UNITED KINGDOM

THE TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL 2011: CONTROL ORDERS REDUX

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in June 2011 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: EUR 45/007/2011
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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INTRODUCTION

The Terrorism Prevention and Investigation Measures Bill was published by the UK government on 23 May 2011.[1] If enacted, the Bill will replace a system of supposedly temporary powers to order restrictions on the activities of individuals suspected of involvement in terrorism-related activity, that had been created by the Prevention of Terrorism Act 2005 (PTA), restrictions which were called under the PTA 'control orders'. The Terrorism Prevention and Investigation Measures Bill 2011 (TPIMB) contains a very similar but permanent regime of administratively-ordered restrictions on individuals, though the orders would now be renamed as "Terrorism Prevention and Investigation Measures". Because essential features of the regime under the TPIMB will be similar or the same as those under the PTA, the new administrative orders will be referred to throughout this document as 'TPIMB control orders' (though the government has tended to refer to them simply as 'TPIMs' or as 'Terrorism Prevention and Investigation Measures notices'.)

Amnesty International considers that the proposed TPIMB reforms to the control order system fundamentally fail to address the manner in which the control orders regime under the PTA falls short of international human rights standards.

The PTA was introduced hastily in 2005 as emergency legislation intended to replace the system of indefinite detention without charge or trial established by Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA).[2] The control orders regime created by the PTA was supposed to be temporary, but has been renewed annually by Parliament since the PTA became law over six years ago. Unlike the PTA, the powers under the TPIMB would be permanent and to date the government has taken the position that the powers need not be subject to annual renewal by Parliament which, at least in principle would allow for a degree of continued discussion about control orders.[3]

The TPIM Bill specifies a list of categories of restrictions that could be included in a TPIMB control 'measure' that is slightly narrower than, but on the whole similar to, that under the PTA. Particularly when such measures are applied in combination, TPIMB control orders could therefore still result in severe restrictions on the rights of individuals subject to the new regime, including the rights to liberty, privacy, association and movement. As with the PTA, the TPIM Bill would make breach of restrictions in a TPIMB control order, without reasonable excuse, a crime carrying a possible sentence of up to five years in prison.

The procedures for imposing TPIMB control orders, however, would continue to allow the government to rely on secret evidence to make determinations about the threat posed by an individual and thus the purported need for the application of controls on that person's movement, association and other rights.[4]

The administrative control orders regime that would be established under the TPIMB is largely a continuation and re-branding of the regime that existed under the PTA. Having regard to the history of this system (ATCSA detention, PTA control orders, TPIMB control measures), Amnesty International remains concerned that in purpose and effect, the TPIMB regime will essentially allow the government to bypass the ordinary criminal justice system wherever the government decides it is expedient to avoid the safeguards for liberty and fairness that the ordinary criminal justice system includes.

It is difficult to imagine circumstances in which the same acts a person is accused of as providing grounds for imposing a TPIMB control order, would not constitute a crime under UK law. While Amnesty International considers a number of the counter-terrorism offences as presently defined under UK law to be potentially overbroad in their application or formulated with insufficient precision,[5] a properly-framed set of counter-terrorism offences that were appropriately and effectively investigated and prosecuted in practice would eliminate the purported need to constantly re-invent administrative regimes that circumvent the ordinary criminal justice system. After all, most other countries have no system of control orders similar to that under the PTA or TPIMB but rely instead on their criminal justice system as the means of preventing individuals from preparing for or carrying out acts of terrorism. Unlike many other states, however, the UK has passed laws that preclude any use of intercept evidence in criminal trials because it wants to keep secret its methods and sources. It seems, then, that the supposed "necessity" for enacting the PTA/TPIMB administrative control order regimes, and allowing for the use of secret evidence in them, is in fact created by the UK's policy choice not to allow such evidence in criminal trials. Such a choice cannot then be relied upon by the UK as a ground for arguing that a control order regime constitutes necessary or proportionate limitations to human rights, since any "necessity" for avoiding or bypassing the ordinary criminal justice system is essentially of the UK's own making, and given that the criminal justice system is a less sweeping means for obtaining the objective of preventing terrorism the control order regimes cannot be proportionate because they are not the least restrictive means available to obtain the objective.

