Neutral Citation Number: [2009] EWCA Civ 731

Case No: T1/2008/2144 + T1/2008/2431

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT (MR JUSTICE KEITH)**
**REF NO: PTA/26/2008**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2009

**Before :**

**LORD JUSTICE CARNWATH**
**LORD JUSTICE WALL**
and
**LORD JUSTICE MAURICE KAY**

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**Between :**

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| **AP** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

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**Mr Edward Fitzgerald CBE QC** and **Ms Kate Markus** (instructed by **Wilson & Co**) for the **Appellant**
**Mr Robin Tam QC** (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 4 June 2009

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# Judgment

**Lord Justice Maurice Kay :**

1. AP is an Ethiopian national. He came to this country with other members of his family in 1992 when he was aged 14. On 6 October 1999 he, his siblings and their mother were granted indefinite leave to remain. On 22 December 2006, when AP was detained by the authorities while staying in Ethiopia, the Secretary of State decided to exclude him from the United Kingdom. It is clear that by then AP was suspected of involvement in terrorism. On 27 December 2006 he arrived in this country. He was refused leave to enter and detained under the Immigration Act 1971. His indefinite leave to remain was cancelled on the ground that his exclusion is "conducive to the public good". He appealed to the Special Immigration Appeal Commission (SIAC) and was granted bail on stringent conditions. On 10 January 2008 the Secretary of State was granted permission to make a control order in respect of him. At the same time she reinstated his indefinite leave to remain and withdrew the decision to remove and exclude him. That brought the SIAC proceedings to an end. Since January 2008, AP has been the subject of a control order. There is now no dispute about the need for a control order. The present appeal is about its terms, to which I shall shortly refer. To complete the procedural history: AP requested a modification of the original terms; in April 2008, the Secretary of State modified the terms without consent; and on 23 May 2008, AP appealed against the modifications. In due course, there was a six day hearing in the Administrative Court before Keith J, who gave judgment on 12 August 2008. Although he confirmed the need for a control order, he allowed AP's appeal in relation to the modification. His open judgment [2008] EWHC 2001 (Admin) contains a detailed account of the background to the case which, in view of the limited issues arising on appeal, it is unnecessary for me to repeat.

**The terms of the control order**

2. At first, the control order required AP to live at an address in north London. When in this country, he had always lived in the London area and that is where his family, friends and associates live. He is subject to a 16 hour curfew and electronic tagging, along with other restrictions on association and communication. Since the modification, he has been required to live at an address in a town about 150 miles from London.

**The judgment of Keith J**

3. Having considered the open and the closed material, Keith J concluded that it is necessary, in order to protect the public from a risk of terrorism, for AP to be the subject of a control order. Indeed, he would have come to the same conclusion on the basis of the open material alone. AP does not challenge that conclusion.

4. Keith J then addressed the conditions attached to the control order. It is necessary for me to set out at some length what he said, particularly about the conditions which impact on this appeal:

> "86. The justification for relocating him outside London was to make it more difficult for him to see his extremist associates … Given that there has been a concentration of Islamist extremists in London, there is a need to remove AP from that milieu.

87. This justification has to be balanced against the incontestable hardship for AP in being isolated from his mother and his brother. His evidence is that while he was in Tottenham, they would visit him about twice a week, and that every week he would see his sister's three children who he would take to the park. His move has had a profound impact on how often he sees them. His mother has not visited him at all and his brother has visited him just twice. That is just as upsetting for his mother as it is for him, because at present she needs AP around more than ever. That is compounded by the fact that he does not know anyone in the town where he now lives, and sometimes speaks to no one in the course of the day other than short calls to his solicitors or to his mother and his brother.

88. It is true that the town where he now lives is not that far from London. The journey by rail takes about 1¾ hours and trains travel every half hour or so. It is also true that there is no limit on the length of time AP's mother and brother can spend with him if they choose to visit him, and there is … no need for them to seek prior Home Office approval. But the practical difficulties of visiting him are not inconsiderable, bearing in mind his mother now looks after his sister's three young children. She cannot go to the town where AP now lives on those days when she has to take the children to, or collect them from, school, and if she was to go to that town, she would have to take the children with her. It is said that she cannot go to that town without AP's brother, because she has never left London alone. The only day of the week he could go when the children are not at school would be on Sundays. But these practical difficulties are not insuperable. The fact is that they could visit AP *en famille* on Sundays, as well as on other days of the week outside the school terms, and they could travel at off-peak times to get the advantage of lower fares.

89. Having said that, there is unquestionably another significant hardship for AP in having to live in the town where he now lives. It is difficult for him to feel part of the local community. He claims that the local Muslim population comes for the most part from Bengal and Pakistan. They are a close-knit and closed culture. No one in the mosque has welcomed him into the community, or asked him how he finds the area or even what his name is. The Imam shows no interest in him, though that may be the product of language differences. The mosque has simply become a place to pray. It has not become either the spiritual or the social focus of his life. He has spotted the occasional Ethiopian or Eritrean, but he has not tried to befriend them because he does not want to burden them with his problems. He goes to the gym but people there see his tag and naturally think that he is a criminal. Although he has tried

> to explain what a control order is, that tends to make things worse. All in all, these experiences merely serve to reinforce his sense of alienation."

