



House of Lords
House of Commons
Joint Committee on Human
Rights

**Counter–Terrorism Policy
and Human Rights
(Sixteenth Report): Annual
Renewal of Control Orders
Legislation 2010**

Ninth Report of Session 2009–10

*Report, together with formal minutes, and oral
and written evidence*

*Ordered by The House of Commons to be printed 23 February
2010*

Ordered by The House of Lords to be printed 23 February 2010

**HL Paper 64
HC 395**

Published on Friday 26 February 2010
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 73 (Lords)/151 (Commons) (Statutory Instruments (Joint Committee)).

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is three from each House.

Current membership

HOUSE OF LORDS

Lord Bowness
Lord Dubs
Baroness Falkner of Margravine
Lord Morris of Handsworth OJ
The Earl of Onslow
Baroness Prashar

HOUSE OF COMMONS

Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Ms Fiona MacTaggart (Labour, *Slough*)
Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Mr Edward Timpson MP (Conservative, *Crewe & Nantwich*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Chloe Mawson (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), John Porter (Committee Assistant), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk

Contents

Report	<i>Page</i>
Summary	3
Annual Renewal of Control Orders Legislation 2010	5
Introduction	5
Parliamentary scrutiny	6
Events since the last annual renewal	8
The Government's case for renewal	11
The Explanatory Memorandum	12
The Home Office Memorandum	12
The Carlile Report	13
The impact of control orders on controlees, their families and communities	14
Basic fairness of control orders	16
Disclosure of the essence of the case against	17
Continued Limitations on Special Advocates	18
International comparisons	24
Views of international monitoring bodies	25
Assessment of the fairness of the system	26
Taking the special advocates seriously	29
The cost of control orders	31
Conclusion	33
Conclusions and recommendations	35
Formal Minutes	39
Witnesses	40
List of Written Evidence	40
Written Evidence	41
List of Reports from the Committee during the current Parliament	67

Summary

On 1 February 2010 the Home Secretary laid before both Houses the draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2010. This provides for the continuation of the control order regime from 11 March 2010 until 10 March 2011. This is the fifth renewal order extending the life of the control order regime.

Parliament's opportunities to thoroughly scrutinise these powers are limited. First, parliamentarians have not been supplied with all the information they need. We call on the Government to make public at least a summary of the responses of the consultees whose views are sought by the Secretary of State before the annual renewal order is laid. Secondly, the affirmative resolution procedure limits detailed scrutiny. We recommend that extraordinary counter-terrorism powers, such as control orders, should be made subject to a proper sunset clause, requiring them to be renewed by primary legislation. Thirdly, we are concerned about the Government's post-legislative assessment of the Prevention of Terrorism Act 2005. We believe that it has mischaracterised the important judgments of *MB* and *AF* by suggesting that the House of Lords has "confirmed" that the control orders regime operates in a manner fully compliant with the ECHR. That is not a fair or accurate characterisation of the effect of the House of Lords judgments.

We have serious concerns about the control order system. Evidence shows the devastating impact of control orders on the subject of the orders, their families and their communities. In addition detailed information is now available about the cost of control orders which raises questions about whether the cost the system is out of all proportion to the supposed public benefit. We find it hard to believe that the annual cost of surveillance of the small number of individuals subject to control orders would exceed the amount currently being paid to lawyers in the ongoing litigation about control orders. Finally, we believe that because the Government has ignored our previous recommendations for reform, the system gives rise to unnecessary breaches of individuals' rights to liberty and due process.

We have previously recommended that the gist of the allegations against a controlled person should be disclosed to that person. The Government resisted this. The decision in *AF* requires separate consideration be given in each case to whether a sufficient gist of the allegations and evidence has been given to the controlled person in the open part of the proceedings to enable them to give effective instructions to their special advocate. Although the Government had said that it would be reviewing the material in each control order in the light of *AF*, in practice the Secretary of State has taken a "minimalist" approach to the decision. We recommend a more thoroughgoing and proactive review of the material on which the Government relies to sustain existing control orders with a view to deciding in each case whether more disclosure is required.

We have previously heard evidence from the special advocates about the limitations on their ability to perform their function of providing controlees with the "substantial measure of procedural justice" required by Article 6 ECHR. Notwithstanding the rule change which permits special advocates to adduce evidence, it remains the case that they continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Services. This gives rise to a serious inequality of arms. In addition there is a significant problem of late disclosure of closed

material by the Secretary of State to the special advocates. This leaves the special advocates with insufficient time to scrutinise the closed material and to challenge the Government's reasons for the material being closed. This creates the risk of serious miscarriages of justice.

In previous reports we have drawn attention to the unfairness caused by the rule prohibiting communication between special advocates and the controlled person or his representative following receipt of the closed material. We believe that so long as the rules remain unchanged, the inability of special advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person. We conclude that the special advocate system has not proved capable of ensuring the substantial measure of procedural justice required. In short, it cannot be operated fairly without fundamental reforms which the Government has so far resisted.

Our conclusion is that the current control order regime is no longer sustainable. A heavy onus rests on the Government to explain to Parliament why alternatives, such as intensive surveillance of the very small number of suspects currently subject to a control order, and more vigorous pursuit of the possibility of prosecution, are not now to be preferred.

Annual Renewal of Control Orders Legislation 2010

Introduction

1. On 1 February 2010 the Home Secretary laid before both Houses the draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2010,¹ along with an Explanatory Memorandum (“EM”).
2. The draft Order provides for the continuation of the control order regime contained in sections 1 to 9 of the Prevention of Terrorism Act 2005 (“the PTA 2005”) for another year from 11 March 2010 (when those provisions would otherwise expire) until the end of 10 March 2011.
3. The EM explains that “the powers are needed to ensure that a control order can continue to be made against any individual where the Secretary of State has reasonable grounds for suspecting that individual is or has been involved in terrorism-related activity and it is necessary to impose obligations on that individual for purposes connected with protecting members of the public from a risk of terrorism.”²
4. The Home Secretary has made a statement of human rights compatibility in respect of the draft Order: “In my view the provisions of the Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order are compatible with the Convention rights.”³
5. The draft Order is expected to be debated in the House of Commons on 1 March 2010 and in the House of Lords on 3 March 2010.
6. This is the fifth renewal order extending the life of the control order regime.⁴ Our predecessor Committee reported on the 2005 Bill which introduced the control order regime,⁵ and we have reported on all four of the previous annual renewals.⁶ In our reports on the Counter Terrorism Bill we recommended a number of amendments to the control

1 The renewal order is made under s. 13(2)(c) of the Prevention of Terrorism Act 2005 which empowers the Secretary of State, by order made by statutory instrument, to provide that sections 1 to 9 of that Act are not to expire but are to continue in force for a period up to a year. Section 13(4) of the Act requires the order to be laid in draft for approval by resolution of each House of Parliament.

2 EM para. 2.1.

3 EM para. 6.1.

4 The PTA 2005 received Royal Assent on 11 March 2005. Sections 1 to 9 were previously renewed by SI 2006/512, SI 2007/706, SI 2008/559 and SI 2009/554.

5 Ninth Report of 2004-05, *Prevention of Terrorism Bill: Preliminary Report*, HL Paper 61, HC 389 and Tenth Report of 2004-05, *Prevention of Terrorism Bill*, HL Paper 68, HC 334.

6 Twelfth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122, HC 915 (hereafter “JCHR’s First Report on Control Order Renewal”); Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60, HC 365 (hereafter “JCHR’s Second Report on Control Order Renewal”); Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57, HC 356 (hereafter “JCHR’s Third Report on Control Order Renewal”); Fifth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Order Legislation 2009*, HL Paper 37, HC 282 (hereafter “JCHR’s Fourth Report on Control Order Renewal”).

orders regime which we considered necessary in order to render it human rights compatible.⁷ Some of our recommended amendments were extensively debated when the Counter Terrorism Bill was in Committee in the Lords,⁸ and some were voted on at Report stage and narrowly defeated.

7. As in all our reports on counter-terrorism policy and human rights, we approach the question of the renewal of control orders in agreement with the Government about the importance of the positive obligation imposed on the State by human rights law, to take effective steps to protect the public from the real threat of terrorism. In our earlier reports, we have consistently maintained that a regime of less restrictive civil restriction orders with proper due process guarantees would be capable, in principle, of being compatible with both the right to liberty and the right to due process. However, we have consistently raised a number of human rights concerns about the control orders legislation that we have got and the way it operates in practice.⁹

8. In this report we consider whether the system of control orders is sustainable in the light of significant developments since last year's renewal, including important court judgments and the availability of more detailed information about the cost of control orders. We took evidence from the Minister, the Rt Hon David Hanson MP, on this subject amongst others, on 1 December 2009¹⁰ and from three special advocates¹¹ and two solicitors¹² with experience of representing controlees on 3 February 2010. We invited the Minister to give us oral evidence on that date as well but he was not available, and we draw attention to the fact that, in the time available, the Government has not had an opportunity to respond to the oral evidence we took.

Parliamentary scrutiny

9. We have often commented in the past on the shortcomings in the arrangements for parliamentary scrutiny of the renewal of control orders.¹³ The Government has made some improvements in response to these criticisms and we have therefore considered, in the light of those changes, whether the arrangements for scrutiny are now adequate.

