

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**IN THE MATTER OF AN APPLICATION PURSUANT**  
**TO THE PREVENTION OF TERRORISM ACT 2005**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/05/2008

**Before :**

**Mr Justice Mitting**

**Between :**

**SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

Applicant

**- and -**

**AH**

Respondent

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
A Merrill Communications Company  
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Official Shorthand Writers to the Court)

**Mr James Eadie QC and Miss Katherine Grange** (instructed by **The Treasury Solicitor**) for  
the Applicant

Mr Keir Starmer QC and Miss Stephanie Harrison (instructed by Tyndallwoods Solicitors) for  
**Respondent**

**Mr Andrew Nicol QC and Mr Justin Cole** (instructed by **The Treasury Solicitor Special  
Advocate Support Office**) as **Special Advocates**

Hearing dates: 21, 22, 23,24,25 & 29 April 2008

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**Approved Judgment**

## **Mr Justice Mitting:**

### Background

1. AH is an Iraqi national, who first arrived in the United Kingdom on 21<sup>st</sup> July 2000 and claimed asylum. His claim was refused on 30<sup>th</sup> October 2001, but he was granted four years exceptional leave to remain. He travelled to Iraq in June 2004 and returned to the United Kingdom in September 2004. On 26<sup>th</sup> January 2005 he was detained pending deportation to Iraq. He appealed to the Special Immigration Appeals Commission. The Secretary of State withdrew his decision to deport AH on 23<sup>rd</sup> November 2005 and he was released from immigration detention. As he left prison, he was arrested under the Terrorism Act 2000 and charged with terrorism offences. He was tried at Woolwich Crown Court in August 2006. On 29<sup>th</sup> August 2006, he was acquitted of all charges. On 31<sup>st</sup> July 2006, the Secretary of State applied for permission to make a non-derogating Control Order. Permission was granted by Sullivan J on the same date. The order was served on AH on the day of his acquittal. The order was renewed on 27<sup>th</sup> July 2007 and modified to correct an error on 31<sup>st</sup> July 2007. On 17<sup>th</sup> April 2008, the obligations in the Control Order were significantly relaxed. In these proceedings, AH challenges the Secretary of State's decision to make the first Control Order by way of a review under Section 3(10), appeals against the Secretary of State's decision to renew the Control Order under Section 10(1) and appeals against the Secretary of State's refusal to revoke the Control Order on the 26<sup>th</sup> September 2007 under Section 10(3)(a). The issue in each case is whether or not the decision of the Secretary of State was flawed: Section 3(10) and (10)(4)(a). The review of and appeal against the making and renewal of the Control Order are not academic: criminal proceedings have been undertaken against AH, for breaches of the order, which will lapse if the orders are quashed; and the continuance of the order in its varied form depends upon the lawfulness of the original and renewed order.

### The principal issues

2. There are four principal issues:
  - i) Procedural: has AH been afforded at least the minimum requirements of procedural fairness to which he is entitled in these proceedings?
  - ii) Substantive: is the Secretary of State's decision that AH has been involved in terrorism-related activity flawed?
  - iii) Article 5: did the order as originally made and renewed deprive AH of his liberty or merely restrict his liberty?
  - iv) Necessity: is the Secretary of State's decision that the making, renewal and continuance in force of the Control Order is necessary for purposes connected with protecting members of the public from a risk of terrorism flawed?

There are subsidiary questions which I will deal with under the appropriate head.

### The Secretary of State's case

3. The Secretary of State relies on four principal grounds of suspicion:

- i) AH collected and organised the remittance of funds for the insurgency in Iraq
- ii) AH used anti-surveillance techniques, such as the use of telephone kiosks to make sensitive calls and erratic driving, to escape surveillance
- iii) AH is an associate of BC (identified by name in the Closed Judgement), an Islamist extremist based in the United Kingdom
- iv) AH facilitated the travel of Mukhtar Ibrahim Said, Rizwan Majid and Shakeel Ismail to Heathrow, for onward travel to Pakistan, on 11<sup>th</sup> December 2004. Their journey was for terrorism-related purposes and AH knew or believed that that was so.