5. Keith J also referred to medical evidence, the essence of which was that, whilst AP may be exhibiting the early signs of mental illness, there is no such diagnosis at the moment, although his circumstances render him vulnerable to mental health problems.

6. All this led Keith J to conclude:

> "93. At the end of the day, the issue boils down simply to a matter of judgment. Moving him out of London altogether is the most effective way of reducing the chances of him maintaining personal contact with those of his associates in London who are or may be Islamist extremists. Giving due, but not undue, deference to the view of the Secretary of State on the topic, my opinion is that, but for the view I have reached on the impact of Article 5 of the Convention, the need to ensure that AP does not maintain personal contact with those of his associates in London who are or may be Islamist extremists would have made it necessary, in order to prevent or restrict his involvement in terrorism-related activity, for him to be removed from London altogether. Balancing that need against the undoubted hardship which AP experiences as a result of having to live in the town where he now lives, the view I would have reached is that the move was not a disproportionate response to that need."

7. Keith J then considered Article 5. He referred to the decision of the House of Lords in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 and the distillation of the principles as summarised by Mitting J in *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin). His application of the principles resulted in these conclusions:

> "95. Although the paradigm examples of deprivation of liberty are detention in prison and house arrest, deprivation of liberty can take many other forms, and the court's function is to look at the package of measures as a whole … [a] sense of social isolation would be felt particularly acutely when the controlled person was required to live in an area unfamiliar to him in which he had no family, friends or contacts. If he was cut off from his old haunts and acquaintances, his ability to lead any kind of normal life during non-curfew hours as well as curfew ones would be affected … I would characterise it as a form of internal exile …
>
> 97. It is the combination of the equivalent of house arrest up to the maximum period identified by Lord Brown [*viz* 16 hours], and the equivalent of internal exile which makes AP so socially isolated during the relatively few hours in the day when he is not under house arrest, coupled with his inability to make even

> social arrangements because pre-arranged meetings (otherwise than with his mother and his brother) are prohibited, which lead me to conclude that the obligations imposed on him fall on the side of the line which involves the deprivation of liberty rather than the restriction of movement … [Had] he remained in London, so that he could still be visited by his mother, his brother and his sister's three children, my view would have been different."

8. Keith J then went on to consider Articles 8 and 9 of the ECHR but summarily rejected AP's reliance on them on the ground that the interference was on the grounds of national security and, therefore, proportionate.

**The appeal and the cross-appeal**

9. The Secretary of State now appeals against the finding that the control order, in its modified form, is an unlawful deprivation of AP's liberty. AP cross-appeals on the ground that, if Keith J was right to find an unlawful deprivation of liberty, he ought to have acceded to a submission on behalf of AP that, in addition to quashing the condition of residence in the distant town, Keith J ought to have gone further and directed the Secretary of State to modify the conditions so as to require AP to reside at an address in London.

**The legal landscape**

10. A control order is defined by section 1(1) of the Prevention of Terrorism Act 2005 as "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism". The Secretary of State may make a control order against an individual if he (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual: section 2(1). Once the Secretary of State has decided that there are grounds to make a non-derogating control order against an individual, he must apply to the court for permission under section 3(1)(a). In the present case, Silber J granted permission. By section 7(2)(d) the Secretary of State may at any time make to the obligations imposed by a control order any modifications which he considers necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity. Where an obligation imposed by a non-derogating control order has been modified without the consent of the controlled person, he may appeal to the court against the modification: section 10(1). The function of the court is described in section 10(5). In determining whether the decision of the Secretary of State was flawed, the court must apply principles applicable on an application for judicial review: section 10(6). If the court determines that a decision of the Secretary of State is flawed, its only powers relevant to the circumstances of this appeal are the power to quash one or more obligations imposed by the order and the power to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations it imposes: section 10(7)(b)(c). The jurisdiction is that of the Administrative Court. No appeal lies to this court except on a question of law: section 11(3).

11. At the heart of this appeal is the question whether the modification whereby AP was relocated out of London contravened his rights under Article 5 of the ECHR. Article 5(1) provides:

> "Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law …"

12. The question in the present case is whether the obligations imposed by the control order amounted to a deprivation of liberty. If they did, they breached Article 5. They fell outside the permitted exceptional categories.

13. In *Guzzardi v Italy* [1983] EHRR 333 the European Court of Human Rights said:

> "92. The Court recalls that in proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no-one shall be dispossessed of this liberty in an arbitrary fashion. … The paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No 4 which has not been ratified by Italy [or the United Kingdom]. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends."

These paragraphs have informed all the domestic authorities on deprivation of liberty in the context of Article 5.

14. The leading domestic authority is *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] 1 AC 385. The case concerned non-derogating control orders in respect of six persons. The orders obliged each controlled person at all times to wear an electronic tagging device, to remain within his specified residence, a one-bedroom flat, except between 10.00am and 4.00pm, and to permit police searches of the premises at any time. Visitors to the premises were permitted only where prior Home Office permission had been given. During the six hours when the controlled persons were permitted to leave their residences they were confined to restricted urban areas, which deliberately did not extend, except in one case, to any

area where they had previously lived. Each area contained a mosque, healthcare facilities, shops and entertainment and sporting facilities. Each controlled person was prohibited from meeting anyone by prearrangement without prior Home Office approval. By a majority of three to two the House of Lords held that the judge at first instance (Sullivan J), in taking as his starting point the detention imposed by the 18 hour curfew and considering the concrete situation in which the whole regime imposed on the controlled persons had placed them, had applied the correct approach and his conclusion that the order amounted to a deprivation of the controlled persons' liberty contrary to Article 5 was unimpeachable.