10. The annual report of the statutory reviewer of the PTA 2005, Lord Carlile of Berriew QC, was also published on 1 February 2010, at the same time as the draft Order and Explanatory Memorandum. **We welcome the timely publication of the reviewer's report, in accordance with our previous recommendation that such reports should be published at least a month before the debate in Parliament to which they are relevant,**

7 Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): The Counter Terrorism Bill*, paras 39-73; Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): The Counter Terrorism Bill*, paras 67-114; Thirtieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): The Counter Terrorism Bill*, paras 128-132.

8 HL Deb, 21 October 2008, cols 1048-1105; HL Deb, 11 November 2008, cols 576-603.

9 See Fourth Report on Control Order Renewal, above, at para. 9 for a summary of the human rights concerns that we have consistently raised.

10 Uncorrected transcript available at: <http://www.publications.parliament.uk/pa/jtselect/jtrights/uc111-i/11102.htm>

11 Ev 6.

12 Ev 1.

13 See e.g. Third Report on Control Order Renewal, above n. 6, paras 19-34; Second Report on Control Order Renewal, above n.6, paras 12-17; First Report on Control Order Renewal, above n. 6, paras 13-14.

in order to facilitate proper parliamentary scrutiny. We consider Lord Carlile’s report in detail below.

11. Along with Lord Carlile, we have also called for the Secretary of State’s quarterly reports to Parliament to provide more detail and to be less in the form of a statistical bulletin. We welcome the more informative quarterly reports on control orders that the Secretary of State has made to Parliament, although we note that these still fall short of the equivalent reports made by the relevant minister to the Canadian Parliament.

12. While we welcome these significant improvements in the arrangements for parliamentary scrutiny, there are two respects in which in our view there is still considerable room for improvement. We note that section 13(3) of the PTA 2005 requires the Secretary of State to consult not only the statutory reviewer of the Act but also the Intelligence Services Commissioner and the Director-General of the Security Service before laying a renewal order. The Explanatory Memorandum records the fact that the Secretary of State has consulted all the necessary consultees but merely states that they were “content with the proposal to renew the Act.”¹⁴ Lord Carlile’s reasons are explained in full in his report, but as far as the Intelligence Services Commissioner and the Director-General of the Security Service are concerned, no further explanation or even summary of their reasons is given.

13. We would have been assisted in our scrutiny of the justification for renewal of the control orders regime if we had known more about the responses of the Intelligence Services Commissioner and the Director-General of the Security Services to the Secretary of State’s consultation. We would be surprised and concerned if the Director-General had not conducted a fundamental review of the costs and benefits of control orders following the significant court judgments in the last year, and in our view an explanation of that thinking should be made available to Parliament. Given the considerable controversy which exists about the continued justification for control orders, we consider that Parliament is entitled to more than an assertion that they are “content” with the proposal to renew. We obviously do not expect the disclosure of sensitive information but between bare assertion and damaging disclosure there is still considerable room for sensible explanation. **We recommend that in future, where the Secretary of State is required by statute to consult certain officers before renewing a counter-terrorism power, at least a summary of the consultee’s response be published in order to facilitate parliamentary scrutiny of the justification for the renewal.**

14. We have commented previously on the importance of proper “sunset clauses” in legislation providing the Government with powers which Parliament recognises as extraordinary, the justification for which is in need of frequent parliamentary review. Control orders clearly qualify as an example of such extraordinary powers. A proper sunset clause is one which provides for statutory provisions to lapse altogether after a specified period, requiring the Government to bring forward new primary legislation to renew the powers. The mechanism of annual renewal by an affirmative resolution SI, used in the PTA 2005, whilst providing an opportunity for parliamentary scrutiny of the justification for renewal, is much less of a safeguard. It is very rare for the House of Lords to move fatal amendments to Government motions to approve affirmative resolution

14 EM para. 8.1.

statutory instruments.¹⁵ The Government has argued that this should be a strong constitutional convention. There is also in practice a stronger onus on the Government to justify powers which it proposes to take in primary legislation. The annual renewal debates on control orders are poorly attended, despite the significance of the issues at stake. **We recommend that, in future, counter-terrorism powers as extraordinary a departure from principle as those contained in sections 1-9 PTA 2005 be made subject to a proper sunset clause, requiring them to be renewed by primary legislation.**

Events since the last annual renewal

15. In our last report on the annual renewal of the control orders regime, in February 2009, we pointed out to the Government that the recent decision of the Grand Chamber of the European Court of Human Rights in *A v UK*¹⁶ left no room for doubt that basic fairness requires that the controlled person be provided with the gist of the closed material which supports the allegations made against them, otherwise the controlled person is not in a position effectively to challenge those allegations.¹⁷

16. In *A* the Grand Chamber unanimously held that there had been a violation of the right in Article 5(4) ECHR to have the lawfulness of detention decided by a court in the cases of four of those who were detained under Part IV of the Anti-Terrorism, Crime and Security Act 2001, which preceded the control orders regime. The Court held that the evidence on which the state relied to support the principal allegations made against the four individuals was largely to be found in the closed material and was therefore not disclosed to the individuals or their lawyers. It said that special advocates could not perform their function, of safeguarding the detainee's interests during closed hearings, in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. There was a violation of the right to a judicial determination of the legality of detention because the four detainees were not in a position effectively to challenge the allegations against them.¹⁸

17. In light of that clear ruling of the European Court of Human Rights, we again recommended that to make the control orders regime compatible with human rights the law had to be amended to require the disclosure to the controlled person of the essence of the case against him.¹⁹ Unless the legal framework was amended in this way, we warned that it was inevitable, in light of the recent ruling of the European Court of Human Rights in *A v UK*, that there would be cases in which individuals are denied the right to a fair hearing.

18. In May 2009 the Government rejected our recommendation, on the basis that it “continues to disagree with the JCHR” about the correct interpretation of what Article 6 ECHR (the right to a fair hearing) requires.²⁰ The Government believed that the approach

15 See chapter 6 of the Report of the Joint Committee on Conventions, 2005-06 HL 265/HC 1212, at paras 227-230.

16 *A and others v UK*, Application No. 3455/05 [GC], judgment of 19 February 2009, at paras 193-224.

17 Fifth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders 2009*, HL Paper 37/HC 282 at paras 11 and 23-28.

18 *A v UK*, above, n.16, at paras 218-220.

19 Fifth Control Order Renewal Report (2009) at para. 27.

20 *Government Reply to the Report by the Joint Committee on Human Rights on the Annual Renewal of Control Order Legislation 2009*, Cm 7625 (May 2009), p. 1.

of the majority of the Court of Appeal was correct when it found in the case of *AF* that there is no minimum amount of disclosure that must be made to controlled persons in order for the proceedings to comply with Article 6.

19. When *AF* came before the House of Lords the Government sought to avoid the application of *A v UK* to control orders by arguing that the reasoning of the Grand Chamber only applied to deprivation of liberty cases (as indicated above, *A v UK* itself concerned the regime for detaining foreign nationals suspected of terrorism under Part IV of the Anti-Terrorism, Crime and Security Act 2001).

20. On 10 June 2009 the House of Lords held, unanimously, that basic fairness requires that people who are subjected to control orders are given sufficient information about the allegations against them to enable them to give effective instructions to those representing them.²¹ The Government's argument that *A v UK* only applied to deprivation of liberty cases was rejected: the minimum disclosure necessary for a fair trial would be the same whether the matter was considered under Article 5(4) ECHR in deprivation of liberty cases or under Article 6(1) ECHR in the case of non-derogating control orders. The Law Lords held that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against them. Lord Phillips, who gave the leading judgment, held:²²

Where ... the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

21. Once the House of Lords had held, in light of the Strasbourg case-law, that Article 6 requires that the essence of the allegations against a controlled person must be disclosed to enable him to give effective instructions in relation to those allegations, it was clear that the basis for the Government's rejection of our recommendation in our last Report on Control Orders renewal was no longer tenable.

22. We therefore wrote to the Home Secretary the day after the House of Lords judgment, on 11 June 2009, asking how the Government intended to respond to the judgment in *AF*.²³ We asked whether the Government would now bring forward amendments to the Prevention of Terrorism Act 2005 and the Civil Procedure Rules to make it clear beyond doubt on the face of the legal framework that:

(a) individuals who are subjected to control orders are given sufficient information about the allegations against them to enable them to give effective instructions to those representing them and

(b) the absolute requirement of non-disclosure is qualified by the right of the controlled person to a fair hearing.

23. We also asked whether the Home Secretary considered it desirable for Parliament to have an early opportunity to debate the appropriate response to the decisions of the House

21 *Secretary of State for the Home Department v AF and others* [2009] UKHL 28, [2009] 3 WLR 74.

22 *Ibid.* at para [59].

23 Written evidence, p 43.

of Lords and the European Court of Human Rights on an issue of this importance. We asked for a prompt response, bearing in mind the seriousness of the restrictions on those subjected to control orders which may have been made unfairly, the importance of parliamentary consideration of the implications of the House of Lords judgment and the imminence of the long parliamentary recess which would make parliamentary consideration of the issue impossible until October.