Amnesty International calls on Parliament to repeal the control orders regime under the PTA and to reject the refurbished system of controls provided for by the TPIMB. The UK government should instead commit itself to using its ordinary criminal justice powers to investigate those individuals reasonably suspected of involvement in terrorism-related activities and, where sufficient evidence exists, to prosecuting them in the ordinary criminal courts in conformity with international fair trial standards.

TERRORISM PREVENTION AND INVESTIGATION MEASURES

The introduction of the Terrorism Prevention and Investigation Measures Bill follows the outcome of the Home Office's review of key counter-terrorism and security powers. The stated intention of the review was "to restore the balance of civil liberties and counter-terrorism powers".[6] In announcing the review before Parliament in July 2010, the Home Secretary expressed her intention to "restore the ancient civil liberties that should be synonymous with

the name of our country"[7] and that she wanted "a counter-terrorism regime that is proportionate, focused and transparent"[8]. The January 2011 findings and recommendations of the review stated, inter alia, that any replacement to control orders should be less-intrusive, time-limited, more clearly and tightly defined and should place an emphasis on prosecution.[9] As recently as 16 June 2011, the Home Secretary, expressed the view that Terrorism Prevention and Investigation Measures were being proposed as "a new, less intrusive and more focused regime" than control orders.[10]

RANGE OF RESTRICTIONS AVAILABLE

The Bill would continue to allow for wide-ranging restrictions to be imposed by the Home Secretary on an individual suspected of terrorism-related activity. Schedule 1 of the Bill sets out these measures, most of which are similar to the measures permitted under the PTA. Some measures that the Home Secretary has described as the "most restrictive" in the PTA, however, are not included in the Bill.[11] In comparison with the PTA regime, which permits the Home Secretary to impose a relatively open-ended array of obligations and restrictions on an individual,[12] the list of possible Terrorism Prevention and Investigation Measures is shorter and exhaustive. Only those measures specified in Schedule 1 of the Bill can be imposed on an individual. The Home Secretary retains the power, however, to subject an individual to a range of different permutations of the measures—including to various levels of severity—depending on the "terrorism-related risk" that the Home Office assesses a particular individual to present.[13]

The measures that the proposed legislation would allow the Home Secretary to impose, singularly or in combination, on an individual suspected of terrorism-related activity include:

- *"Overnight residence measure":* a requirement that the individual remain overnight at a specified residence for a number of hours specified in the order, and/or that the individual resides at a residence provided by the Home Office in an "appropriate locality";

- *"Travel measure"*: a requirement not to leave the country, or a specified area within the country, or possess any travel documents;

- *"Exclusion measure":* restricting an individual from entering a specified area or place (i.e. a locations described by geography), or types of areas or places (such as internet cafes, i.e. locations described by an activity);

- *"Movement directions measure":* a requirement that an individual comply with directions given by a police constable in relation to his or her movements;

- *"Financial services measure":* restrictions on access to financial services, including limits on access to bank accounts, financial services and the possession of cash;

- *"Property measure":* prohibiting an individual's from transferring money and property without prior permission from the Home Secretary, and a requirement to disclose details of any assets or property (including temporary property, such as a rental car);

- *"Electronic communication device measure":* restrictions on the use of mobile telephones, memory storage or audiovisual recording devices, and internet, both by the individual concerned and others in the

same residence, including a spouse or partner and children;

- *"Association measure":* restrictions on association and communication with other individuals, including a prohibition on contacting certain named individuals or even persons of specified description (e.g. any individual living outside the UK), without prior permission;

- *"Work or studies measure":* restrictions on types of employment and academic studies and a requirement to notify and/or obtain permission to begin any employment or academic study;

- *"Reporting, Photography and Monitoring Measures":* a range of monitoring measures, including requiring the individual to report to a particular police station, to have his or her photograph taken, and to wear an electronic tag.