15. The majority in the House of Lords comprised Lord Bingham, Baroness Hale and Lord Brown. Lord Bingham referred (at paragraph 13) to the common ground between the parties that the prohibition in Article 5 on depriving a person of his liberty has an autonomous meaning, "that is, it has a Council of Europe-wide meaning for purposes of the Convention, whatever it might or might not be thought to mean in any member state". Having reviewed the Strasbourg authorities, he concluded that there was no legal error in the reasoning of Sullivan J or the Court of Appeal. Indeed he would have come to the same conclusion. He said (at paragraph 24):

> "The effect of the 18 hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self entertainment and with knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size … but they were (save for GG) located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason. The requirement to obtain prior Home Office clearance for any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy."

16. Baroness Hale gave a similar description of the restrictions which operated during the non-curfew hours, adding that "the areas to which they were confined were deliberately designed to cut them off from their old haunts and acquaintances" (at paragraph 61). She, too, concluded (at paragraph 63) that the judge had applied the right test and had reached a conclusion on the facts with which she agreed. She added:

> "It is necessary to focus on the actual lives these people were required by law to lead, how far they were confined to one place, how much they were cut off from society, how closely

> their lives were controlled. The judge was entitled to conclude that the concrete situation in which they found themselves did deprive them of their liberty within the meaning of Article 5 …"

17. It is noticeable that neither Lord Bingham nor Baroness Hale was inclined to specify a length of curfew which would fall on the other side of the line.

18. Lord Brown felt no such inhibition. He said (at paragraph 105):

> "I have reached the clear conclusion that 18 hour curfews are simply too long to be consistent with the retention of physical liberty. In my opinion they breach Article 5. I am equally clear, however, that 12 or 14 hour curfews … are consistent with physical liberty. Indeed, I would go further and, rather than leave the Secretary of State guessing as to the precise point at which control orders will be held vulnerable to Article 5 challenges, state that for my part I would regard the acceptable limit to be 16 hours, leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day. Such a regime, in my opinion, can and should properly be characterised as one which restricts the suspect's liberty of movement rather than actually deprives him of his liberty. That, however, should be regarded as the absolute limit. Permanent home confinement beyond 16 hours a day on a long term basis necessarily to my mind involves the deprivation of physical liberty. And, although naturally I recognise that this cannot be the touchstone for the distinction, I think that any curfew regime exceeding 16 hours really ought not to be imposed unless the court can be satisfied of the suspect's actual involvement in terrorism, the higher threshold test that would apply to the making of derogating control order."

19. After writing these passages, Lord Brown had sight of the draft opinions of his colleagues. This led him to add (at paragraph 108):

> "Despite the explicit reluctance of several of your lordships to suggest the point at which curfews would, by virtue of their length, involve the deprivation of liberty, I remain unrepentant for doing so. I recognise of course, that 'situations may be many and various' (Baroness Hale of Richmond, at paragraph 63), that 'the overall factoral matrix' is important (Lord Carswell, at paragraph 84) and that the decision whether or not a particular non-derogating control order involves a deprivation of liberty is one for the judge, appealable only for error of law. As mentioned, however, the other conditions and circumstances of these six control orders (and, indeed, those under consideration in the related appeals) are all broadly similar and, as Lord Bingham points out in paragraph 11 of his opinion in *Secretary of State for the Home Department v E* … what principally must be focused on is the extent to which the

> suspect is 'actually confined': 'other restrictions (important as they may be in some cases) are ancillary' and '[can] not of themselves effect a deprivation of liberty if the core element of confinement … is insufficiently stringent.' Just so there is no mistake about it, my view is that, taking account of conditions and circumstances in all these various control order cases, provided 'the core element of confinement' does not exceed 16 hours a day, it is 'insufficiently stringent' as a matter of law to effect a deprivation of liberty. Beyond 16 hours, however, liberty is lost."

20. *Secretary of State to the Home Department v E* [2007] UKHL 47 [2008] 1 AC 499 concerned a control order with a 12 hour curfew and other familiar restrictions. At first instance Beatson J held that the totality of the restrictions amounted to a deprivation of liberty but his decision was reversed by the Court of Appeal and *E*'s appeal to the House of Lords failed. The full passage from the opinion of Lord Bingham to which Lord Brown referred in *JJ* is in these terms (at paragraph 11):

> "… it must, I think, be inferred that the Court of Appeal found the judge to have erred in law in failing to focus on the extent to which E was actually confined, here an overnight curfew of 12 hours, a period accepted by the Strasbourg authorities, as compared with the very much more stringent restriction in *JJ*. The matters which particularly weighed with the judge were not irrelevant, but they could not of themselves effect a deprivation of liberty if the core element of confinement, to which other restrictions (important as they may be in some cases) are ancillary, is insufficiently stringent."

21. Since *JJ* and *E* in the House of Lords, the specialist judges who deal with these cases at first instance have approached their task on the basis that the authorities do not mean that a 16 hour curfew is permissible in every control order case nor that a control order with a curfew of less than 16 hours cannot amount to a deprivation of liberty: see paragraph 25, below.