#### Procedure

4. Like all, or at least almost all, Control Order cases, this case raises the vexed question of what precisely is required to ensure that the controlled person's right to a fair trial is secured when the Secretary of State relies significantly on closed material. I will not repeat the analysis which I undertook in *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin). I repeat, and intend to apply, the conclusion which I reached in paragraph 9:

“the conclusion which I draw from the four speeches of the majority in MB is that unless, at a minimum, the Special Advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them”.

Mr Starmer QC, AH's open advocate, accepts that distillation, with one qualification: that the possible exception in cases in which the controlled person has no conceivable answer does not exist. I was not intending in AN to state that I accepted the existence of the exception, merely that it was possible. I have read, and am persuaded by, the Judgement of Stanley Burnton J in *Secretary of State for the Home Department v AF* (Number 2) [2008] EWHC 689 (Admin), and agree with his conclusion in paragraph 32 that there is no such exception.

5. Mr Starmer submits that the Secretary of State must prove, on balance of probabilities, the facts upon which she founds her reasonable suspicion. Mr Eadie QC, for the Secretary of State, submits that this is an erroneous test. It is not necessary for me to decide this issue, for reasons which will be apparent. The approach which I have adopted applies the test for which Mr Starmer contends.
6. Mr Starmer contends that in relation to the first issue (money transfers), AH does not know the case which he has to meet and is deprived of the opportunity of doing so. AH has given evidence that, if he were told the occasions on which he was said to have transferred money, he would, perhaps with the help of the Hawala sender whom he used be able to allay the Secretary of State's suspicion. Mr Eadie contends that the bare statement of the ground of suspicion has, in fact, been sufficient to permit him to

advance his case: in part denial, and in part the transfer of funds to his wife, which the Secretary of State acknowledges to have occurred. Nothing has prevented him from obtaining the assistance of the Hawala sender, if he truly wished to do so. After evidence was complete, I expressed the provisional view, that AH had not been told the essential features of this ground and was not in a position to give instructions to the Special Advocates to challenge them; but Mr Eadie's submissions have persuaded me that the issue is more finely balanced than I had thought. Because I have reached firm conclusions on the remaining grounds, it is not necessary for me to determine whether or not the Secretary of State should be permitted to rely on this ground. I have not taken into account the open allegation or the closed material which supports it in reaching the decisions set out below. I do not understand Mr Starmer to suggest that, if I take that course, AH's right to a fair trial of this issue will have been infringed. It is not necessary for me to put the Secretary of State to an election whether to rely on it or not.

7. On the remaining three grounds, I am satisfied that their essential features have been disclosed to AH and he has had, and has taken, the opportunity to attempt to rebut them in detail. He has done so in his witness statement dated 7<sup>th</sup> March 2008 (3/852-878) and in evidence given at the hearing. In one respect (the use of telephone kiosks as a security measure on particular occasions), the evidence which he has given has permitted the Special Advocates to demonstrate that the Security Service's conclusion was erroneous, so that the Secretary of State no longer relies on that as a ground for suspicion. He has had disclosed to him the surveillance logs for 22/23 October 2004 and 11/12 December 2004. That has prompted him to give a detailed account of his activities on each night (3/868/7.14-7.30 and 3/860-863/5-6). He repeated this detailed account in his evidence at the hearing. The fact that he does not know the contents of the closed material has not in any way inhibited him from doing so. He has been told the essential features of the Secretary of State's case about his relationship with BC and the nature and purpose of his activities. He has been able to give a detailed account about it (3/855-860/4) and has repeated it in evidence. Again, the fact that he does not know the contents of the closed material on this issue has not in any way inhibited him from advancing his case about it. The essential features of the trip to Heathrow and its aftermath have been disclosed to him, in the form of surveillance logs. The purpose of the three men travelling to Pakistan and the grounds for suspecting that it was for terrorism-related activity have been disclosed to him in the Metropolitan Police summaries of their interviews of the three men and their record of what they had with them. AH has been able to give a detailed account of the arrangement of the trip to Heathrow, the trip itself and its aftermath (3/860-863/5-6), repeated and as to aftermath, supplemented, in his evidence at the hearing (which itself repeated the evidence which he had given at his criminal trials). The fact that he did not know the contents of the closed material has not in any way inhibited him from advancing his account. Further, in relation to all three issues, the Special Advocates have been able to probe and challenge the Security Service's assessments and the open and closed material which supports them, on the basis of AH's detailed account.
8. Mr Starmer submits that questions asked by Mr Eadie in the open hearing which may have been based on closed material of which AH was unaware, were unfair. To the extent that they were designed simply to clarify and confirm precisely what AH's case was, they were not: the effect, and I take it the purpose, of the questions was just that.