As with PTA control orders, a breach, without reasonable excuse, by an individual of a restriction imposed by a TPIMB control order would be a criminal offence subject to a maximum penalty of five years imprisonment. [14]

OVERNIGHT RESIDENCE MEASURES: NO MEANINGFUL CHANGE FROM THE PTA

The Government has argued that its powers under the TPIMB, unlike the PTA, would no longer permit the Home Secretary to require individuals to relocate to another part of the country.[15] The Home Office's memorandum outlining its view of the proposed legislation's compatibility with the United Kingdom's obligations under the European Convention on Human Rights (ECHR) states that this would prevent the Secretary of State from forcibly relocating an individual away from their home "in a way that is allowed by a control order".[16] However, "overnight residence measures" will allow the Home Secretary to require that individuals live in accommodation provided by the Home Office, either in their own locality, or, in cases where the Home Office considers the individual to have no residence or connection in their own locality, in "any" other locality that the Home Secretary considers "to be appropriate".[17] Amnesty International accordingly remains concerned that the government's representation that the current Bill is more limited in this regard may not be accurate, and that it may ultimately in practice be used to force individuals to relocate to another part of the country, without respecting the fair trial rights of the individual.

The "overnight residence" measures provided for in the TPIMB will also replace the up-to-16-hour curfews provided for under the PTA.[18] The Bill, however, does not state how many hours an individual would be required to stay "overnight" at a specified residence. The explanatory notes accompanying the Bill state that, although "the term 'overnight' is not defined in the Bill, [...] as a matter of public law the period would need to fall between the hours which a reasonable person would consider 'overnight'," and as such "contrasts with the position under control orders, where current case law allows for the imposition of a curfew of up to 16 hours' duration per day."[19] Whatever the details, it seems clear this provision will allow the government to order a person to remain within the four walls of their home or another place every night for periods of at least eight hours at a time, with a criminal sentence of imprisonment of up to five years as a penalty for leaving that building during that period. Amnesty International considers a person in such a situation to have been effectively deprived of their liberty during the periods specified in the order, and as with the PTA control order scheme, opposes any regime that allows for the imposition of such measures through procedures that bypass or otherwise fail to meet the fair trial guarantees of the ordinary

criminal justice system.

OTHER MEASURES

The TPIMB does not include in the list of possible measures some of the restrictions on association and communication with others that characterized the control orders regime under the PTA. Whilst a number of individuals subject to control orders were prohibited from accessing the internet or using mobile telephones altogether, the Bill would oblige the Home Office to permit the individual to possess and use at least one fixed line telephone, one computer with fixed-line internet access, and a mobile telephone without internet access. This limited usage is subject to a number of conditions, however, including monitoring requirements, a requirement that the devices are supplied or modified by the Home Office, and that they can only be used under other conditions specified by the Home Secretary.

CONDITIONS AND SAFEGUARDS

The UK government has claimed that the replacement of control orders with Terrorism Prevention and Investigation Measures will be less restrictive of rights and have more safeguards. Clause 3 of the Bill sets out five conditions which must be met in order for the Home Secretary to impose a Terrorism Prevention and Investigation Measures notice.[20] The Government has stated that one of the key features distinguishing the Terrorism Prevention and Investigation Measures system from control orders under the PTA is a change in threshold for one of these conditions to "*reasonable belief* that an individual is or has been involved in terrorism-related activity" (under the TPIMB) from "*reasonable suspicion of* involvement in terrorism-related activity" (under the PTA). However, Amnesty International remains concerned that in practical application, the standard under the TPIMB would be little different than that under the PTA. In essence, the government would continue to be able to impose highly restrictive administrative measures, including in some cases deprivation of liberty, without having to prove that the person more likely than not (i.e. the ordinary civil law standard of proof "on the balance of probabilities"), let alone proving beyond reasonable doubt (i.e. the criminal standard), that the person is preparing for or contributing to the carrying out of an attack, or otherwise committing a terrorism offence.