24. The Home Secretary sent a holding reply on 25 June 2010 saying that he was carefully considering the judgment and reviewing his options but was not yet in a position to respond to the Committee's questions. In the meantime, the Home Secretary wrote to all those representing controlees, and their special advocates, indicating that the Government would be reviewing all current control order cases in the light of the House of Lords judgment, considering in each case whether further disclosure could be made or whether to revoke the control order.²⁴

25. The Home Secretary eventually replied substantively to our letter more than three months after it was sent, on 15 September 2009,²⁵ and made a written statement to Parliament on 16 September.²⁶ He said that the Government had now reviewed all current control order cases in the light of *AF*, and it was clear that not all control orders would be adversely affected by the judgment, because the new test for disclosure could be met in some cases, but the Government recognised that the judgment will require a greater degree of disclosure to be made in other control order cases. The control order in *AF* itself had been revoked because the Home Secretary had decided that the disclosure required by the court could not be made. In another case the Home Secretary had decided to make the disclosure ordered by the court in order to maintain the control order in force. In one case, *AN*, the court directed that the control order be revoked because non-disclosure denied the controlled person of the essence of the case against him, but the Home Office immediately served him with another, less restrictive control order without making any further disclosure.²⁷ In other cases, the Home Secretary has revoked the control order and replaced it with a "light touch" control order with far less restrictive obligations but no further disclosure and argued that Article 6 ECHR does not apply. That argument has been rejected by the High Court²⁸ but that decision is on its way to the Court of Appeal and the issue may very well end up back before the Supreme Court.

26. The Home Secretary's current assessment was therefore that the control orders system remains viable, and that the national security reasons for maintaining the regime have not changed. However, he intended to keep this assessment under review as control order cases continued to be considered by the courts, and he asked Lord Carlile to report on whether the system remains viable as part of his annual report on the operation of the control orders legislation. The Home Secretary also said that the Government did not intend to bring forward any amendments to the relevant statutory provisions or procedural rules: such amendments were unnecessary because the PTA 2005 "now reads as amended

24 Evidence of Helen Mountfield, Q34.

25 Written evidence, p 45.

26 HC Deb 16 September 2009 col. 152WS.

27 *Secretary of State for the Home Department v AN* [2009] EWHC 1966 (Admin).

28 See *R (on the application of the Secretary of State of the Home Department) v BC and BB* [2009] EWHC 2927 (Admin) (11 November 2009).

by the House of Lords” and to amend the law to clarify this might lead to unintended consequences. Nor did the Government consider it necessary for Parliament to have an early opportunity to debate the appropriate response to the House of Lords judgment: it was for the High Court to consider the implications of the House of Lords judgment for individual control orders and “the scope for sensible Parliamentary debate at this stage would appear to be limited.”

27. According to the Home Secretary’s most recent quarterly report, on 15 December 2009,²⁹ 12 control orders are currently in force, nine of which are in respect of British citizens. Between September and December six control orders were revoked: three because it was not possible to meet the disclosure test set out in *AF*; two because they were no longer considered to be necessary; and one on the order of the court. In two of the cases where the control order was revoked because the more stringent disclosure test could not be met, new control orders with significantly reduced obligations (“light touch control orders”) had been imposed in their place.

28. The revocation of control orders as a result of the decision of the House of Lords in *AF* has given rise to the question whether the Secretary of State is liable to pay compensation to those who were the subject of control orders that, it has now been established, were unlawfully made because the controlees had never been told the gist of the case against them. On 18 January 2010 the High Court held that where, because of the requirements of Article 6 ECHR, as interpreted by the House of Lords in *AF*, the Secretary of State withdrew the material relied upon in support of two control orders so that the orders could not be maintained, the control orders should not merely be revoked prospectively but should be treated as if they never had any lawful effect.³⁰ The significance of this is that it opens the way to claims for damages by those controlees arising out of the unlawful imposition of a control order on them. Moreover, the High Court also held that the disclosure requirements identified by the House of Lords in *AF* apply to such a claim for damages by a controlee. The Government is appealing to the Court of Appeal against this decision.

The Government’s case for renewal

29. On 1 February 2010 the Government published three documents which between them contain the Government’s case for renewal of the control orders regime:

- (1) the Explanatory Memorandum to the draft Order;
- (2) the Home Office’s Memorandum to the Home Affairs Committee containing its post-legislative assessment of the control orders legislation³¹ (hereafter “the Home Office Memorandum”); and
- (3) the Fifth Report on Control Orders by Lord Carlile, its Reviewer of terrorism legislation³² (hereafter “the Carlile Report”).

29 HC Deb 15 December 2009 col. 108WS.

30 *Secretary of State for the Home Department v AF and AE* [2010] EWHC 42 (Admin).

31 *Memorandum to the Home Affairs Committee: Post-Legislative Assessment of the Prevention of Terrorism Act 2005*, Cm 7797 (1 February 2010).

The Explanatory Memorandum

30. The Explanatory Memorandum accompanying the draft renewal order explains that the order does not change the Government's policy relating to control orders, it simply provides for the regime to continue in force for another year.³³ The essence of the Government's reasons for seeking Parliament's approval to renew the control order regime is that "control orders are a key measure for addressing the threat posed by suspected terrorists who cannot currently be prosecuted or, in respect of foreign nationals, removed from the UK", and they remain necessary because, over the past year, the terrorist threat level to the UK has been assessed as either "Severe" or "Substantial", both of which signify a serious threat to the UK.³⁴

The Home Office Memorandum

31. According to the Home Office Memorandum, "the Government's overall assessment is that control orders remain an important counter-terrorism power for protecting the public from the risk of terrorism. They are the best available disruptive tool for addressing the threat posed by suspected terrorists whom we can neither prosecute nor, in the case of foreign nationals, deport."³⁵ The national security reasons for maintaining the control order regime are said to remain strong (relying on Lord Carlile's conclusions in his Report, considered below). Although there have been seven absconds from control orders, there have been none since June 2007 and the Government's assessment is that in some cases control orders have prevented controlled individuals from involvement in terrorism-related activity, while in others (the majority) they have restricted and disrupted that activity without entirely eliminating it.³⁶

32. After the decision of the House of Lords in *AF*, the Home Secretary said that his preliminary assessment was that the control order regime remained viable, but that he would keep that assessment under review. In the Home Office Memorandum, the Government maintains its view that the control order regime continues to be a viable and necessary part of the Government's counter-terrorism strategy, in the light in particular of three High Court judgments since September 2009 upholding individual control orders after considering them for compliance with the requirements of Article 6 ECHR following the decision in *AF*.³⁷ That overall judgment, that the system remains viable, is said to be not affected by the ongoing litigation about whether Article 6 ECHR applies to "light touch control orders" and about possible claims for compensation by those whose control orders have been quashed.

33. The Home Office memorandum also considers the argument that maintaining the control order regime is extremely costly, but concludes that "viable alternatives to control

32 *Fifth Report of the Independent Reviewer Pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, Lord Carlile of Berriew QC (1 February 2010).

33 EM para. 7.10.

34 EM para. 7.1.

35 Home Office Memorandum at para. 44.

36 *Ibid* at para. 55.

37 *Ibid* at para. 72.

orders that offered similar levels of assurance against risk, such as surveillance, would be considerably more expensive.”³⁸

The Carlile Report

34. The Carlile Report combines the Reviewer’s annual report on the operation of the control orders legislation in 2009 and his “viability review” which he was asked by the Home Secretary to conduct in September 2009 to assess whether the control order system continues to be viable after the House of Lords decision in *AF*.

35. Lord Carlile concludes that the control orders system remains necessary for a small number of cases, in the absence of a viable alternative for dealing with individuals who pose a risk to the public but cannot be prosecuted, deported or dealt with in any other way.³⁹ He has considered whether control orders can or should be replaced, but has been unable to find or devise a suitable alternative that would be as effective in disrupting terrorism-related activity. Control orders continue to play a significant part in making it more difficult for terrorists to undertake such activity. The potential cost of losing control orders is that the UK would be more vulnerable to a successful terrorist attack.⁴⁰ Abandoning the control orders system entirely would therefore have a damaging effect on national security in Lord Carlile’s view.⁴¹

36. Lord Carlile also concludes that “the control orders system functioned reasonably well in 2009, despite some challenging Court decisions.”⁴² He considers that the “review procedure has proved effective”;⁴³ he has received no complaints from controlees or lawyers instructed by them to the effect that court procedures are not working satisfactorily;⁴⁴ and “the rules of court continue to work reasonably well.”⁴⁵ He reports that he has received “anxious representations” from the special advocates about their role in control order cases.⁴⁶ However, while he reports that he is “broadly sympathetic” to their concerns, “improved training and closer co-operation should resolve them.”⁴⁷

37. Lord Carlile says that he has considered the effects of the Court decisions on disclosure, but he does not agree that their effect is to make control orders impossible: for most cases, it should be possible to provide sufficient disclosure to comply with legal requirements without damaging the public interest. As in all previous years, Lord Carlile reports that, having seen the intelligence material on which the Home Secretary makes his decisions, he

38 Ibid at para. 85.

39 Carlile Report, paras 1, 96-97.

40 Ibid at para. 101.

41 Ibid at para. 85.

42 Ibid at para. 3.

43 Ibid at para. 125.

44 Ibid at para. 129.

45 Ibid at para. 162.

46 Ibid at para. 130.

47 Ibid at para. 140.

would have reached the same decision as the Secretary of State in each case in which a control order was made.⁴⁸

38. However, Lord Carlile thinks that the control order system can be improved. He thinks that control orders are no longer suitable for cases where the main objective is to prevent travel abroad.⁴⁹ He recommends that in such cases control orders should be replaced by a new preventative order, a “Travel Restriction Order”, which would contain a narrower range of obligations than a control order, but would still be based on an intelligence-based risk assessment and made following consideration of closed evidence.