Asking them did not violate AH's right to a fair trial. A controlled person, faced with closed material, who gives detailed evidence in support of his case, inevitably runs the risk of contradicting closed material; and, in doing so, may expose himself to a finding that he has suppressed the truth or lied. That risk is inherent in the proceedings. It has not been exacerbated by Mr Eadie's questions.

9. For the reasons given, I am satisfied that at least the minimum procedural requirements of fairness have been satisfied in relation to the three determinative issues identified above.

### Substance

#### AH's association with BC

10. AH's admitted association with BC is one of the building blocks upon which the Secretary of State founds her suspicion under Section 2(1)(a). Before the nature of that association can be determined, it is necessary to consider the nature and purpose of the activities of BC. He is regarded by the Security Council of the United Nations, by the Federal Government of the United States of America and by the British Government as an extremist organiser and facilitator in the United Kingdom. Hence, his inclusion on 12<sup>th</sup> December 2006 in the list of individuals associated with the Taliban and Al-Quaeda and the making of orders in the United States and the United Kingdom freezing his assets immediately thereafter. He has been prosecuted, unsuccessfully, for terrorism-related offences in 2004; but he is not the subject of a Control Order. He has been the subject of newspaper articles which witness W has stated, correctly, not to be wholly accurate. Material relevant to the assessment of BC's position has been considered by me in the closed session.
11. AH's case is that he first encountered BC in 2003. There is no reason to conclude otherwise. He says that he befriended him after his return from Iraq in September 2004. While in Iraq, he had sought his help to resolve a problem over housing benefit with Newham LBC. On his return, he acted for BC as his driver and assisted him with innocent trading. Witness W accepted that he did both, but asserted that his account of his dealings with BC was not complete or wholly truthful. That view is based in part on closed material. I accept that it is well founded. I am satisfied that, even though AH has said things which are true about his relationship with BC, he has by no means told the whole truth about it. I am satisfied that BC was an Islamist extremist and that AH knew or believed that he was.

#### Security Awareness

12. I have already indicated that a significant ground for the belief that AH undertook anti-surveillance measures is ill-founded. I also accept that he had been observed for 198 hours in total, over nineteen days, during which security conscious behaviour was only believed to have occurred on four occasions. Two of any substance remain: the events of the nights of 22/23 October 2004 and of 11/12 December 2004. For the reasons set out in the Closed Judgement, I accept that he did display security conscious behaviour on these occasions. Professor Silke, who prepared a report on behalf of AH, concluded that there were, from the open material alone, ambiguous

signs of security conscious behaviour on the first occasion. He did not consider the second. His opinion is not inconsistent with my finding.

13. AH's case is that on the first occasion, he thought he was being followed by "dodgy men" in a white van who may have been muggers. He has given an account of his movements which fits in with the redacted surveillance log which forms part of the open case. It has been tailored to do so. I am satisfied that AH has not told the whole truth about these events and has lied about some of them. I have reached that conclusion on the totality of the evidence about these events, both open and closed, and have done so to the criminal standard.