Another difference between the PTA and the proposed TPIMB system is that rather than the potentially indefinite application (although subject to annual renewal) of PTA control orders, a TPIMB control order may only be imposed for a maximum of two years (i.e. initially for one year, and renewable for a further year if the Home Secretary reasonably believes the statutory conditions for their imposition to still be met). After that two-year period, a further notice can only be made if the Home Secretary considers there to have been new 'terrorism-related activity' since the previous notice was made. Amnesty International is concerned, however, that this formal change will make little difference to the operation of the control order scheme in practice, especially given the vague and overbroadly-drawn definitions relevant to 'terrorism-related activity' in UK law.[21] It begs the further question as to why the government would not seek to prosecute an individual on the basis of evidence of new 'terrorism-related activity'.

INADEQUATE JUDICIAL SCRUTINY

Apart from these variations, much of the process surrounding Terrorism Prevention and Investigations Measures remains similar to or the same as that under the PTA. There is no enhanced judicial scrutiny. As with control orders, the Secretary of State must obtain

permission of the relevant court[22] before measures are imposed on an individual, but this process provides an insufficient safeguard to protect the rights of those subject to Terrorism Prevention and Investigation Measures. This court hearing can be held without notifying the individual concerned or providing him or her with an opportunity to make representations, and the court is obliged to give permission for the order unless the decision of the Secretary of State is "*obviously flawed*". Both control orders under the PTA and Terrorism Prevention and Investigation Measures can be imposed without permission of the court if urgency so requires, although this must be reviewed by the Court subsequently; such appeal hearings, in practice, have occurred after a considerable passage of time, during which the individual is subject to the administrative measures and restrictions.

SECRECY AND LACK OF PROCEDURAL FAIRNESS

The appeal process for a TPIMB control order is fundamentally the same as that for a control order and retains the deeply flawed procedures for the use of secret evidence and closed hearings which Amnesty International has opposed since their initial introduction in national security deportation cases before the Special Immigration Appeals Commission.[23] Neither the individuals subject to a TPIMB control order nor their lawyers of choice are allowed to see the secret material on which the government's allegations are based and which is considered by the court in closed sessions. Amnesty International regards the system of court-appointed Special Advocates[24]—lawyers appointed to represent the interests of the individual subject to a control order, but not permitted to consult the individual or his lawyer about the secret material—to be insufficient to mitigate the unfairness of the process, even with the current practice of providing the 'gist' of the secret material to the individual.[25]

The international treaties that recognise and protect the human rights infringed by the PTA and TPIMB control order schemes, require among other things that any limitations of those rights be restricted to those measures that are demonstrably necessary and proportionate to the objective for which the limitation is imposed. As was argued earlier, it seems the main reason cited by the UK for establishing PTA/TPIMB control order proceedings that allow use of secret evidence, require a far lower standard of proof than would ordinarily be the case in civil or criminal proceedings, and otherwise fall short of ordinary fair trial guarantees, is the desire to protect intelligence gathering methodologies or sources. However, the fact is that many other states have developed other less drastic means of seeking those objectives while relying on the ordinary criminal justice system, rather than such control order schemes, to prevent individuals from preparing or carrying out attacks. This demonstrates that a control order scheme that allows for use of secret evidence and otherwise fails to respect ordinary fair trial rights in procedures for the imposition of measures that can, among other things, result in the deprivation of liberty of an individual, is not a demonstrably necessary or proportionate limitation to human rights, and so its continuance would be inconsistent with the UK's international human rights obligations.