The impact of control orders on controlees, their families and communities

39. We have consistently expressed our concern in previous reports about the impact of control orders on controlees, their families, and the communities from which they come.⁵⁰ According to the Home Office Memorandum, however, the impact of control orders on the physical and mental health of an individual and his⁵¹ family is taken extremely seriously by the Government, both when a control order is considered and imposed, and on an ongoing basis.⁵² Lord Carlile gives a similar account: the Control Order Review Group (“CORG”) monitors the impact of control orders on the individuals concerned, including on their mental health and physical well-being, as well as the impact on the individual’s family, especially any children living with them.⁵³ He reports that control orders are sometimes modified in light of that monitoring where there is concern about the impact of the order.

40. The Government’s and Lord Carlile’s accounts of the attention that is paid to the impact of the control order on the individual and their family were strongly disputed by two solicitors with experience of representing individuals who are the subject of control orders. Gareth Peirce, who has many years’ experience of acting in terrorism cases and has represented a number of individuals subject to control orders, described the primary sensation of those subject to a control order as being one of “despair” and feeling “utterly impotent”.⁵⁴ She described how at one point three of her clients who were under control orders were all in the health section of Belmarsh Prison, imprisoned because they were in breach of their control order, all having made serious attempts on their lives, and all of whose wives had left them temporarily or permanently. She described the impact of the order, on the person himself and his family, as “colossal”. The whole family is affected by the conditions of the control order, which, for example, prevent visits to the house without authorisation and prohibit the use of phones or computers and the internet. The last of these restrictions has a particularly severe impact on children over the age of about 7, for whom access to the internet is an important part of their school curriculum.

48 Ibid at para. 114.

49 Ibid at para. 2 and paras 87-89

50 See e.g. First Control Order Renewal Report (2006), above n. 6, at paras 79-86.

51 All control orders to date have been made against men and we therefore refer to controlees as “he” throughout this Report.

52 First Control Order Renewal Report (2006) at para. 79.

53 Carlile Report at paras 119-20.

54 Q1

41. We heard with alarm about the “growing use” of conditions in control orders which require the controlled person to move out of the community in which they live and stay away from it – “a form of internal exile” as it was described. We learned that these “relocation conditions” are being used to require British citizens who have grown up in a particular community to uproot themselves from that community and move to a new and unfamiliar location. The impact of such relocations on the controlled person’s families was described as “extraordinary”. The female partners of controlees, we heard, “are treated with complete contempt”,⁵⁵ told that they can either stay where they are or move to the new location and find a new job. Children are uprooted from the schools they have been attending and forced to relocate in order to be with their family. Moreover, such treatment was having a disproportionate impact on the Muslim community which the Government says it is seeking to reassure: Gareth Peirce said “this may affect only a small group of people but in terms of its contribution to what one might call the folklore of injustice it is colossal.” Our witnesses’ sense that such relocations were becoming more frequent has since been confirmed. In a written answer to a question put down by our Chair, the Minister has confirmed that of the 12 individuals subject to control orders on 10 December 2009, eight had been required to (and had) relocated, although two relocations were subsequently overturned by the court.⁵⁶ As the Government increasingly resorts to “lighter touch” control orders, so it seems the use of such relocation conditions is set to increase.

42. We also heard from the controlees’ lawyers about the effect of the legal process being so protracted. The slow service of evidence, the need for the special advocates to be able to do their job, the secret hearings to consider closed evidence, these all mean that it is an extraordinarily prolonged process with no immediate remedy.⁵⁷ The long and drawn out procedures also mean that in practice, by the time that a request for a modification to a control order has been considered, refused and appealed against, the whole point of seeking the modification has been made redundant by the passage of time.⁵⁸ One of the examples given was of a request to vary a condition in a control order to enable the controlee to attend a college course, but the course was finished by the time his modification appeal had been resolved.

43. Gareth Peirce also made the point to us in evidence that all of the main court decisions about the human rights compatibility of the control order regime had been on procedural issues, as opposed to the impact of the control orders on the individuals concerned: “however strong the arguments and the evidence that one has that this is destroying someone, he is going to kill himself, his life is in danger, those arguments do not win in the courts as being disproportionate to the measures and the reasons given for them.”⁵⁹ In her view, control orders are simply disproportionate when the impact on the individual concerned is compared to the benefit it is sought to achieve.

44. As we pointed out above, we have not had the opportunity to hear the Government’s response to the oral evidence of the solicitors representing the controlees. However, we

55 Evidence of Gareth Peirce, Q2.

56 HC Deb 10 Feb 2010 col 1053-4W. Of the 45 individuals who have ever been subject to control orders, 17 have been required to relocate.

57 Evidence of Gareth Peirce, Q5.

58 Evidence of Sean McLoughlin, Q8.

59 Gareth Peirce, Q15.

remain extremely concerned about the impact of control orders on the subject of the orders, their families and their communities. There can be no doubt that the degree of control over the minutiae of controlees' daily lives, together with the length of time spent living under such restrictions and their apparently indefinite duration,⁶⁰ have combined to exact a heavy price on the mental health of those subjected to control orders. The severe impact on the female partners and children of the controlees, including on their enjoyment of their basic economic and social rights as well as their right to family life, is an example of the "collateral impact" of counter-terrorism measures recently identified by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁶¹ These concerns grow more acute the longer a control order against the same individual subsists.

45. We are particularly concerned about the apparent increase in resort to conditions in control orders which amount to internal exile, banishing an individual and, effectively, his family, from his and their community. We have very grave reservations about the use of such historically despotic executive orders, and the contribution they undoubtedly make to "the folklore of injustice."

46. Moreover, the UK has not ratified the Protocol to the ECHR which recognises freedom of movement as a fundamental human right in the ECHR system,⁶² but it is already recognised as such within the legal order of the European Union. It seems to us likely that it is only a matter of time before executive "requirements to relocate" in control orders are found to be incompatible with the fundamental right of a citizen to move freely within the territory of one's state.

Basic fairness of control orders

47. In a series of reports we have expressed serious concerns about the basic fairness of the system of control orders.⁶³ During the passage of the Counter Terrorism Bill in 2008 we proposed a number of amendments to the legal framework governing control orders designed to ensure that in future control order proceedings could operate in a way which secured to the controlled person the "substantial measure of procedural justice" to which he is entitled under both Article 6 ECHR and the common law.

48. One of the most significant recommendations that we made was that the statutory framework should be amended in order to require that the gist of the allegations against a controlled person always be disclosed to that person to enable them to give instructions to those representing their interests. The Government resisted that recommendation but, as we have explained above, the House of Lords in *AF* has now required that the statutory

60 Fourth Annual Renewal Report, 2009, above, at paras 29-33.

61 *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (3 August 2009), A/64/211 at para. 30.

62 Protocol No. 4 to the ECHR (Article 2 of which protects freedom of movement).

63 In addition to our report on the Prevention of Terrorism Act 2005 when it was introduced, and our annual reports on the renewal of control orders (see above), we have twice reported in detail on the control orders regime after hearing evidence from special advocates: see Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 790 at paras 183-212 and Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL 50/HC199 at paras 39-73.

scheme be read as if it included such a requirement. We sought to discover from the special advocates and some of the lawyers who represent controlees the extent to which the House of Lords decision in *AF* had made a difference in practice to the fairness of control order proceedings.

Disclosure of the essence of the case against

49. The decision of the House of Lords in *AF* was widely reported in the press as a ruling that the entire control orders system is unlawful, or that the use of secret evidence in control order cases is itself unlawful. This is not the case. The decision in *AF* requires separate consideration to be given in each case to whether a sufficient gist of the allegations and evidence has been given to the controlled person in the open part of the proceedings to enable them to give effective instructions to their special advocate. As one of the special advocates put it in evidence, “What *AF* decided was that somebody has the right to know the essence of the case against them. What that means in practice is quite difficult to determine in an individual case.”⁶⁴

50. We heard from the special advocates that, although the Government had said that it would be reviewing the material in each case in the light of *AF* to see whether further disclosure could be made or whether the control order should be revoked, in practice the Secretary of State has taken a “minimalist” and essentially passive approach to the decision in *AF*, not voluntarily disclosing any more material but leaving it to the special advocates to make the running on what more should be disclosed and waiting for the courts to tell the Secretary of State what material he cannot rely on unless he discloses it.⁶⁵ We were told that the decision therefore had not led in practice to much more disclosure. Where further disclosure was thought to be necessary, control orders had been revoked and replaced by less stringent orders (“light touch control orders”), to which it was argued *AF* does not apply because the less severe restrictions do not determine civil rights within the meaning of Article 6(1) ECHR. In cases where the decision in *AF* clearly required more disclosure, we were told that the Government’s approach was to disclose “headline allegations” only, such as the individual concerned is involved in terrorist training, whereas the decision of the European Court of Human Rights in *A v UK* appears to suggest that a greater degree of detail than that is required, such as when and where they are alleged to have engaged in such training.⁶⁶ The special advocates’ view, therefore, was that, from their perspective, the Government’s approach to disclosure since the decision in *AF* was not in keeping with the spirit of that decision,⁶⁷ and even possibly not in keeping with the letter of the underlying Strasbourg decision in *A v UK*.