**The grounds of appeal**

22. In his skeleton argument Mr Robin Tam QC summarises the three original grounds of appeal put forward by the Secretary of State as follows:

> "(1) Keith J erred in law in concluding that the obligations imposed by the control order following the modification deprived AP of his liberty, because when considering the decision of the House of Lords in … *JJ* … , he wrongly failed to take into account the common facts of the cases considered by the House of Lords, and/or double-counted the features of social isolation and difficulty with making social arrangements that were relevant in *JJ* and in AP's case.

> (2) In any event, Keith J erred in law in so concluding because a curfew of 16 hours is as a matter of law insufficiently long to amount to a deprivation of liberty.
>
> (3) Further or in the alternative, Keith J erred in law in relying on the inability of AP's mother, sibling and nephews/nieces to visit him as the decisive factor in rendering the control order obligations a deprivation of liberty, as the question whether there is a deprivation of liberty does not depend on the 'subjective' or person specific impact of the measures on the controlled person."

23. To these original grounds of appeal, Mr Tam now adds a further argument based on the recent decision of the House of Lords in *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 2 WLR 372. The additional point is said to be that, when considering whether a restriction amounts to a deprivation of liberty, it is relevant to have regard to the purpose for which the restriction was imposed. *Austin* was not a control order case. However, Mr Tam submits that it enshrines a principle which reinforces the second ground of appeal that, as a matter of law, a 16 hour curfew is insufficient to amount to a deprivation of liberty in the context of a control order which has been imposed for the purposes of protecting the community against terrorism-related risks posed by the controlled person.

**Discussion**

24. It seems to me that the logical starting point is the second ground of appeal whereby it is submitted that, as a matter of law, a 16 hour of curfew is "insufficiently stringent" to amount to a deprivation of liberty. The submission is principally founded on the speech of Lord Brown in *JJ*. However, in my judgment, neither *JJ* read as a whole nor any other authority supports the proposition that a 16 hour curfew cannot amount to a deprivation of liberty. The other members of the majority in the House of Lords in *JJ* deliberately chose not to draw a line in that way and Lord Carswell in his dissenting speech, while concluding that the 18 hour curfew in that case did not amount to a deprivation of liberty, nevertheless considered that "a great deal depends on the overall factual matrix of the case" (paragraph 84). Moreover, I am not sure that Lord Brown was saying that in every case 16 hours will be permissible. He described it as "the absolute limit" (paragraph 105) and appeared to accept (paragraph 108) the view of Baroness Hale that "situations may be many and various" and that of Lord Carswell that "the overall factual matrix" is important. In *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin), Silber J concluded (at paragraph 84) that *JJ* does not mean that a 16 hour curfew is permissible in every case and when his judgment was considered by the Court of Appeal as one of the appeals in *Secretary of State for the Home Department v AF(No.3) and others* [2008] EWCA Civ 1148, [2009] 2 WLR 423 it was found to be free from legal error on this point (paragraph 102). A similar approach was taken by Mitting J in *Secretary of State for the Home Department v AU* [2009] EWHC 49 (Admin) when he held that the particular circumstances produced by the restrictions, which included a sixteen hour curfew, "came as close as was possible to the point at which he must be adjudged to have been deprived of liberty, but did not quite cross it" (paragraph 19). See also *Secretary of State for the Home Department v GG and NN* [2009] EWHC 142 (Admin), at paragraph 53 per Collins J.

25. I do not consider that *Austin v Metropolitan Police Commission* "reinforces" the submission that a 16 hour curfew in a control order is, as a matter of law, insufficient to amount to a deprivation of liberty. *Austin* was concerned with measures of crowd control during a demonstration. The effect was that a large number of people were detained in Oxford Circus, for some hours. Lord Hope referred to a pragmatic approach to Article 5 which took full account of the circumstances, including the fact that the measures were taken with a view to public safety. He added (at paragraph 34):

> "So any steps that are taken must be resorted to in good faith and must be proportionate to the situation which has made the measures necessary … If these requirements are met however it will be proper to conclude that measures of crowd control that are undertaken in the interests of the community will not infringe the Article 5 right of the individual members of the crowd whose freedom of movement is restricted by them."

26. That is, of course, good sense as well as good law. However, in my view it does not assist in the establishment of a bright line rule of law that a 16 hour curfew in a control order does not amount to a deprivation of liberty.

27. Once the submission that a 16 hour curfew in a control order is not, in itself and as a matter of law, "insufficiently stringent" to amount to a deprivation of liberty is rejected, the position becomes more difficult. If the length of the curfew is not determinative in itself (at least where it is shorter than 18 hours, by reference to *JJ* and in the light of the authorities, none of which countenance an 18 hour curfew), the test must embrace other aspects of the factual matrix. That is the lesson learnt on the road from *Guzzardi* to *JJ*. It is what explains the concern with social isolation, which plainly came within the purview of Lord Bingham and Baroness Hale in *JJ* and in *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499 (in which a 12 hour curfew was upheld). However, although consideration of the degree of social isolation is, on the authorities, a matter of relevance, it must be remembered that, as Baroness Hale said in *E* (at paragraph 25):

> "The starting point in any consideration of deprivation of liberty is the 'core element' of confinement."