CONCLUSION

Amnesty International does not consider the tweaks to the control order regime that would be made by the proposed Terrorism Prevention and Investigation Measures Act (as the TPIMB would be known if it were to become law) to be sufficient to end the inconsistency of the regime with the UK's international human rights obligations. The changes to the system—regardless of whether it is called the Prevention of Terrorism Act or the Terrorism Prevention and Investigation Measures Act—fail to address the underlying problems in the system,

especially because it would continue: to allow for individuals to be deprived of their liberty on the basis of administrative orders; to allow the Home Secretary to impose severe restrictions on individuals' rights such as liberty, freedom of movement, association and privacy, while relying on secret evidence which is not disclosed to the affected individual or the lawyer of his or her choice; and to allow the government to choose, essentially at will, to bypass the ordinary criminal justice system and the guarantees of fair trial that that system contains.

RECOMMENDATIONS

Amnesty International urges Members of Parliament and peers to:

- Repeal the Prevention of Terrorism Act 2005;
- Reject the new administrative or "civil preventative" measures proposed by the Terrorism Prevention and Investigation Measures Bill, which essentially amount to the making permanent of the control order regime with a few relatively minor tweaks;
- Call on the Home Secretary to commit instead to fully investigating those people reasonably suspected of involvement in terrorism-related activities, and where sufficient evidence exists, to prosecute them in the ordinary criminal courts, in conformity with international fair trial standards.

Amnesty International calls on the UK government to:

- Repeal the Prevention of Terrorism Act 2005;
- Withdraw the proposed Terrorism Prevention and Investigation Measures Bill;
- Commit to fully investigating those people reasonably suspected of involvement in terrorism-related activities, and where sufficient evidence exists to prosecute them in the ordinary criminal courts, in conformity with international fair trial standards;
- Refrain from bypassing the ordinary criminal justice system , including by seeking the enactment of secretive administrative procedures for imposing restrictions on individuals' rights of liberty, freedom of movement, association and privacy.
- ensure access to an effective remedy for anyone who alleges to have been subjected to human rights violations as a result of a control order, and ensure that anyone established as having been subject to such violations receives full reparation.

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[1] The Terrorism Prevention and Investigation Measures Bill was first presented to Parliament ('first reading') on 23 May 2011, at which time there was no debate, and was subject to parliamentary debate ('second reading') on 7 June 2011. The Bill, in all successive versions, can be found here: http://services.parliament.uk/bills/2010-11/terrorismpreventionandinvestigationmeasures.html.

[2] Part IV of the ATCSA allowed a government minister to order the indefinite detention without charge or trial of any foreign national believed to be an "international terrorist" and therefore a "threat to national security". In 2005, the Appellate Committee of the House of Lords (then the UK's highest court) declared the system of indefinite internment of foreign nationals under Part IV of the ATCSA to be unjustifiably discriminatory, and therefore incompatible with their right to liberty guaranteed by the European Convention of Human Rights (incorporated by the Human Rights Act 1998), *A & Others v Secretary of State for the Home Department* [2004] UKHL 56, http://www.bailii.org/uk/cases/UKHL/2004/56.html.

[3] See Government Response to the Eighth Report for them Joint Committee on Human Rights Session 2010-11 HL Paper 106, HC 838, "Renewal of Control Orders Legislation", 6 June 2011.