51. We also heard that the lower courts are in some cases adopting an approach to disclosure following *AF* which is causing further practical difficulties for controlees and special advocates and which may also be causing unfairness to controlees. We were told that the lower courts are applying a so-called “iterative approach” to disclosure, “whereby a bit of disclosure is given to a controlled person, the idea being that that may be enough for

64 Evidence of Helen Mountfield, Q 35.

65 Evidence of Angus McCullough, Helen Mountfield and Thomas de la Mare, Q 34.

66 Evidence of Helen Mountfield, Q35.

67 Qs 37-8.

them to respond effectively and give effective instructions to their own lawyers and the special advocates, and if it turns out that it is not then to give a bit more.”⁶⁸ The special advocates were concerned that this iterative approach to disclosure caused a practical problem of requiring disclosure issues to be constantly revisited in what was already a very protracted process, and that it was also possibly unfair in principle to require a controlled person to respond first to part of the case against him before disclosing more of what, after *AF*, he is entitled to know about that case.

52. The solicitors who represent those subject to control orders confirmed that the decision in *AF* had not resulted in practice in much if any more disclosure to their clients.⁶⁹ They acknowledged, however, that the decision had had a significant impact because it had led to the revocation of control orders in some cases where the Government was not prepared to make the further disclosure that the decision in *AF* would require.

53. By requiring, in effect, the disclosure to a controlled person of the gist of the allegations against him, the decision in *AF* has gone some way to addressing one of the main sources of unfairness of the control order regime. However, it appears that the impact of the decision on improving fairness in practice may have been limited by the Government’s passive and minimalist approach to compliance, and the approach of some lower court judges of requiring only a little further disclosure at a time. We recommend that the Government conduct a more thoroughgoing and proactive review of the material on which it relies to sustain existing control orders with a view to deciding in each case whether more disclosure is required in the light of *AF*, rather than leave that task to the special advocates in ongoing proceedings.

Continued Limitations on Special Advocates

54. We have previously heard evidence from the special advocates about the limitations on their ability to perform their function of providing controlees with the “substantial measure of procedural justice” required by Article 6 ECHR, in particular:

- (1) the special advocates’ lack of access to independent expertise and evidence
- (2) the special advocates’ ability to test the Government’s objections to disclosure of the closed case, and
- (3) the special advocates’ ability to communicate with the affected person after seeing the closed material.

55. We have made recommendations in the past to address these limitations but, with only one exception, the Government has resisted our suggestions. According to a recent article by Martin Chamberlain, who has several years’ experience of acting as a special advocate and gave evidence to us in 2007, all of these limitations on the special advocates’ ability to provide a fair hearing remain firmly in place.⁷⁰

68 Evidence of Angus McCullough, Q44.

69 Qs 30-31.

70 M. Chamberlain, “Special Advocates and Procedural Fairness in Closed Proceedings” (2009) *Civil Justice Quarterly* 314.

(1) Lack of access to independent expertise and evidence

56. The only change to the legal framework governing special advocates which has been accepted by the Government was the amendment of the relevant procedure rules to enable special advocates to adduce their own evidence in control order proceedings. This rule change arose out of the evidence of the special advocates, both to us and the Constitutional Affairs Committee, explaining their concern about “a potentially serious inequality of arms in closed proceedings” due to the special advocates’ lack of access to independent expertise, advice and evidence to deal with some of the closed material relied on by the Secretary of State.⁷¹ “Inequality of arms” is a term of art in human rights law meaning simply unfairness as a result of one party to litigation being at a substantial disadvantage compared to the other party in the opportunity they have to present their case to the court. The lack of a meaningful opportunity to challenge the other side’s evidence would be an example of such an inequality.

57. The relevant procedure rules were amended to enable special advocates to adduce evidence in closed proceedings.⁷² We asked the special advocates whether this rule change had made any difference in practice to the special advocates’ ability to ensure fairness. The answer was “a resounding no”.⁷³ It appears that, notwithstanding the rule change to facilitate the adducing of evidence by special advocates, no special advocate in any case to date has ever been in a position to adduce evidence him or herself. The practical obstacles to special advocates having access to such independent expertise to equip them to challenge some of the expert evidence of the Secretary of State were explained to us by Andrew Nicol QC, a special advocate, in 2007.⁷⁴ He said that, to be of any use, such an expert would need to be somebody with relevant expertise and recent “inside knowledge”, such as somebody who had recently retired from the Security Service or one of the intelligence services, but this was a very small pool of people and the more recent their experience the greater would be the doubt about whether they were sufficiently independent.

58. One of the special advocates who gave oral evidence to us, Angus McCullough, provided us with a copy of the Special Advocate’s Note submitted to the House of Lords in a recent case to demonstrate the practical reality of this problem.⁷⁵ The Note explains to the House of Lords the “profound – and thus far insuperable – difficulties” which prevent the identification and instruction of a suitable expert by the special advocate and states that “the efforts by Special Advocates to gain access to such expert assistance have continued since the hearing before the JCHR, but with no material result.”⁷⁶ The Special Advocate in that case therefore agreed with the open advocates that it was in practice “entirely fanciful” that the special advocate was able to instruct and call an expert to challenge the expert

71 CAC, Seventh Report of Session 2004-05, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of special advocates*, HC 323-I; JCHR, Nineteenth Report of 2006-07, Ev 19, Q78.

72 There was no equivalent provision in the CPR (governing control order proceedings in the High Court) to r. 44(5A) of the SIAC (Procedure) Rules 2003, permitting the special advocates to adduce evidence. See also the addition of “adducing evidence” into the list of the functions of a special advocate in r. 35 of the SIAC rules.

73 Evidence of Angus McCullough, Q45.

74 Evidence of Andrew Nicol QC, Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 790, Ev 19-20, Q78.

75 Written evidence, p 75.

76 *Ibid* at para. 8.

evidence relied on by the Secretary of State in the closed proceedings. Mr. McCullough told us in evidence that, as far as he was aware, it is still the case that no special advocate has ever been in a position to adduce expert or other evidence to challenge the evidence relied on by the Secretary of State.

59. Notwithstanding the rule change which permits special advocates to adduce evidence, it remains the case that special advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Service, assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary. The unfairness identified by the Constitutional Affairs Committee as long ago as 2005 therefore still persists: in practice, special advocates have no means of adducing any evidence which contradicts the evidence relied on by the Secretary of State in closed proceedings, which gives rise to a serious inequality of arms in those proceedings.

(2) Ability to test Government objections to disclosure of closed case

60. One of the special advocate's important functions in control order proceedings is to test the Government's objections to disclosure of the closed material, that is, the material on which the Government proposes to rely without disclosing it to the controlee or his legal representatives. The special advocates explained to us that in practice there are serious limitations on their ability to do this effectively.

61. The most effective way of challenging an objection to disclosure is to demonstrate that the material is already in the public domain,⁷⁷ for which the special advocate simply needs an internet search engine. The Security Service's objection to disclosure is usually withdrawn if it can be shown to be already in the public domain.⁷⁸ The other main way for special advocates to challenge the Government's objection to disclosure is by suggesting a "gist" of the allegation in question, by reducing the specific allegation to a more general one divorced from the factual detail which might imperil sources or techniques.⁷⁹ Although the decision of the House of Lords in *AF* has strengthened the hand of the special advocates when arguing for more disclosure, by upholding the right of the controlled person to know at least the essence of the case against them, the special advocates remain very limited in their ability to challenge the Government's objection to more disclosure.

62. The special advocates confirmed our observation in an earlier report that the Government adopts a "precautionary" approach to disclosure.⁸⁰ The Security Service was described as taking "an extraordinarily precautionary approach to what needs to be kept private in the interests of national security", and in one case a Security Service witness apparently agreed that the Service was "institutionally cautious."⁸¹ Where an allegation is known only from a closed source, such as an intercept or an agent, the objection to disclosure is made not on an individual basis concerning the particular case but on a class basis: that is, that disclosure of an allegation from that kind of source will *necessarily* be

77 Evidence of Thomas de la Mare, Q46.

78 M. Chamberlain, above n.70, at 320.

79 Evidence of Thomas de la Mare, Q46.

80 Nineteenth Report of 2006-07, above n.63,, at para. 196.

81 Evidence of Helen Mountfield, Q54.

damaging to the public interest.⁸² The special advocates felt that more could be disclosed than the Government was prepared to permit,⁸³ but they are not really in a position to challenge such objections to disclosure, because they do not have access to any independent expert evidence. **The special advocates have no means of gainsaying the Government's assessment that disclosure would cause harm to the public interest, and Government assessments about what can and cannot be disclosed are effectively unchallengeable and almost always upheld by the court.**⁸⁴ Courts inevitably “accord great weight to views on matters of national security expressed by the agencies who are particularly charged with protecting national security.”⁸⁵

63. In addition to this de facto limitation on the ability of the special advocates to challenge the Government's objections to disclosure, their evidence to us identified another significant limitation in practice: the problem of late disclosure of closed material by the Secretary of State to the special advocates, which they described as “endemic.”⁸⁶ We heard that in almost every case a very substantial volume of disclosure of closed material is sent to the special advocate very shortly before the start of a hearing and the special advocates share a serious concern that such late disclosure prevents them from performing the function that they are intended to perform. The special advocates did not suggest that such late disclosure of closed material is a deliberate tactic by the Government, but their evidence does suggest that there is a real lack of discipline about disclosing closed material to special advocates within the timetables for disclosure laid down by the Court. There is effectively no sanction since the court cannot refuse to consider material which relates to national security and the controlled person is unlikely to want an adjournment to the proceedings given his continued subjection to a control order.

