, the weaknesses in the system are evident from the special advocates' recent evidence to the JCHR that they cannot be fully confident that, on occasion, material is not withheld from them.[141] Tab 337

72. The right of each party to full access to the evidence relied upon against it is a core element of the right to a fair trial/hearing under both Arts. 5 and 6[142] Likewise, according to the UN Human Rights Committee, the fair trial rights under Art. 14(1) of the ICCPR include the: Tab 309

B

> "…fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party."[143]

73. The right to full access means that a decision cannot be "based either solely or to a decisive extent" on sources or evidence that are withheld from an individual[144]. Liberty submits that the operation of the special advocate procedure in the 2005 Act amounts to a limitation impairing the "very essence"[145] of the fundamental right to a fair hearing. Even if the special advocate system is the least restrictive measure that can be applied, its use in the 2005 Act is inconsistent with the right to a fair trial in Art. 6 and the most basic principles of a fair hearing and due process long recognised as fundamental by English law. Liberty endorses the view of Lord Steyn in *Roberts* at [88] and [96]: Tab 235 Tab 162

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> "Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only…. In truth the special advocate procedure empties the prisoner's fundamental right to an oral hearing of all meaningful content. … It is contrary to the rule of law."

E

74. Moreover, Lord Bingham in *Roberts*[146] doubted whether a decision "based on evidence not disclosed even in outline to [the appellant] or his legal representatives", and which they had had no opportunity to rebut, would meet the fundamental requirements of Article 5(4). Liberty submits that Article 6 requires no less. The majority in *Roberts* acknowledged a grey area between full disclosure and total non-disclosure, at which point "even with a SAA he cannot defend

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[141] See Andrew Nicol QC at Q54 and Nicholas Blake QC at Q58, Uncorrected evidence of special advocates to the JCHR (HC 394-I, 12 Mar 2007). Tab 337

[142] *Jasper v UK* (2000) 30 EHRR 441 at [51]; *Garcia Alva v Germany* (2001) 37 EHRR 335 at [39]-[43]. Tabs 95 & 295

[143] *Aarela v Finland* UNHRC Communication No. 779/1997 at [7.4]. Tab 309

[144] See e.g. *Doorson v Netherlands* (1996) 22 EHRR 330 at [75]-[76]. Tab 57

[145] *Heaney and McGuiness v Ireland* (2001) 33 EHRR 12 at [56].

G

[146] at [19]. Tab 85 Tab 162

himself."[147] It is submitted that, even at its highest, therefore, the decision in *Roberts* did not sanction the use of special advocates unless there was a "minimum kernel" of disclosure.

Tab 244

75. It appears that the Court of Appeal's reasoning in MB on this issue, however, would have applied without modification if it had held control orders to be criminal. Liberty submits that the approach of the Court of Appeal in this regard was therefore fundamentally flawed. Liberty submits that if the Court of Appeal's decision in this respect is upheld the position would be as repugnant as that described by Lord Scott in *A (No.1)*:

Tab 3

> "The grounds [for suspicion of terrorist activity] can be made known to a special advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares..."[148]

Determination of civil rights

76. Liberty further submits that, at the very least, non-derogating orders involve the "determination of civil rights" within the meaning of Art. 6. Non-derogating orders may impose significant restrictions on a suspect's Art. 5, 8, 10 and 11 rights, without any legislative limit, for at least 12 months and are indefinitely renewable. A non-derogating order can, for example, include a prohibition on a person from associating with anyone else at all. Applying *McCann*[149] these qualified rights are at least "civil" rights for the purpose of Art. 6. The Court of Appeal in *A (No.1)*[150] accepted that detention under Part 4 involved the determination of a detainee's civil rights. Non-derogating orders can also involve, albeit less extensive, restrictions of liberty amounting to something "not very short of house arrest"[151].

Tab 158

Tab 2

Tab 320

Tab 162
Tab 3

[147] *per* Lord Woolf at [77].

[148] *A(No.1)* at [155].

Tab 158

[149] at [28], [78]- [79]. Note that the Government also conceded that ASBOs were Art. 6 civil in *McCann*. c.f. CoE report at [18].

Tab 2

[150] [2004] QB 335 at [57].

Tab 255

[151] Lord Carlile in the *First Report of the Independent Reviewer pursuant to s.14(3) of the Prevention of Terrorism Act 2005* (2/2/06) at [43].