[4] For further information on Amnesty International's concerns regarding Part IV of the ATCSA and the PTA, see *UK: Human rights: a broken promise,* AI Index: EUR 45/004/2006, 23 February 2006, *United Kingdom: Briefing to the Human Rights Committee*, AI Index: EUR 45/011/2008, June 2008, *United Kingdom: Five years on: Time to end the control orders regime,* AI Index: EUR 45/012/2010, August 2010; and *United Kingdom: Submission for the review of counter-terrorism and security powers*, AI Index: EUR 45/015/2010, September 2010. Amnesty International has long argued for the abolishment of the control orders regime, which places severe restrictions on, and can violate, individuals' rights to liberty, freedom of movement, expression, association, and privacy and have been used by the UK government as an alternative to prosecution or deportation of individuals suspected of involvement in terrorism-related activity, but who, in most cases, have not been charged with any criminal offence.
[5] Amnesty International has had longstanding serious concerns about the definition of terrorism in UK domestic law, particularly as set out in the Terrorism Act 2000 and Terrorism Act 2006. The definition of "terrorism" and "terrorism-related activity", for instance categories of "giving encouragement" or "support and assistance", are so broad and vague that it infringes the principle of legal certainty, exposing people to harsh sanctions such as the imposition of a control order, for a potentially wide variety of activity and conduct. Amnesty International has expressed concern about the definition of "terrorism" in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, *UK: Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000, published in April 2000. For examples from other organisations see: Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, London, April 2006; and Human Rights Watch, *Universal Periodic Review of the United Kingdom: Human Rights Watch's Submission to the Human Rights Council*, April 7, 2008.
[6] Home Office press release, Rapid review of counter-terrorism power, 13 Jul 2010, http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers
[7] House of Commons HANSARD, 13 July 2010 : Column 798
[8] http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers
[9] Home Office, "Review findings and recommendations," 26 January 2011, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary, Paragraphs 23-26. It must be noted that despite the commitment to replace control orders with a new, less-intrusive measure, the use of the policy continues. In the last three-monthly statement required by Parliament, the Home Secretary confirmed that as of 11 June 2011, 12 control orders were in force, and that between 11 March and 10 June, two new control orders had been served, two existing control orders renewed, and one further control order which had been revoked by a court was replaced by a fresh control order. Home Secretary, Control Powers (11 March - 10 June), Written Ministerial Statement, House of Commons, 16 June 2011, http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/110616.htm
[10] Home Secretary, Control Powers (11 March - 10 June), Written Ministerial Statement, House of Commons, 16 June 2011, http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/110616.htm
[11] See http://services.parliament.uk/bills/2010-11/terrorismpreventionandinvestigationmeasures.html
[12] The PTA only offers a non-exhaustive list of possible restrictions, requirements and obligations. See PTA, Section 1 (3)-(8).
[13] See Explanatory Notes to the Terrorism Prevention and Investigation Measures Bill, Page 7, Paragraph 39: "The Secretary of State may impose any or all of the measures that he or she reasonably considers necessary, for purposes connected with prevention got restricting the individual's involvement in terrorism related activity".
[14] Terrorism Prevention and Investigation Measures Bill, Section 21.
[15] The government has stated in relation to the TPIM Bill, "relocation to another part of the country without consent will be scrapped" (See Home Office, http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill/, 23 May 2011), which follows the recommendations of the Home Office review of counter-terrorism and security powers, (see "Review findings and recommendations," 26 January 2011, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary, Paragraphs 23 and Report by Lord Macdonald of River Glaven QC, 26 January 2011, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary, Paragraphs 22-24). Despite this commitment, the Home Office has continued to modify existing control orders in force to require the relocation of individuals since the publication of the review of counter-terrorism and security powers, and its stated commitment to repeal the PTA. See CD v Secretary of State for the Home Department [2011] EWHC 1273 (Admin), 20 May

2011, http://www.bailii.org/ew/cases/EWHC/Admin/2011/1273.html. The government has also made clear its policy position that "[u]ntil the new system of TPIMs is implemented [...] all the obligations that can be imposed under the current control orders system remain available for use" (Government Response to the Eighth Report for them Joint Committee on Human Rights Session 2010-11 HL Paper 106, HC 838, "Renewal of Control Orders Legislation", 6 June 2011).

[16] "Terrorism Prevention and Investigation Measure (TPIM) Bill," *ECHR Memorandum by the Home Office,* http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill-docs/echr-memorandum?view=Binary, paragraph 17, fn. 2.