#### The Heathrow trip and its aftermath

14. It is common ground that on 11<sup>th</sup> December 2004 AH and Anhar Hussain drove Mukhtar Ibrahim Said to Heathrow Airport. A following car drove two other men, Rizwan Majid and Shakeel Ismail. Mukhtar Ibrahim Said was one of those convicted of the failed attempted bombings on 21<sup>st</sup> July 2005. All three men were travelling to Pakistan. The purpose of their trip can be discerned from the redacted Metropolitan Police Information Reports prepared following their detention at the airport before they were permitted to fly to Pakistan on the following day and from Mukhtar Ibrahim Said's participation in the events of 21<sup>st</sup> July 2005. They said that they were going for a wedding, but Mukhtar Ibrahim Said did not know the name of the bride or the nature of the betrothal. Despite the fact that he was in receipt of Housing and Employment Benefit, he had paid £520 for the return flight and had approximately £3,000 cash with him. He suggested that he had access to funds through market trading. He said that he did not know the name of the man who drove him to the airport. Rizwan Majid had £2,200 cash on him and a military style first aid kit. Shakeel Ismail had approximately £3,000 cash on him and a first aid manual annotated with notes relating to injuries inflicted by bullet or blast.
15. I accept the assessment of the Security Services that the purpose of their trip to Pakistan was terrorism-related, probably for a training purpose in the case of Mukhtar Ibrahim Said.
16. AH's account is that he was approached by three men outside the Mosque after Friday prayers to ask him to take them to Heathrow on 11<sup>th</sup> December 2004. He agreed to do so. It was a normal commercial fare for which he was paid thirty to forty pounds. When they arrived outside his flat on the next day, it was obvious that they had too much luggage. Accordingly, he arranged for BC to send another car with a driver for no additional fare. He asked a friend, Anhar Hussain, to accompany him. The two cars drove by a normal route to Heathrow. He did not simply drop off his passenger and depart, but accompanied him and the other two men to the check-in point and saw them through it. In a comradely gesture, common amongst Muslims, he said good-bye to them by shaking their hand and/or hugging them. He then left with Anhar Hussain and drove back towards his flat in Glenparke Road, Forest Gate. When he reached the Kings Cross area, he noticed a Toyota in his rear view mirror and was suspicious because it followed the exact direction that he took. He stopped in Nile Street, Shoreditch. The Toyota also stopped. He and the driver looked each other in the eye. He went into a pizza restaurant thinking that the man may have been a criminal. He and Anhar went into various restaurants. They went back to the car and he took an A-Z, a few cassettes and a couple of papers away in a blue carrier bag.

There was nothing significant in the car. He and Anhar then walked to a Vietnamese restaurant where they used the toilet. It crossed his mind that the men following may have been the police, though he did not believe that they were. If they were, he was anxious to leave the car because he had no driving licence or insurance. Eventually, he and Anhar walked to their respective homes in Forest Gate and Upton.

17. Again, AH's account fits the redacted surveillance log disclosed to him. Mr Eadie submits that the open material raises grounds for suspicion: the implausibility of the account that, despite the use of two cars, AH agreed to take the men to Heathrow for the original fare of thirty to forty pounds; the fact that he delayed at the airport to see them off; and the implausibility of AH's reason for leaving the car in Nile Street and walking home. He submits that I can, on the open material alone, conclude that the Secretary of State's suspicions were reasonably founded. I decline to adopt this course. My task is not to determine whether the open material is capable founding the Secretary of State's suspicion. It is to determine whether, on all of the open and closed material properly considered, her decision is flawed. That requires me to make findings about AH's account which are based on the totality of that material. I am satisfied, to the criminal standard, that in very significant respects, AH has deliberately suppressed and lied about events before and after the Heathrow trip. I acknowledge, and have taken into account, the difficulty which he faces in giving a detailed account in ignorance of the closed material. I have anxiously asked myself whether there may be any other explanation for suppression and lying. I am satisfied that there is not. The totality of the material about these events satisfies me, at least on balance of probabilities, that AH was involved in conduct which gave assistance to individuals who were known or believed by him to be involved in terrorism-related activity. It follows that I am satisfied that, in relation to these events, the Secretary of State's decision was not flawed.
18. In the light of all of those conclusions, I am satisfied that the Secretary of State did have reasonable grounds to suspect that AH was involved in terrorism-related activity.