28. In *E*, the judge at first instance had held the control order to amount to a deprivation of liberty. As I have related, Lord Bingham described his legal error in these terms (at paragraph 11):

> "The matters which particularly weighed with the judge were not irrelevant, but they could not of themselves effect a deprivation of liberty if the core element of confinement, to which other restrictions (important as they may be in some cases) are ancillary, is insufficiently stringent."

29. If I may be permitted to put it metaphorically: for the purposes of Article 5, the other restrictions (including the degree of social isolation) are the tail; it is the core element of confinement that is the dog.

30. In the present case, Keith J concluded in paragraph 97 of his judgment (set out at paragraph 7, above) that it was "the combination" of the confinement and the degree of social isolation or "internal exile", coupled with AP's inability to make social arrangements, which caused him to hold this particular control order to be a deprivation of liberty rather than simply a restriction of movement. The key to his reasoning is clarified by the final sentence of paragraph 97,

> "… had he remained in London, so that he could still see and be visited by his mother, his brother and his sister's three children, my view would have been different."

The question now is whether, by treating the effect of relocation on family visits as the decisive factor, the judge fell into legal error. In my judgment, he did.

31. The reasons for my conclusion on this point are twofold. First, as a matter of fact, AP could still see and be visited by those members of his family, although there were logistical and, no doubt, financial difficulties. I base that on the judge's finding (at paragraph 88):

> "The fact is that they could visit AP *en famille* on Sundays, as well as other days of the week outside the school terms, and they could travel at off-peak times to get the advantage of lower fares."

On that basis, the judge erred in law in treating as decisive something that was at variance with his earlier finding of fact.

32. Secondly, having concluded that the core element of confinement – the 16 hour curfew – was otherwise compatible with Article 5, the judge was wrong in law to permit the issue of family visits to tip the balance. He had earlier concluded that relocation away from London was otherwise necessary and proportionate "to ensure that AP does not maintain personal contact with those of his associates in London who are or may be Islamist extremists" (paragraph 93). It seems to me that then to allow that to be trumped by what is really an Article 8 rather than a core Article 5 consideration amounted to an error of law. As it happens, the judge also considered the case by reference to Article 8 in paragraph 98 of his judgment, where he came to the unsurprising conclusion that the proven interference with AP's family and private life was justified on grounds of national security. In my judgment, he was wrong then to allow the failed Article 8 case to prove decisive in the Article 5 case in the circumstances I have described.

33. For these reasons, I have concluded that the Secretary of State's appeal should be allowed, essentially by reference to the third ground of appeal according to Mr Tam's enumeration. I consider that the first ground, which included the reference to "double counting" in the judge's application of *JJ* does not really arise. It rather assumes the existence of a fixed maximum – Lord Brown's 16 hours – and factual identity between the present case and *JJ*. Mr Tam's submission is that the element of social isolation is already factored into the conclusion of the House of Lords that 16 hours is or is around the limit. However, not only am I (as I have explained) unpersuaded that there is a binding quantified limit; it is also relevant that the element of social

isolation, to the extent that it may be relevant, is rather greater in the present case than in the *JJ* cases, where the relocations were within or close to London.

**The cross-appeal**

34. If we are to allow the Secretary of State's appeal, AP's cross-appeal does not arise. Its concern was with the appropriate order at first instance on the assumption that the judge correctly found the control order to be unlawful by reason of a deprivation of liberty. Keith J took the view that the appropriate disposal was simply to quash the order. He declined to accede to a submission on behalf of AP that he should direct the Secretary of State to modify it so as to require AP to reside at an address in London. In my judgment, he was correct to do so, even though this opens the door to the prospect of further litigation in relation to any later order made by the Secretary of State pursuant to section 2 and paragraph 8 of the Schedule. (Indeed, we are told that the Secretary of State has made a later order with a shorter curfew and that AP is indeed challenging it.) This territory has been visited by this Court in *JJ* [2006] EWCA Civ 1141, [2007] QB 446 (at paragraph 27) and by the House of Lords (particularly per Lord Carswell at paragraph 85). It will generally be for the Secretary of State, pursuant to statutory power and being "very much better placed" to perform the exercise than the Court, to make a new order in place of one that has been quashed. That may involve a judgment between a variety of possible alternative packages, with various adjustments to personal, temporal and spatial restrictions and not simply a judicial rewrite at the behest of the controlee.

**Lord Justice Wall:**

35. I have had the advantage of reading in draft the judgments prepared by Carnwath and Maurice Kay LJJ. For the reasons which the latter gives, I would, like him, allow the Secretary of State's appeal and dismiss AP's cross-appeal.

36. Whilst I would like to express my admiration for Carnwath LJ's analysis of the three decisions of the House of Lords identified in paragraph 2 of his judgment, I remain of the view that Maurice Kay LJ has neatly encapsulated the judge's error of law in paragraph 32 of his. It is plainly proportionate in ECHR Article 8 terms for AP to be placed some distance from London: indeed, the judge so found in the passages in paragraphs 86 to 89 and 93 of his judgment, which are cited by Maurice Kay LJ, It was, accordingly, in my judgment, impermissible for the judge to use ECHR Article 8.1 (AP's isolation from his mother and brother) effectively to determine the issue of liberty under ECHR Article 5.