[17] Terrorism Prevention and Investigation Measures Bill, Schedule 1, Part 1, Paragraph 1 and Explanatory Notes to the Terrorism Prevention and Investigation Measures Bill, Pages 7-8, Paragraphs 40-43.

[18] The Appellate Committee of the House of Lords (the Law Lords) confirmed in an October 2007 judgment (Secretary of State for the Home Department v JJ & Ors [2007] UKHL 45 (31 October 2007) http://www.bailii.org/uk/cases/UKHL/2007/45.html), by a majority of three to two, that the 18-hour curfew which the Home Secretary had attempted to impose on one group of individuals (those whose cases were considered under the name JJ and others) amounted to a deprivation of liberty, and as such went beyond what the law authorized the Home Secretary to do. In this case, the Law Lords held that the conditions imposed on these individuals – who had not been charged with any criminal offence – were in some ways more severe than those under which a prisoner convicted of a criminal offence would be held in an open prison. The Law Lords, however, were unanimous in holding that a 12-hour curfew did not amount to a deprivation of liberty within the meaning of Article 5 of the ECHR. Though several of the Lords expressed reluctance to suggest a specific length of time as representing the threshold for a "deprivation of liberty", Lord Brown suggested that 16 hours a day might mark a boundary between a restriction on "liberty of movement" (within the meaning of Article 2 of the ECHR) and a "deprivation of liberty" (within the meaning of Article 5 ECHR) (see paragraphs 103-109). In June 2010, the UK Supreme Court (formerly the Appellate Committee of the House of Lords) issued its judgment (Secretary of State for the Home Department v AP [2010] UKSC 24 (16 June 2010) http://www.bailii.org/uk/cases/UKSC/2010/24.html) in the case of an Ethiopian national known as AP, who had been subject to a control order between January 2008 and July 2009, and who remains subject to deportation proceedings on national security grounds. The Supreme Court found that the Home Office's modification of AP's control order between April 2008 and July 2009, which required him to reside in a city some 150 miles away from his family in London, when taken together with the 16-hour curfew restriction and the resultant social isolation, constituted a deprivation of AP's right to liberty. The effect of this judgment was two-fold. Firstly, in delivering the leading judgment, Lord Brown clarified that the earlier suggested 16 hours curfew length was not the "sole criterion of the loss of liberty" and that other criteria such as "type, duration and effects" of control orders were of relevance (see paragraph 3). Secondly, in his concurring judgment Sir John Dyson SCJ stated that the onus now fell on the Home Office to consider and evaluate what the likely effects of the creation or modification of a control order would be, or the authorities would run the risk of a court finding that the various restrictions (including, but not limited to a curfew), when taken together, amounted to a deprivation of liberty (paragraph 31).

[19] Explanatory Notes to the Terrorism Prevention and Investigation Measures Bill, Page 7, Paragraph 40. The Home Office's explanatory notes refer to what it perceives to be a 16-hour maximum, with reference to Secretary of State for the Home Department v JJ & Ors [2007] UKHL 45 (31 October 2007) and Secretary of State for the Home Department v AP [2010] UKSC 24 (16 June 2010). See detailed note above for a clear statement from the courts that there is no simple support in case law for such a 16-hour 'rule'. The Home Office's ECHR memorandum, also states that "under a TPIM [Terrorism Prevention and Investigation Measures] notice, an overnight residence requirement will fall well short of the 'grey area' that has been identified in the control orders context – a confinement of between 14 and 16 hours – where consideration of the other restrictions imposed on an individual are to be taken into account (and indeed will be key to) assessing whether there is a deprivation of liberty". See "Terrorism Prevention and Investigation Measure (TPIM) Bill," *ECHR Memorandum by the Home Office,* http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill-docs/echr-memorandum?view=Binary, paragraph 23.