77. Based on *McCann*, the Secretary of State conceded at first instance in the MB case that the affected person is entitled to the fair hearing guarantees applicable to civil proceedings under Art. 6.1.[152] Liberty submits that the concession was rightly made. Tab 158 Tab 243

Civil guarantees breached

78. Even if control orders attract only the civil protections of Art. 6, the seriousness of both the allegations and the consequences demands certain due process protections equivalent to those in criminal proceedings. As the JCHR put it: Tab 270

> "Even if the proceedings for the standard non-derogating control orders are "civil" rather than "criminal" in nature for the purposes of Article 6(1) ECHR, we consider it to be likely that they will be regarded as sufficiently close in nature to "criminal" proceedings as to warrant the application of criminal procedural protections commensurate with the importance of what is at stake for the individual."[153]

Standard of proof

79. Liberty submits that the Court of Appeal in MB was wrong to distinguish *McCann* solely on the basis that it required proof of conduct (rather than mere suspicion of conduct) as a condition precedent to the making of an anti-social behaviour order. Liberty also submits that the Court of Appeal erred in holding that Art. 6 was strictly limited to procedural (rather than substantive) fairness so that (at best) it only required a merits-based review of the reasonable suspicion standard of proof and not a higher, criminal standard of proof.[154] It is submitted that Sullivan J was correct when he held that the standard of proof that applied to the initial decision-maker was part of the *overall substantive* (rather than procedural) fairness of the 2005 Act.[155] Laws LJ explained the overall significance of the standard of proof in *A (No. 2)*[156]: Tab 244 Tab 158 Tab 243 Tab 4

> "…it is axiomatic that a power of executive detention on grounds of no more than belief and suspicion – albeit reasonable belief and

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[152] [30]-[31]. c.f. *R(Smith) v Parole Board; R(West) v Parole Board* [2005] 1 WLR 350, HL at [44], [90] and [91]. Tabs 243 & 163

[153] JCHR 12th Report of 2005-6 at [53]. Tab 270

[154] See further JCHR 8th Report of 2006-7 at [30]-[32]. Tab 329

[155] at [60]. Tab 243

[156] (op cit.) at [224]. Tab 4

> suspicion – is on its face grossly antithetical to established constitutional rights."

Tab 244

80. Furthermore, the effect of Court of Appeal's reasoning in MB is paradoxical. It enables the enhanced due process protections which the civil limb of Art. 6 requires in certain situations to be circumvented merely by a statutory requirement of suspicion, rather than findings of fact, as the relevant condition precedent.

81. The Court of Appeal held that:

> "If an English statute restricts a civil right by reference to criteria which operate in a manner which is unfair, it will not follow that legal proceedings that give effect to that statute will be unfair so as to infringe Article 6."[157]

82. If correct, this conclusion would mean that Art. 6 is toothless if the statute expressly imposed, for example, a standard of proof based on wholly subjective or capricious grounds for suspicion. Such an approach would be inconsistent with the approach adopted, for example,

Tab 93

by Parker LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* at [148], when referring to passages in the

Tab 11

decision of the European Court in *Albert & Le Compte v Belgium* (1983) 5 EHRR 533 on the possibility that proceedings may be neither criminal nor civil:

> "These passages, as I read them, emphasise the importance of giving Article 6 a flexible interpretation, and of not using the process of construction to place concepts of essential fairness in a verbal straitjacket. In my judgment, for the purposes of Article 6 there is no such clear-cut dividing line … but neither can the distinction between civil and criminal proceedings so clearly made in the language of the Article be ignored for all purposes. As I see it, there must be something in the nature of a sliding scale, at the bottom of which are civil wrongs of a relatively trivial nature, and at the top of which are serious crimes meriting substantial punishment. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one. This is consistent with the court's approach to the standard of proof in civil proceedings: the more serious the allegation, the more cogent the evidence which will be needed to prove it to the requisite standard. In the case of disciplinary proceedings, as in *Albert & Le Compte*, one can readily see why the distinction between civil and criminal proceedings was not considered to be helpful."

Tab 244

[157] *MB* at [36].