64. One of the special advocates provided us with a Note from the Special Advocates in a recent case to illustrate what he described as “this widespread problem.”⁸⁷ The Note sets out a detailed chronology of the Secretary of State's disregard of the Court's directions in relation to disclosure in that particular case, and states that the efficacy of the disclosure hearing has been “seriously compromised” as a result. The special advocates “record their profound concern that their ability to discharge their functions has been, and continues to be, compromised by the Secretary of State's serial failures to comply with the Court's directions.”

65. **The effect of late disclosure of the closed material to the special advocates is seriously to compromise their ability to discharge their important function, because it leaves them with insufficient time to scrutinise the closed material and to challenge the Government's reasons for the material being closed.** As a result, “the disclosure process ... one of the two most important jobs that a special advocate does ... always goes out the window when you get late disclosure.”⁸⁸ Although the problem is a practical one, arising

82 Evidence of Helen Mountfield, Q46.

83 Evidence of Thomas de la Mare and Helen Mountfield, Q46.

84 M. Chamberlain, above n.70 at 320.

85 Evidence of Angus McCullough, Q54.

86 Evidence of Helen Mountfield, Q96; evidence of Angus McCullough, Q101.

87 Evidence of Angus McCullough, Q101; Special Advocates' Open Note in *Secretary of State for the Home Department v AN PTA/42/2009*, written evidence, p .

88 Evidence of Thomas de la Mare, Q99.

from the way in which the system is operated in practice rather than anything designed into the rules, the special advocates agreed that it is very significant: it means there is a serious disjuncture between the role which the rules say the special advocate performs and the role which they are actually able to perform in practice, and “that is a difficult position for a lawyer to be in if you care about the rule of law.”⁸⁹ **By seriously hampering special advocates in their performance of the role they are intended to perform, it creates the risk of serious miscarriages of justice.**

(3) Limits on ability to communicate with controlled person

66. In a number of previous reports we have drawn attention to the unfairness caused by the rule⁹⁰ prohibiting communication with the controlled person or his representative following receipt of the closed material.⁹¹ We considered it essential, if special advocates are to be able to perform their function, to relax the absolute prohibition on communication and we recommended ways in which the rule could be relaxed consistently with protecting the interests of national security.⁹² The special advocates confirmed the injustice caused by this rule and also recommended ways of amending the framework to allow some communication to take place, with the authority of the court but without having to disclose to the Secretary of State the reason for, or the fact of, the application. None of these recommendations has been accepted by the Government and the absolute prohibition on communication therefore remains, subject only to the exception that the court may grant permission for such communication but only where the application for that permission is notified to the Secretary of State.

67. Bearing in mind that the statutory function of the special advocate is to represent the interests of the controlled person in proceedings from which they and their legal representatives are excluded, this limitation on communication between special advocates and their clients, and requirement that the other side be notified of any application for permission to communicate, is a drastic departure from the usual features of the lawyer/client relationship. In all other contexts, unconstrained communication between lawyer and client is positively protected by legal professional privilege, which is legally recognised to be an important attribute of the fundamental right of access to court, both under the ECHR⁹³ and at common law.⁹⁴ Restrictions on that fundamental right of access to court are in principle capable of being justified, but, given the fundamental importance of the right, on which the vindication of other rights may effectively depend, there is a heavy onus to demonstrate the necessity and proportionality of such restrictions.

68. This issue remains a “profound concern” of the special advocates, who regard it as a significant constraint on their ability to discharge their role effectively in control order proceedings.⁹⁵ It was taken up by them with Lord Carlile during his most recent review of

89 Evidence of Helen Mountfield, Q99 and 104.

90 Civil Procedure Rules r. 76.25(2) and r. 36(2) of the SIAC (Procedure) Rules 2003.

91 See e.g. Nineteenth Report of 2006-07, above n.63, at paras 200-205; Ninth Report of 2007-08, above n. x at paras 67-69.

92 Nineteenth Report of 2006-07, above n. x, at para. 205.

93 *Campbell and Fell v UK* (1985) 7 EHRR 165 at paras 111-113.

94 *R v Secretary of State for the Home Department, ex p. Daly* [2001] 2 AC 532.

95 Evidence of Angus McCullough, Q47.

the operation of the control order system.⁹⁶ They held a meeting with him in October 2009 at which they raised a number of concerns, of which the prohibition on communication was the major one. In their subsequent written submission, invited by Lord Carlile, and which they have supplied to us, they explained the practical effect of the rule and argued that “the scope of the current prohibition is unjustifiably broad.”⁹⁷ They pointed out that the permission of the court “is very rarely sought” because of the requirement that such applications must be made on notice to the Secretary of State. They made two specific proposals for a relaxation of the rule:

(1) to allow communication on matters of pure legal strategy and procedural administration; and

(2) to give special advocates power to apply to a High Court judge for permission to ask questions of the person whose interests they represent, without being required to give notice to the Secretary of State.

69. The special advocates’ submission was signed by 23 special advocates, consisting of almost all of the current special advocates who are regularly appointed or have significant past experience in the role. It is therefore a concern which reflects “a reasonably collective view” amongst the special advocates.⁹⁸

70. In Lord Carlile’s report he refers to having received “anxious representations” from the special advocates about their role in control order cases, and he sets out in detail their concern about the prohibition on communication contained in the procedural rules, and their proposals for relaxing the rule.⁹⁹ He states that he is “broadly sympathetic” to their concerns, but after summarising the security concerns about modifying the system in the way they suggest (concerns about inadvertent leakage of sensitive material to controlees), he concludes that “improved training and closer co-operation should resolve the concerns recorded above. I doubt that any rule changes are necessary.”¹⁰⁰

71. The special advocates, in evidence to us, expressed themselves to be “bemused” by this conclusion.¹⁰¹ In their view, as is apparent from the nature of their concern correctly recorded by Lord Carlile himself, “the problem is hardwired into the current rules, so we do find it hard to understand why Lord Carlile concludes by doubting that any rule changes are necessary.” In the special advocates’ view, rule changes are not only necessary but essential in order to address this problem, and they feel that they have made realistic suggestions as to ways in which the present rule could and should be relaxed.¹⁰²

72. The inability of special advocates to communicate with the controlee after seeing the closed material, identified as a source of unfairness by the Constitutional Affairs Committee in 2005, remains unchanged, notwithstanding the clear evidence that it

96 *Special Advocates’ Submission to Lord Carlile*, 3 December 2009, written evidence, p 96.

97 *Ibid.*, para. 5.

98 Evidence of Angus McCullough, Q47.

99 Carlile Report, paras 130-139.

100 *Ibid.*, para. 140.

101 Evidence of Angus McCullough (Q48), who was one of the special advocates who met personally with Lord Carlile and co-ordinated the input of the special advocates into the written submission signed by 23 of them.

102 Qs 48-49.

seriously affects the special advocates' ability to discharge their function of representing the controlee's interests in the closed proceedings. Lord Carlile's report fails to address the systemic nature of these concerns about the limitation on the special advocates' ability to perform their function: it is a limitation inherent in the current rules, not something which can be overcome by improved training or co-operation. So long as the rules remain unchanged, this inability of special advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person and therefore the extent to which they are capable of mitigating the unfairness to the controlled person in the closed proceedings.

73. Finally, the special advocates confirmed that the decision of the House of Lords in *AF* does not affect any of these systemic limitations on the special advocates' ability to ensure a substantial measure of procedural justice to the controlee.¹⁰³

International comparisons

74. We think it is important to correct a misperception, often encountered, that the UK system of special advocates is regarded internationally as a model of good practice to be followed. Lord Carlile, for example, observes that the use of special advocates "has been studied, with favourable comment, by other jurisdictions."¹⁰⁴ In fact, as far as we are aware, there is no other jurisdiction in the common law world which operates a comparable system of closed proceedings in which there are the same limitations on the functions of the special advocates.¹⁰⁵ It is correct to say that the UK system was of considerable interest to the Canadian Government when it was recently considering how to address the same issue of reconciling public safety and individual fairness. Significantly, however, the special advocate regime adopted in Canada after examining the UK system has not reproduced one of the principal limitations inherent in the UK system, the prohibition on communication with the controlled person other than with the permission of the court following an application made on notice to the Secretary of State.

75. As we pointed out in our 2007 report on special advocates, the Special Senate Committee of the Canadian Parliament on the Canadian Anti-Terrorism Act recommended (with reference to the recommendations of the Constitutional Affairs Committee) that special advocates should be able to communicate with the party affected by the proceedings and his counsel even after receiving closed material.¹⁰⁶ The Canadian system of special advocates appears to have learnt this lesson from the UK experience: the relevant statutory provision provides that, after receiving the closed material, the special advocate may communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate,¹⁰⁷ but there is no requirement to notify the Government about the proposed communication.

103 Evidence of Thomas de la Mare, Q52.

104 Carlile Report, para. 130.

105 *Secret Evidence*, JUSTICE, June 2009, paras 360-366.

106 Nineteenth Report of 2006-07, above n.63, at para. 201.

107 Section 85.4(2) of the Immigration and Refugee Protection Act 2001, as amended in February 2008 following the decision of the Supreme Court of Canada in *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 that the use of closed proceedings and secret evidence in immigration cases concerning national security, without any legal representation for the immigrant in the closed proceedings, was in breach of the principles of fundamental justice under section 7 of the Charter.