[20] At the time of this submission, Conditions A to E are: (A) the Home Secretary reasonably believes "that the individual is, or has been, involved in terrorism-related activity"; (B) "some or all of the relevant activity is new terrorism-related activity"; (C) the Home Secretary considers it reasonably necessary for public protection to impose Terrorism Prevention and Investigation Measures on the individual; (D) the Home Secretary considers it reasonably necessary for preventing or restricting

terrorism-related activity to impose Terrorism Prevention and Investigation Measures on the individual; and (E) the Home Secretary obtains Court permission to take such action, except where he or she "reasonably considers that the urgency of the case requires [the measures] to be imposed without obtaining such permission" (Terrorism Prevention and Investigation Measures Bill, Section 3 (1)-(5)).

[21] See note 5 above for further detail on Amnesty International's concerns about the overly broad and vague definitions of terrorism in UK domestic law.

[22] The High Court of England and Wales; the Outer House of the Court of Sessions; or the High Court in Northern Ireland; for notices relating to England and Wales, Scotland and Northern Ireland respectively.

[23] For further information on Amnesty International's concerns regarding the operation of the special advocates system under Part IV of the ATCSA and the PTA, see *UK: Human rights: a broken promise,* AI Index: EUR 45/004/2006, 23 February 2006, sections 2.5.1 and 2.7; *United Kingdom: Briefing to the Human Rights Committee*, AI Index: EUR 45/011/2008, June 2008; *United Kingdom: Five years on: Time to end the control orders regime,* AI Index: EUR 45/012/2010, August 2010, pages 8 & 11-13; and *United Kingdom: Submission for the review of counter-terrorism and security powers*, AI Index: EUR 45/015/2010, September 2010.

[24] The special advocate is allowed to attend the closed hearings from which the controlled person and his lawyers are excluded; is allowed to see the secret evidence relied on by the Secretary of State; and is allowed to cross-examine witnesses who give evidence for the Secretary of State in the course of closed hearings. However, the special advocate is not allowed to take instructions from the controlled person after he has seen the closed evidence (subject to a limited exception which is, to the best of Amnesty International's knowledge, rarely if ever used in practice). The ability of the special advocate to ensure that the controlled person is able to effectively defend him or herself against the allegations on which the control order is based, necessary for a fair hearing, is therefore severely limited. Amnesty International considers, therefore, that the special advocate procedure is not, and cannot be, an effective substitute for a legal counsel of choice in proceedings such as the control order proceedings. The presence of even the best-intentioned, highly skilled, and most diligent special advocate cannot mitigate the fundamental unfairness of the use of secret hearings and secret evidence, which are fundamentally invidious to the rule of law and the fairness and transparency that human rights law requires when the individual faces the real risk of what are essentially penal sanctions. For further information see House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* (Seventh report of session 2004-5), 3 April 2005, http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf, paragraphs 52-55. For detailed information regarding the "one-way" communication that can occur between the individual and/or his lawyer and the special advocate (but not vice versa) once the special advocate has been served the secret material, see TSol, *A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO): Open Manual*, November 2006, http://www.attorneygeneral.gov.uk/SiteCollectionDocuments/Special_Advocates.pdf, paragraphs 101-107.

[25] In June 2009, the Law Lords ruled in the case of *AF and others* that the "controlled person must be given sufficient information about the allegations against him to give effective instructions to the special advocate" and that this was the bottom line or core irreducible minimum that "could not be shifted" (*Secretary of State v AF & another & one other action* [2009] UKHL 28, paragraph 81). While partially addressing some shortcomings of the control order regime, Amnesty International considers that the Law Lords' ruling in the case of *AF and others* fell short of fully restoring the right to a fair trial for individuals subject to control orders. The secret material disclosed in some cases could be a minimal gist of the allegations, still limiting the opportunity of the individual to mount an effective challenge against the allegations levelled at him. Following *AF and others* the principle of "gisting" or providing the "core irreducible minimum" of disclosure has been applied grudgingly and incrementally by the government, and often not without direction by the judiciary, in control order and other national security cases where secret material procedures are used.

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