83. Thus, anti-social behaviour orders, generally involving lesser restrictions than non-derogating control orders, have a criminal standard of proof (when the *court* makes such an order)[158]. Likewise, football banning orders, which have been held to be civil, have a standard of proof that "will be hard to distinguish from the criminal standard"[159]. Liberty submits that, given the gravity of the allegations and extent of potential restrictions, the reasonable suspicion threshold (not even amounting to a standard of proof) is therefore a violation of the due process guarantees implied by Art. 6(1) and is irreconcilable with the approach adopted in *McCann*. Tab 158

84. Under the 2005 Act the Secretary of State need not be "satisfied" or have a "belief" to make a control order: mere suspicion will suffice. Nor need there be proof, even on a civil standard: reasonable grounds are enough. Realistically, there could have been no lower threshold imposed. Liberty notes that serious crime prevention orders in the Serious Crime Bill 2007, which closely resemble control orders, and which the Government contends are also civil restriction orders, have a "flexible" civil standard of proof with balance of probabilities as a minimum threshold. Moreover, the Government has accepted that such orders should have a criminal standard in relation to proof of the predicate conduct.[160] Tab 235

85. During the passage of the Prevention of Terrorism Bill 2005, the Secretary of State explained to the JCHR that there was no reason in principle for not requiring the standard of proof for non-derogating control orders to be at least the civil standard of balance of probabilities but he thought that there were "quite serious practical arguments" about which particular possible standard should apply.[161] However, it is a well established legal principle that the gravity of the allegation is an important factor in determining the appropriate standard of proof in relation to that matter in legal proceedings. Tab 327

86. Reasonable suspicion is the same standard as applied under Part 4 of the 2001 Act, of which SIAC said "it is not a demanding standard for the Secretary of State to meet"[162] and of which Baroness Hale said "It is not surprising that, of the 16 who have been detained under section 23 so far, only one has had his certificate cancelled by SIAC."[163]. Similarly, Liberty is not aware of any control order which has been quashed Tab 228 Tab 310 Tab 3

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[158] *McCann* at [37] and [81]ff. Tab 158

[159] *Gough* (op cit., CA) at [90] Tab 77

[160] See further JCHR 12th report of 2006-7 at [1.16]-[1.20]. Tab 330

[161] JCHR 10th Report of 2004–05, Ev 13 at Q53. Tab 327

[162] *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003, generic judgment on appeals SC/1,6,7,9,10/2002) at [71]. Tab 310

[163] *A (No. 1)* at [223]. Tab 3

because the court was not satisfied there were sufficient grounds for reasonable suspicion.[164]

Standard of review

87. Liberty submits that the standard of review for non-derogating orders contained in the 2005 Act is inadequate to ensure Art. 6(1) compliance, which requires access to a court with full jurisdiction in cases involving such extensive powers.[165] The court only has an *ex post facto* supervisory jurisdiction over the Secretary of State's decision to make a non-derogating order. Under section 3, the court may only quash a non-derogating control order if it is satisfied that the Secretary of State's decision is "flawed". There is no compelling reason for such a weak measure of judicial control. There is a fundamental difference between full appellate/autonomous jurisdiction and supervisory jurisdiction, as the Government itself has accepted by granting the court full appellate/autonomous jurisdiction for derogating orders[166]. By comparison, under the Crime and Disorder Act 1998, the court, not the chief constable or local authority, makes the anti-social behaviour order (which generally involves lesser restrictions than a control order). Similarly, serious crime prevention orders in the Serious Crime Bill 2007, which bear many similarities to control orders, are made by the court, not the executive.[167]

Tab 325

88. Although the Court of Appeal in MB "read down" s.3(10) to permit the court to consider post-decision material[168], it did not interpret s.3 so as to give the court full jurisdiction in two key respects. First, the Court held that in reviewing whether the Secretary of State had reasonable grounds for suspicion, it may substitute its own decision for that of the decision-maker "if that is what Art. 6 requires"[169]. Liberty submits that it does so require.[170] Secondly, the Court imposed a traditional judicial review (including proportionality) test as regards the court's consideration of the Secretary of State's decision that any particular control order obligation is necessary to protect the public from a risk of terrorism, whilst emphasising that it was "appropriate to accord such

Tab 244

Tabs 255 & 280 [164] See the tables of control orders in the *First and Second Reports of the Independent Reviewer pursuant to s.14(3) of the Prevention of Terrorism Act 2005* (2/2/06, 19/2/07).

Tab 258 [165] See further CoE report at [21].

Tab 327 [166] Section 4. See further JCHR 10th Report of 2004-5 at [12].