37. Having acknowledged that ECHR Article 8 had to be decided in the Secretary of State's favour, and having decided the ECHR Article 5 point in AP's favour, the only reasons the judge gives at this point (paragraph 98 of his judgment) for his conclusion are the following: -

> 98. Arts. 8 and 9 of the Convention – which protects one's right to respect for one's private and family life and to practice one's religion – are relevant here as well. The obligations imposed on AP unquestionably interfere with his private and family life and his ability to pray at a mosque of his choosing, the issue here being whether those obligations are necessary in the interests of national security. That is really no different from the issue which

> I have already decided in the Secretary of State's favour under section 1(3). The difference between Art. 5 and Arts. 8 and 9 is that the rights protected by the latter may be interfered with on grounds of national security, whereas the right not to be deprived of one's liberty may not be interfered with at all.

In my judgment, whilst this is, of course, true, it does not address what I perceive to be the contradiction at the heart of the judgment.

38. In reaching the conclusion that the Secretary of State's appeal should be allowed, I would like to make it clear that I do not resile (indeed, it would not be open to me to resile) from anything which this court (of which I was a member) said in ***Secretary of State for the Home Department v. E*** [2007] EWCA Civ 459. (one of the three cases cited by Carnwath LJ and a decision upheld in the House of Lords – see [2007] UKHL 47, [2008] 1 AC 299 (***Re E***)). I note, in particular, that in ***Re E*** we rejected a submission made on behalf of the Secretary of State that issues which related to ECHR Article 8 should not be considered under ECHR Article 5: -

> 58. We do not accept Mr. Tam's submission that, because restrictions engage other articles in the Convention, such as article 8, they should be disregarded in an article 5 context. Evidence relevant to an article 8 claim, even if a breach of that article is not established, may be relevant on a consideration of article 5. We regard ourselves as bound, on this point, by the finding of this court in ***JJ***, at paragraph 19:
>
> > We do not agree that [the Judge] should have disregarded these matters merely because they could have been made the subject of complaint under other articles of the Convention. The different Convention rights overlap, it would be contrary to the approach of the Strasbourg Court to consider them in watertight compartments.
>
> In any event, we respectfully agree with that proposition. When considering the weight to be given to such matters in an article 5 context, it must, however, be kept in mind that it is deprivation of liberty, and not some other right, which is under consideration.

39. There is, in my judgment, a substantial difference between taking ECHR Article 8.1 factors into account when discussing ECHR Article 5 on the one hand, and, on the other, of treating them as determinative of, or, as Maurice Kay LJ puts it, as "tipping the balance" in relation to an Article 5 determination. In my judgment, the judge has done the latter, and it principally for this reason that I find myself in respectful disagreement with him.

40. Although it may be more an issue of fact than of law, I also have to say that, speaking for myself, I agree with the judge when he says in paragraph 88 of his judgment (cited by Maurice Kay LJ) that whilst the difficulties of AP's mother and his brother visiting him are "not inconsiderable", the practical difficulties of them doing so are in no sense insuperable. Cheap train and coach fares are available, even if AP's mother cannot be taken to visit AP by car and despite her other family commitments. In my

judgment, therefore, this particular ECHR Article 8 factor does not weigh heavily in the balance.

41. I would also like to make it clear, however, that I would allow this appeal with elements of both reluctance and surprise. Neither has anything to do with Maurice Kay LJ's reasoning, which, in my judgment, is compelling. Both sentiments derive from my strong agreement with the judge (in the passage from paragraph 93 of this judgment, cited by Maurice Kay LJ at paragraph 6 of his) - and in the absence of determinative guidance from the House of Lords - that the terms of control orders are, at the end of the day, matters of judgment, to be exercised by the specialist judges of the Administrative Court. Nothing in my disagreement with the judge should be read as diminishing the force of that proposition, and I stress that it is only because I detect an error of law in his approach that I feel the confidence to intervene.

42. I would, however, both for the reasons I have given and those given by Maurice Kay LJ allow the Secretary of State's appeal. It follows, I think, inevitably, that I would also dismiss AP's cross appeal.

**Lord Justice Carnwath:**

43. I regret that I find myself in respectful disagreement with my colleagues on the disposal of the Secretary of State's appeal.

44. The guiding principles governing this case must be found in three judgments of the same constitution of the House of Lords, delivered on the same day:

    i) *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] 1 AC 385;

    ii) *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] 1 AC 440;

    iii) *Secretary of State to the Home Department v E* [2007] UKHL 47 [2008] 1 AC 499

45. They involved control orders containing "curfews" lasting respectively 18, 14 and 12 hours, along with other restrictions. They were no doubt selected for hearing together, to enable the House to provide useful guidance by reference to a range of periods of confinement.

46. For the purposes of the present appeal, I gratefully adopt Maurice Kay LJ's account of the facts and much of his legal analysis. However, I am unable with respect to agree with his grounds for allowing the appeal, particularly by reference to what he calls "the core element of confinement" (para 27). Although that expression was taken from the speech of Lord Bingham in *E*, it must be read in the context of the judgments as a whole. So considered, in my view, it does not justify impeaching the judge's reasoning in this case.

47. The first-delivered of the trilogy, *JJ*, is described by Maurice Kay LJ as the "leading domestic authority" on the present issue under Article 5, and he has referred in some detail to the facts and the majority judgments. It is true that the speeches in *JJ* contain the fullest discussion of the requirements of Article 5, which is then used as the

starting-point for the discussion of this issue in the other two cases. The main focus of the speeches in the other two cases is on different aspects of the control order procedure. However, in view of the disparate views in *JJ* on the Article 5 issue, one may reasonably look to the others for further assistance as to the practical application of the principles.