Indeed, any communication between the special advocate and the person whose interests they represent is deemed to be subject to legal professional privilege if it is the sort of communication that would attract such privilege between lawyer and client.¹⁰⁸ As one of the special advocates told us in evidence:¹⁰⁹

... in Canada after the Canadians examined the British system and the British experience, ... they have adopted a system which permits discussion between open representatives and special advocates on open matters, and have deployed a regime whereby the *ex parte* procedure may be used if there is a desire to communicate from the special advocates to the open advocates on anything that may impinge on closed material.

76. The special advocates' Note to Lord Carlile also records their understanding, gained from visiting Canadian special advocates, that in Canada extensive use is made of a procedure whereby special advocates apply to a judge for permission to ask questions of the person they represent, without being required to give notice to the Government.¹¹⁰

Views of international monitoring bodies

77. Parliament should also be aware of the impact of control orders on the UK's international reputation. In our renewal report last year we reminded Parliament of the views of various international monitoring bodies about the human rights compatibility of control orders.¹¹¹

78. The Concluding Observations of the UN Human Rights Committee on the UK's compliance with the International Covenant on Civil and Political Rights, for example, included a recommendation that the Government should ensure that the judicial procedure for challenging the imposition of a control order complies with the principle of equality of arms, and also that those subjected to control orders are promptly charged with a criminal offence.¹¹²

79. The Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, published on 17 February 2009,¹¹³ expressed concern that, over the longer term, control orders could give rise to a "parallel legal system" and undermine the rule of law. It concluded that, if control orders are to be used, it is essential to build in appropriate safeguards and that there are many important safeguards missing in the control order system, currently in operation in the UK:

- the evidentiary standard required is ... low – that of 'reasonable suspicion';
- there is limited ability to test the underlying intelligence information;

¹⁰⁸ Section 85.1(4) of the Immigration and Refugee Protection Act 2001.

¹⁰⁹ Evidence of Angus McCullough, Q50.

¹¹⁰ Special Advocates' Submission to Lord Carlile, above, para. 12(ii), written evidence, p 96.

¹¹¹ Fifth Control Order Renewal report, above n. 6, paras 10 and 13.

¹¹² UN Human Rights Committee Concluding Observations on the UK at para. 17.

¹¹³ *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and human Rights, 17 February 2009 (International Commission of Jurists), at 120-121.

- there are no definite time-limits and the orders can last for long periods;
- there are limitations on effective legal representation and to legal counsel of one's own choosing;
- the right to a full fair hearing (guaranteed in both civil and criminal proceedings) is denied.

80. The Report points out that such safeguards are all the more important given that criminal sanctions often flow from the currently flawed procedures, and expresses the Panel's reservations about alternative safeguards such as the system of special advocates, which put the affected person at a grave disadvantage.

Assessment of the fairness of the system

81. The Home Office's Memorandum to the Home Affairs Committee on the control orders legislation asserts that the control orders system complies fully with the requirements of human rights law. It points to "extensive internal and external (including judicial) safeguards to ensure that there is rigorous scrutiny of the control orders regime as a whole – and that the rights of each controlled person are properly safeguarded."¹¹⁴ In one extraordinary passage it states that "various House of Lords judgments have confirmed the way in which the 2005 Act operates in a manner fully compliant with the ECHR"¹¹⁵: a reference to the House of Lords decisions in *MB* and *AF* in which the highest court effectively rewrote the statutory regime in order to make it compatible with the ECHR by subjecting the public interest in non-disclosure to the overriding right of the controlled person to a fair hearing.

82. As a result of the decision of the House of Lords in *AF v Home Secretary*, the relevant statutory provisions in the Prevention of Terrorism Act 2005, and procedural rules in Part 76 of the Civil Procedure Rules, now say one thing but mean another. They say, on their face, that there is an absolute requirement of non-disclosure of material the disclosure of which would be contrary to the public interest and that the overriding objective of the civil procedure rules, namely doing justice, is subject to the requirement not to disclose material contrary to the public interest. They mean, after *AF*, effectively the opposite: that the interests of justice trump the public interest in non-disclosure. The statute and the rules do not require the Secretary of State to provide a statement of the gist of any closed material on which fairness requires the controlled person have an opportunity to comment. After *AF*, that duty must be read into the legislation.

83. The Explanatory Memorandum accompanying the draft order acknowledges the gap between the wording of the statutory framework and the way in which it is now required to be interpreted as a result of judicial decisions reading words into the legislation in order to make it compatible. It says that that the High Court carries out an automatic review of the material to determine whether the Secretary of State's decision to make a control order is "flawed", but points out that "case law now requires a more rigorous review by the Court."¹¹⁶ In one post-*AF* case, *BM*, Mitting J also highlighted the gap between the

¹¹⁴ *Ibid.* at para. 59.

¹¹⁵ *Ibid.* at para. 61.

¹¹⁶ EM para. 7.7.

statutory framework and the approach which the courts are now required to take as a result of judicial interpretation of that framework.¹¹⁷

“15. On the basis of the closed material, I would have decided that the decision was not flawed and would have upheld the modification, notwithstanding its significant and highly adverse impact upon BM’s family, in particular upon his children.

16. As will be apparent from my reasoning, the task which I have performed is not the statutory task set out in sub-section 10(5)(a) [Prevention of Terrorism Act 2005]:

‘... to determine whether the following decision of the Secretary of State was flawed –

(a) in the case of an appeal against a modification, his decision that the modification is necessary ...’

What I have decided is that the open material is not capable of supporting the decision. That is not the test which Parliament intended. Nor is it a satisfactory basis upon which to determine the rationality and proportionality of a decision properly made in the public interest by the Secretary of State. It is, however, the inevitable result of applying the principles clearly identified by the Appellate Committee in *AF*.”

84. The Home Secretary, however, does not intend to bring forward any amendments to the relevant statutory provisions in the Prevention of Terrorism Act, or to the Civil Procedure Rules. His view is that it is unnecessary because “the 2005 Act now reads as amended by the House of Lords”. Nor does the Government consider it necessary for Parliament to have an early opportunity to debate the appropriate response to the decisions of the House of Lords and the European Court of Human Rights.

85. Even allowing for a degree of advocacy in a Government document setting out the Government’s own post-legislative assessment of one of its most important pieces of counter-terrorism legislation, we take a serious view of the mischaracterisation of the House of Lords judgments in MB and AF in the Home Office’s Memorandum to the Home Affairs Committee. The law in this area is complex and technical and we regard it as positively misleading to say to parliamentarians, most of whom are not legally trained and do not have ready access to legal advice, that the House of Lords has “confirmed” the way in which the control orders regime operates in a manner fully compliant with the ECHR. That is not, on any view, a fair or accurate characterisation of the effect of the House of Lords judgments. The special advocates who gave evidence to us, with all their experience of interpreting and applying the case-law in their day to day practices, did not consider it to be a fair reading of the House of Lords decisions.¹¹⁸

86. It is important for parliamentarians to be in no doubt that the control orders legislation has not in fact been operated in practice in a way which is compatible with the ECHR. On the contrary, it has led to a number of judicial findings of breaches of human rights,

¹¹⁷ *BM v Secretary of State for the Home Department* [2009] EWHC 1572 Admin.

¹¹⁸ Evidence of Thomas de la Mare and Angus McCullough, Qs 62-63

including unlawful deprivations of liberty and breaches of the right to a fair hearing. It is also important to be clear that the legislation itself has only been saved from being declared to be incompatible with the European Convention on Human Rights by judicial rewriting of the legislation, that is, by judicial interpretations of the framework which the Government resisted in the litigation, and which are the same in substance as amendments to the framework, amendments which the Government also resisted in Parliament.

87. To shelter behind the fact that the Prevention of Terrorism Act 2005 has not been declared to be incompatible with the ECHR, and to imply that it is therefore operating in practice perfectly compatibly with human rights, is to conceal the reality that in practice the framework has led to a number of breaches of human rights and continues to give rise to daily argument about whether the orders made under it are compatible with the right to a fair procedure under Article 6 or the common law.

88. We also heard from the controlees' lawyers that, although there had been some significant court decisions about the control order regime, these had not made very much difference in practice to the position of the individuals under control orders, at least until the decision in *AF*. In an essay in the *London Review of Books* in April 2008, "Was it like this for the Irish?", Gareth Peirce commented that, since the House of Lords judgment in the *Belmarsh* case in December 2004, "it has become clear that the government intends to ignore the spirit if not the letter of the decision." Referring to this and the House of Lords subsequent decision concerning the admissibility of evidence derived from torture, she commented:

Despite the strength and intended permanence of these two rulings by the House of Lords, however, many Muslims have come to see any protection from the courts as constituting only a temporary impediment before the government starts to implement a new method of avoidance.

89. In evidence she told of one individual who was detained for three and a half years under the Anti-Terrorism, Crime and Security Act 2001, won in the House of Lords in the challenge to that legislation, won again in the House of Lords establishing that evidence derived from torture could not be used in his case, won in the European Court of Human Rights on the basis that he had never had anything disclosed to him sufficient to provide due process, and won again in the House of Lords on the same basis, yet, despite all these legal victories, his control order remained in force on the same evidence. Such interminable back and forth, she candidly confessed, "breeds bleak cynicism ... and ... does nothing to reassure those who are affected that the law, or the lawyers, can help them at all."¹¹⁹

90. We have considered very carefully whether the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and Article 6 ECHR. We emphasise that in previous reports we have always maintained an open mind about this possibility, even while we have expressed our serious reservations about whether the actual design of the regime made this a practical impossibility. Our assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not

119 Evidence of Gareth Peirce, Q5.

capable of ensuring the substantial measure of procedural justice that is required. In short, it cannot be operated fairly without fundamental reforms which have so far been resisted.