#### Article 5

19. Until 17<sup>th</sup> April 2008, the Control Order imposed the following obligations on AH: the wearing of a tag; a fourteen hour curfew between 6pm and 8am in a flat in Norwich, to which he was taken on 29<sup>th</sup> August 2006; daily reporting to the monitoring company; a prohibition on association or communication with any person notified to him by the Home Office as being subject to a Control Order (no such person was notified and this provision was deleted on 27<sup>th</sup> July 2007); a requirement to permit entry to police officers etc. to search his residence and remove any item; a prohibition on communications equipment other than a landline telephone; the requirement to attend only one mosque of his choosing (subsequently relaxed); a geographical boundary comprising the centre and inner suburbs of Norwich; a requirement to notify the Home Office of any intended departure from the United Kingdom and a prohibition from entering any port, without prior Home Office agreement; a prohibition on maintaining more than one bank account or on transferring money, documents or goods overseas without Home Office consent; the surrender of his passport; and a requirement to provide details of any employment to the Home Office within seven days of commencement. On 17<sup>th</sup> April 2008, the curfew was reduced to ten hours and the geographical restriction confined to the area bounded by the M25. In all other respects, the obligations remain the same.

20. AH has provided detailed evidence about the impact these constraints have had upon him. It is not necessary for me to set out his evidence in detail because, either the impact is self evident (for example the imposition of a curfew in a flat in a town in which he has never resided) or because they are not relevant to the Article 5 issue (the difficulty which his wife experienced in joining him from Iraq). The factors on which Mr Starmer relies to contend that the order deprived him of liberty are summarized in paragraph 41 of his closing skeleton argument. I will address each of them individually.
21. What does, and does not, amount to deprivation of liberty was fully analysed by the House of Lords in *Secretary of State for the Home Department v JJ* [2007] 3WLR 642 and applied in the linked cases of MB, AF and E. Although the language used by the majority was not identical, the following principles were clearly laid down:
- i) There is no “bright line” separating deprivation of liberty from restriction on liberty: per Lord Bingham paragraph 16 p652b, per Baroness Hale paragraph 58 p664g, per Lord Brown paragraph 91 p675f. In the language of the Strasbourg Court, borderline cases fall within the area of “pure opinion”: *Guzzardi v Italy* 3EHRR333 paragraph 93.
  - ii) The test is objective: the task of the Court is to assess the impact of the measures “on a person in the situation of the person subject to them”: per Lord Bingham paragraph 15 p651f, per Baroness Hale paragraph 63 p666d-e, and Lord Brown’s conclusion at paragraph 105 p678h-679a. Mr Starmer accepts that the same measures cannot amount to deprivation of liberty in one case, but do in another, simply because of the effect on the morale or mental health of the individual controlled person.
  - iii) Many relevant factors must be taken into account, but the starting point or “core element” is the length of the curfew: per Lord Brown at paragraph 108 p680b-c and, in the *Secretary of State for the Home Department v E* [2007] 3WLR 720, per Lord Bingham at paragraph 11 p725f-g and per Baroness Hale at paragraph 25 p730b.
  - iv) Social isolation is a significant factor, especially if it approaches solitary confinement during curfew periods: per Lord Bingham at paragraph 24 in *JJ* p656c and per Baroness Hale at paragraph 60.
22. In none of the cases considered in the House of Lords were the obligations imposed on and the “concrete situation” of the controlled persons identical to those of AH. The nearest is AF who was confined to the flat which he occupied with his father for fourteen hours where Ouseley J’s decision that he was deprived of liberty was overturned as an error of law. But even his case is not identical to AH’s, because he continued to live where he had lived before. AH was deliberately removed from his associates in London and taken to a city where he knew no one. I regard this case as very close to the borderline and well into the realm of “pure opinion”.
23. The starting point is the length of the curfew – at fourteen hours, not, by itself, tantamount to a deprivation of liberty. I now deal with the individual features identified by Mr Starmer, in the order in which he set them out:



- a) Prior detention. This is irrelevant. What has happened to an individual controlled person before the Control Order is made cannot help to determine whether or not it has deprived him of liberty.
- b) AH was required to live in a flat in a city which was wholly unfamiliar to him. He was subjected to a high degree of social isolation. This is a significant feature which points to deprivation of liberty rather than restriction on liberty.
- c) The Secretary of State's opposition to his wife's application to come to the United Kingdom to join him. This is irrelevant. The fact that she was unable to come to the United Kingdom was not due to the imposition of the Control Order even though that was relied on as a ground of refusal by the Secretary of State, but to that entirely separate decision. The fact that his wife did not live with him in the flat is, relevant, because it was a feature of his social isolation.
- d) Well intentioned advice by Norwich police officers to those who did visit him had the effect of deterring them from doing so. This is not the product of the Control Order, which imposed no restriction on those permitted to visit him, except for those who were the subject of a Control Order themselves. If it is relevant, which I doubt, its relevance is highly marginal.
- e) The fitting of the electronic tag. This is relevant, but not the impact which AH says it has had on his mental health – to some extent confirmed by the report of Dr Skogstad dated 15<sup>th</sup> April 2008.
- f) Prosecution for relatively minor breaches of the Order. The fact that the Order is enforceable by criminal sanctions is relevant (a person can be deprived of liberty even without the use of a lock and key), but not the fact that alleged breaches have resulted in prosecution and detention on remand for five weeks.
- g) Regular entry and search of the flat. This is relevant and of some significance.
- h) The claimed routine searching and handcuffing of AH. If it has occurred only by virtue of the Control Order, it is unlawful: the Control Order permits neither. If, as may be the case, it has occurred in the exercise of powers arising from the alleged breaches of the Order, it is irrelevant.
- i) AH's inability to study when and where he wants or to take up all of the offers of employment made to him. They do not amount to deprivation of liberty. At most, they engage Article 8.
- j) The impact on AH's mental health, as evidenced in Dr Skogstad's report. This is irrelevant, for the reasons already explained.

24. In my opinion, this case falls just on the restriction on liberty side of the line and so does not engage Article 5. It is a matter of “pure opinion” or judgement, which does not permit detailed elaboration. Taking all of the factors which I have identified, my opinion is that it falls just on that side of the line.
25. Mr Starmer concedes, as from 17<sup>th</sup> April 2008 or, perhaps, on the arrival of his wife in January 2008, the obligations imposed do not infringe Article 5.
26. Mr Starmer contends that Article 8 and 3 are engaged. I accept that Article 8 is engaged, but am satisfied, by a wide margin, that the requirements of national security, enshrined in law, justify the interference in personal life imposed by the obligations. On the facts, it is not remotely arguable that Article 3 is engaged or breached.

The necessity for the order and its continuance

27. Paying the appropriate degree of deference to the Secretary of State’s decision as to the need for a Control Order and the detailed obligations imposed (*The Secretary of State for the Home Department v MB* [2007] QB 415 paragraph 63-64), I am satisfied that the Secretary of State’s decision to make, renew and continue the Order are not flawed. Mr Starmer does not argue that, once the Article 5 point is determined, analysis of the individual obligations imposed leads to the conclusion that any of them are unnecessary or too restrictive. He makes the plainly sensible point that because the events which led to the making of the Control Order occurred over three years ago, it is likely that the risk posed by AH has diminished. By her decision to relax the curfew and geographical boundary, the Secretary of State has taken account of this submission; but nevertheless, she maintains that it is necessary that a Control Order should remain in place for the time being. I accept that she is entitled to reach that view and that her decision is not flawed.
28. For the reasons given, I uphold the making and renewal of the Control Order and dismiss the appeal against renewal and the Secretary of State’s refusal to abrogate it.