48. As Maurice Kay LJ has said, *JJ* involved control orders in respect of six persons. He has described the restrictions imposed, including a requirement to remain within the specified residence, a one-bedroom flat, except between 10.00am and 4.00pm (that is, confinement for 18 hours per day). By a majority of three to two the House of Lords upheld the decision of the judge (Sullivan J) that the order amounted to a deprivation of the liberty of the controlled persons within Article 5.

49. The speeches in the House can be divided into three groups:

i) Lord Bingham and Baroness Hale, following what they understood to be the approach of the European Court of Human Rights, declined to lay down any precise guidelines. Lord Bingham said:

> "The Strasbourg court has realistically recognised that "The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance" (*Guzzardi*, para 93). There is no bright line separating the two. The court acknowledges (*ibid*) the difficulty attending the process of classification in borderline cases, suggesting that in such cases the decision is one of pure opinion or what may, rather more aptly, be called judgment." (para 17)

Consistently with this guidance, they upheld the judge's view that, taking account of all the circumstances, the Article 5 line had been crossed. As Baroness Hale said:

> "It is necessary to focus on the actual lives these people were required by law to lead, how far they were confined to one place, how much they were cut off from society, how closely their lives were controlled. The judge was entitled to conclude that the concrete situation in which they found themselves did deprive them of their liberty within the meaning of Article 5 …" (para 63)

ii) Lord Brown agreed that the Article 5 line had been crossed, but (in the passages quoted by Maurice Kay LJ) offered more specific guidance. He agreed that "the overall factual matrix" (Lord Carswell's expression) was important, and that the decision in any case was one for the judge, appealable only for error of law. However, he considered that, while an 18 hour curfew was "simply too long" to be consistent with the retention of physical liberty, a 12 or 14 hour curfew would be so consistent; and that "the acceptable limit" was 16 hours. He remained "unrepentant" in maintaining that position having seen the other speeches (para 108).

iii) Lords Hoffmann and Carswell (the minority in *JJ*) regarded the 18 hour curfew as consistent with Article 5, and found the judge's decision to the contrary erroneous in law.

50. The critical distinction between the majority and the minority lay in the identification of the correct legal test, based on the Strasbourg jurisprudence. Notwithstanding the statement in *Guzzardi* (quoted by Lord Bingham) about the difference being one of "degree or intensity" rather than "nature or substance", the minority were able to find in the cases support for what was in effect a difference in *kind*: that is, between confinement, even for periods as long as 18 hours, and detention "comparable to imprisonment".

51. Thus, Lord Hoffmann defined the test as being whether the claimants' situation was "comparable with being in an open prison or a disciplinary unit", or (adopting the words of Sir Gerald Fitzmaurice's dissenting judgment in *Guzzardi*) "confinement so close as to amount to the same thing" (para 41). He concluded:

> "I find it impossible to say that a person in the position of LL is for practical purposes in prison. To describe him in such a way would be an extravagant metaphor. A person who lives in his own flat, has a telephone and whatever other conveniences he can afford, buys, prepares and cooks his own food, and is free on any day between 10 am and 4 pm to go at his own choice to walk the streets, visit the shops, places of entertainment, sports facilities and parks of a London borough, use public transport, mingle with the people and attend his place of worship, is not in prison or anything that can be called an approximation to prison. True, his freedom of movement, communication and association is greatly restricted compared with an ordinary person. But that is not the comparison which the law requires to be made. The question is rather whether he can be compared with someone in prison and in my opinion he cannot." (para 45)

He criticised the statement of Lord Phillips LCJ (in the Court of Appeal) that the judge had to make -

> "a value judgment as to whether, having regard to 'the type, duration, effects and manner of implementation' of the control orders they effected a deprivation of liberty."

Lord Hoffmann observed:

> "But that formulation offers no guidance as to what would count as a deprivation of liberty. It simply says that the judge must take everything into account and decide the question, without saying what the question is." (para 46)

52. In *MB* and *AF* the principal issue discussed in the speeches concerned the requirements of a fair procedure under Article 6. That issue does not arise in the present case. However, in *AF* there was also an issue relating to the judge's finding

that the confinement amounted to deprivation of liberty within Article 5. The House held unanimously that he had been wrong so to hold.

53. The headnote to *MB* notes this part of the holding as "*JJ* applied". By implication one would expect that to be a reference to the principles derived from the *majority* speeches in *JJ*. However, on analysis the position is not so clear. The issue was treated relatively briefly in each of the speeches as follows:

i) Lord Bingham (para 11) said that the judge had erred in paying "close attention" to the judgment of Beatson J in *E*, which had since been reversed by the Court of Appeal (rightly, as the House was about to hold). With the benefit of the Court of Appeal judgment, he would "in all probability" have held that there was no deprivation of liberty. On that basis, Lord Bingham was "willing to accept the view which I understand to be taken by my noble and learned friends" that article 5 was not breached.

ii) Lord Hoffmann (para 47) agreed that the Secretary of State's appeal should be allowed on this point, saying simply:

> "For the reasons I gave in [*JJ*], I do not think that these restrictions come anywhere near amounting to a deprivation of liberty in the sense contemplated by the Convention."

iii) Baroness Hale (para 56) agreed with Lord Bingham on this issue, having nothing to add.

iv) Lord Carswell (para 78) referred to his own opinion in *JJ*, again without reference to the fact that he had been in the minority; he agreed that the judge had been wrong to hold that there had been a deprivation of liberty "for the reasons which I set out in that opinion".

v) Lord Brown (para 89) noted that the order subjected *AF* to 14 hours confinement and commented:

> "For the reasons given in my judgment in *JJ*'s case I do not regard that as involving a sufficient degree of physical confinement to constitute a deprivation of liberty as opposed to a restriction of AF's freedom of movement."