Tab 330 [167] See further JCHR 12th report of 2006-7 at [1.24].

Tab 238 [168] applied by Ouseley J in *Secretary of State for the Home Department v AF* [2007] EWHC (Admin) 651 at [122]-[123].

Tab 244 [169] at [48].

Tab 238 [170] which appears to be Ouseley J's view in *Secretary of State for the Home Department v AF* (op cit.) at [131].

deference [to the Secretary of State] in matters relating to state security"[171]. Liberty submits that the Court of Appeal's interpretation in MB of the appropriate width of the "discretionary area of judgment" in this respect was overbroad and not in accordance with the decision of your Lordships' House in *A (No. 1)*, particularly when the Government has not sought to derogate from Art. 6 at all. Liberty endorses the view of Lord Bingham, that "[t]he exercise of exceptional executive powers calls for exceptional vigilance on the part of all whose duty it is to hold the executive to account".[172]

Tab 3

Tab 333

89. *Ex post facto* supervisory jurisdiction (even as interpreted by the Court of Appeal) over a decision based on "reasonable grounds for suspicion" with a large discretionary area of judgment as regards the obligations in question, is an unacceptably weak form of judicial control over measures with such a potentially drastic impact on Convention rights, particularly in combination with the use of closed procedures. Liberty submits that the combination of the low standard of proof together with such a limited form of review fails to meet the proportionality requirements of the Convention. The CoE Commissioner considered it "vital … that there be effective judicial scrutiny, indeed an autonomous decision on the part of the court"[173]. Following the decision in *Begum*[174], judicial review may be capable of rendering an initial executive decision Art. 6 compliant if that decision is based on an independent, expert finding of fact. A finding by the Secretary of State that a person is suspected of terrorism-related activity (conduct for which he may also be being prosecuted) is not such a decision.

Tab 258

Tab 201

90. It is noteworthy that in none of the cases in which the courts have quashed purportedly non-derogating control orders on the basis that they violated Art. 5[175] has the Secretary of State sought to take steps to impose a derogating control order in its place. Instead, he imposed another purportedly non-derogating control with lesser restrictions – thereby apparently undermining his initial assessment that the particular obligations were strictly necessary to prevent terrorism and protect the public (a decision to which the Court of Appeal in MB afforded the executive the maximal possible discretionary area of judgment).

Tab 244

91. As the CoE Commissioner concluded, Art. 6 requires that non-derogating control orders should be made by the judiciary.[176] Liberty

Tab 258

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[171] at [64].

Tab 244

[172] Lord Bingham, *Personal Freedom and the Dilemma of Democracies* (2003) 52 ICLQ 841 at 857.

Tab 333

[173] CoE report at [24].

Tab 258

[174] *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at [33]-[42].

Tab 201

[175] e.g. *Secretary of State for the Home Department v JJ; KK; GG; HH; NN; LL* (op cit.).

Tabs 241 & 242

[176] CoE report at [24].

Tab 258

Tab 270 also agrees with the JCHR that "our own constitutional traditions of due process, and of the separation of powers between the executive and the judiciary, requires no less."[177]

Special advocates and closed evidence

92. Liberty further submits that the use of special advocates and closed evidence during non-derogating control order proceedings also breaches the civil limb of Art. 6. It is submitted that this issue has not been
Tab 162 definitively resolved by your Lordships' House in *R(Roberts) v Parole Board* for the reasons detailed above.

Conclusions

93. For the reasons above, the Court of Appeal erred in law in reaching its decision that non-derogating control orders are compatible with the Convention in the following respects, in particular:

    a. the making of such an order involves the determination of a criminal charge within the autonomous meaning of Art. 6 and;

    b. the standard of review; the "reasonable suspicion" standard of proof; the use of closed evidence and special advocates violates the criminal and/or civil guarantees in Art. 6.

94. Accordingly, a declaration of incompatibility should be made under s.4 of the Human Rights Act: that s.3 of the 2005 Act is incompatible with Art. 6 of the Convention.

DAVID PANNICK QC

Blackstone Chambers

ALEX BAILIN

Matrix

15 June 2007

Tab 270 [177] JCHR 12th Report of 2005-6 at [68].

IN THE HOUSE OF LORDS

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

E & S

Appellants

and

THE NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")

Intervener

PRINTED CASE ON BEHALF OF LIBERTY

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