54. Although it is not easy to find a common majority thread, one can detect a shift of emphasis. In spite of their unwillingness in *JJ* to subscribe to Lord Brown's specific guidelines, the speeches of Lord Bingham and Baroness Hale in *MB* seem to represent a nod in his direction, and indeed that of the minority. Notwithstanding their emphasis in *JJ* on the absence of "bright lines", they were willing to go along with the view that 14 hours confinement would not ordinarily be sufficient to trigger Article 5, and that the judge was wrong in law so to treat it.

55. The reasoning in the third of the trilogy, *Secretary of State to the Home Department v E*, is consistent with that interpretation. As Maurice Kay LJ has noted, the control order involved a 12 hour curfew and other restrictions. Beatson J had held that taken as a whole those restrictions amounted to a deprivation of liberty under Article 5, but

his decision was reversed by the Court of Appeal. Lord Bingham (with whom the others agreed, for similar reasons to those given in *MB*) referred to the overnight curfew of 12 hours as a period "accepted by the Strasbourg authorities", and agreed with the Court of Appeal's view that the judge had erred in -

> "failing to focus on the extent to which E was actually confined as compared with the very much more stringent restriction in JJ".

The matters relied on by the judge were not irrelevant but -

> "… they could not of themselves effect a deprivation of liberty if the core element of confinement, to which other restrictions (important as they may be in some cases) are ancillary, is insufficiently stringent." (para 11)

56. Taking the three cases together, a picture emerges. Curfew periods of up to 12 or even 14 hours are (at least normally) too short to engage Article 5, regardless of the effect of the other restrictions; decisions that they do are liable to be overturned as erroneous in law. In other words, the three cases can be seen as supporting lower and upper thresholds of 14 and 18 hours respectively, with a grey area between, within which the judge must make a "value judgment" as described by Lord Bingham and Baroness Hale in *JJ*. Although Lord Brown's 16-hour test was not in terms adopted by any of his colleagues, it gains some inferential support from its position as the mid-point of the "grey area".

57. If this is the right interpretation, then in my view there was no error of law in the judge's approach. This was not a case like *E* in which the "core element of confinement" was insufficient in principle to engage article 5. It was within the grey area, in which the value judgment was one for the judge alone. The critical passage of the judgment is at paragraph 97:

> "It is the combination of the equivalent of house arrest up to the maximum period identified by Lord Brown [viz 16 hours], and the equivalent of internal exile which makes AP so socially isolated during the relatively few hours in the day when he is not under house arrest, coupled with his inability to make even social arrangements because pre-arranged meetings (otherwise than with his mother and his brother) are prohibited, which lead me to conclude that the obligations imposed on him fall on the side of the line which involves the deprivation of liberty rather than the restriction of movement …"

58. One may criticise the judge's emphasis on Lord Brown's 16-hour test, as not supported by the other speeches in *JJ*. However, as I have explained, it gains more support from a consideration of those speeches in the context of the other cases in the trilogy. Any error in this respect was not in my view sufficient to undermine the reasoning overall. The other factors referred to by the judge, including the practical isolation even from his family, were relevant to a value judgment of "the concrete situation in which he found himself", as described by Baroness Hale in the passage already quoted. Indeed it is exactly the kind the kind of factor which she identified in *E* (para 25) as likely to make the confinement "more severe", the absence of which in that case was relevant to her conclusion that Article 5 was not engaged.

59. Like Maurice Kay and Wall LJJ, I was at first troubled by the weight given to "Article 8 factors", particularly in the light of the apparent inconsistency with the conclusion arrived at earlier in the judgment in respect of Article 8 itself. However, in the light of the majority speeches in *JJ* it cannot be said that such factors are irrelevant to the judgment under Article 5. Within the grey area, the judge was entitled in law to take them into account.

60. Finally, like Wall LJ, I would emphasise the importance, wherever possible, of respecting the decisions of the judges of the Administrative Court who have to deal directly with cases in this difficult and sensitive area of the law. There is a parallel with the "hands-off" approach advocated by at least some members of the House of Lords in respect of decisions of specialist tribunals, including the Special Immigration Appeals Commission (see *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, paras 118, 219). Although of course the judges who deal with these cases are not a "tribunal" in that sense, some of them also sit on SIAC. They have in any event developed special expertise and experience, not generally shared by members of the appellate courts. They are also much better placed to develop consistent practice for dealing with orders of this kind, and to provide continuing supervision of their making, variation, and implementation.

61. For these reasons, I would dismiss the Secretary of State's appeal. I would also dismiss AP's cross-appeal for the reasons given by Maurice Kay LJ at paragraph 34.