Taking the special advocates seriously

91. In December 2007, at our suggestion, the Minister with responsibility for control orders, who was then Tony McNulty MP, met some of the special advocates to discuss their concerns. However, the meeting concentrated on “practical issues concerning the operation of the special advocate procedure and ensuring it worked as efficiently and effectively as possible, rather than the concerns of principle that you have previously raised with the Government and on which we continue to differ”.¹²⁰ The main outcome of the meeting was that the Government agreed to consider whether it would be possible to expand the training course already available to special advocates to cover concerns the special advocates had about remaining gaps in their knowledge. We expressed our disappointment at the Minister’s failure to discuss with the special advocates the issues of principle about the inherent unfairness of control order proceedings which the special advocates had raised in their evidence to us.¹²¹ Subsequently, in May 2008 the Minister offered to meet representatives of the special advocates again to discuss some of the recommendations we had made about reforming the control order system and we wrote to him to encourage him to do so.¹²² In our report we urged him to meet the special advocates to discuss our recommendations for reform of the system and to report to Parliament on the outcome of that meeting.¹²³

92. In our last report on the renewal of the control orders regime, we noted that this meeting between the Minister and the special advocates to discuss our recommended amendments to the control orders framework which were designed to address their concerns did not appear to have taken place.¹²⁴ We asked the special advocates who gave evidence to us whether any minister had met the special advocates, or asked to meet them, to discuss their concerns about the process.¹²⁵ The special advocates recalled one meeting with the then Attorney General, Lord Goldsmith, which had taken place “some time ago”, before the House of Lords decision in *MB*, and a meeting with a Home Office minister “some years ago”, but there had been no meeting or request for a meeting “in recent times.”

93. It is quite clear that there has been no attempt by the Government to meet the special advocates since December 2007, to discuss their fundamental concerns about the way in which the system of closed proceedings works in practice in the control order regime and other contexts, or to discuss our recommended amendments to the legal framework in light of the various court judgments. This has been despite our best efforts, through our

120 Letter from Tony McNulty MP, 14 December 2007, Appendix 7 in Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL 50/HC199.

121 *Ibid.* at para. 51.

122 Letter to Tony McNulty, 16 May 2008, Appendix 1 in Twenty First Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HL 116/HC 635.

123 *Ibid.* at para. 58.

124 2009 Renewal Report at para. 25.

125 Q94.

reports, to facilitate such a meeting. We welcome the fact that, as we have described above, Lord Carlile did meet four of the special advocates and invite them to set out one of their principal concerns in writing when conducting his review of the viability of the control orders system after *AF*. However, for the reasons we have explained, Lord Carlile's report does not address the substance of the special advocates' concerns about the serious limitation on their ability to discharge their function.¹²⁶

94. In the course of oral evidence we asked the special advocates whether there is any opportunity for special advocates on the one hand and representatives of the intelligence services on the other to discuss their different perspectives about how the competing demands of fairness and public safety can best be reconciled.¹²⁷ It is clear that there is no such opportunity in the day to day operation of the special advocate regime. Discussions about what material can and cannot be disclosed in a particular case take place between the special advocates and counsel instructed on behalf of the Government, and disagreements are then resolved by adversarial argument before the court.¹²⁸ There is no direct discussion between the special advocates and members of the relevant agencies concerned. Attempts by special advocates to raise points of general principle in individual cases, such as whether it is appropriate for the agencies to object to disclosure of a whole class of document or information, "have not got very far."¹²⁹

95. In our view there would be considerable virtue in there being a forum, outside of the adversarial context of legal proceedings, in which experienced special advocates could meet with ministers and representatives of the security and intelligence services to discuss the difficult issues of principle which the day to day operation of the special advocates system has thrown up, and for ministers to report to Parliament, as transparently as possible, on those discussions. We agree with the observation made by one of the special advocates that the intelligence services must be included in these discussions.¹³⁰ In certain respects the special advocates regime has rendered the intelligence and security services more accountable by requiring the agencies to engage with the rigour of adversarial legal processes. We think it is important to acknowledge, to this extent, the net gain in the accountability of the otherwise largely unaccountable security and intelligence services. There is a limit, however, to the additional accountability that such adversarial processes alone can achieve before grinding to a halt in a legal stand-off over how to reconcile the competing demands of public safety and fairness to individuals suspected of threatening that safety.

96. We consider that limit to have been reached, manifested in the endless but largely fruitless litigation about how much disclosure fairness requires in particular cases. There is no obvious end point to such litigation: it could quite literally continue indefinitely, while some controlees continue to languish under control orders which are constantly modified in light of the most recent judgment but never removed. To move forward from here

126 Above, paras 34–38.

127 Qs 55–57.

128 Evidence of Angus McCullough, Q55.

129 Evidence of Helen Mountfield, Q55.

130 Evidence of Thomas de la Mare, Q56: "The relevant interlocutors are the intelligence services, and the intelligence services in my experience have a view, and it is not a view from which they are easily moved and not necessarily one they are interested in debating."

requires a more proactive approach to be taken by the Government to the problems which have proved so intractable to date. One aspect of a more proactive approach should be the creation of a space in which all those engaged in the operation of the special advocate regime can discuss, not the details of individual cases, but the issues of general principle which have arisen, with a view to finding new ways through the current sclerosis in the institutions which have been designed to secure both public safety and individual fairness. Our previous attempts to bring about a meeting between ministers and the special advocates have been with this purpose in mind. By the way in which they have sought to discharge their function and in their evidence to us, the special advocates have proved themselves to be a group of conscientious individuals with a profound professional commitment to the rule of law. It is high time the Government took their concerns seriously.

97. We are disappointed by the Government's failure to follow through on its earlier promise to us to arrange a meeting with the special advocates. We regard this failure as symptomatic of the Government's general passivity in the face of widespread concerns about the basic fairness of closed proceedings. We recommend that the Minister responsible meet representatives of the special advocates to discuss their concerns about the fairness of the special advocate system as it currently operates, and specifically to discuss the modifications to the legal framework which we and the special advocates have suggested. We recommend that representatives of the intelligence and security services also attend and participate at this meeting. We recommend that the meeting take place as a matter of urgency, and whatever the fate of the control order regime, as the special advocates' principled concerns are potentially of relevance to all of the growing number of contexts in which special advocates and closed evidence are deployed.

98. We look forward to receiving from the Minister a detailed account of what was discussed at this meeting and a fully reasoned Government response to the special advocates' concerns. We expect this to be a conscientious political engagement with the persistent demands for changes to the legal framework governing closed proceedings, and not merely a repetition of the legal arguments being made by the Government in the ongoing litigation about the role of special advocates in control order and other proceedings involving closed material.

The cost of control orders

99. Control orders have been the most litigated of the Government's counter-terrorism measures since 2001, and quite probably the most litigated ever. Since they came into force in 2005 there have been two House of Lords judgments, several Court of Appeal judgments and innumerable High Court judgments concerning both the compatibility of the legal framework with human rights and the lawfulness of individual control orders. So numerous have been the interlocutory hearings in the High Court, concerning disclosure and directions, that it appears no record is kept. There is no sign of the litigation abating. As indicated above, since the decision of the House of Lords in *AF* in June there have already been a number of High Court judgments grappling with the implications of the House of Lords decision, and a number of cases are already on their way to the Court of Appeal and, quite possibly, back to the Supreme Court again.

100. The cost of control order litigation to the public purse is unusually high. Every control order triggers an automatic judicial review, which is as it should be in view of the seriousness of the interference with fundamental rights caused by what is essentially an executive order, but it means that every order carries a high price tag. Because of the use of closed material, a large number of special advocates are retained (they numbered 50 at the latest count), complete with their own secretariat, the Special Advocate Support Office. The controlled person's legal representatives are also publicly funded through legal aid. Every hearing concerning a control order therefore requires the presence of several lawyers, all at public expense: solicitors and barristers representing the Secretary of State, solicitors and barristers representing the controlled person, and solicitors from the Special Advocate Support Office and special advocate barristers representing the interests of the controlled person in the closed part of the proceedings from which the controlled person and their legal representatives are excluded. The number of preparatory hearings involved in control order litigation is high because of the extensive arguments over what can and cannot be disclosed to the controlled person and their legal representatives.

101. As questions have grown about the effectiveness of control orders, and as the permissible stringency of the restrictions they imposed has been progressively cut back in litigation, so we and others have had a growing sense that the financial cost of control orders may have become disproportionate to any benefit which can plausibly be claimed for them. We have therefore sought to obtain some detailed information about the costs of control orders to the public purse so that Parliament can be properly informed on this score when it comes to consider whether renewal of this unusually expensive counter-terrorism measure is justified.¹³¹

102. The detailed figures can be found in the correspondence,¹³² but to date we have ascertained that approximately £13 million was spent on control orders between 2006 and 2009. The £13 million figure breaks down approximately as follows:

£8.1 million – legal costs

£2.7 million – administrative costs

£2 million – cost to Legal Services Commission of publicly funded representation

103. This is likely to be a conservative estimate as it does not include any figure for the cost of court hearings, an estimate of which is being prepared by Her Majesty's Court Service, nor does it reflect the actual cost of legal representation of controlled persons, for which the Legal Services Commission is not invoiced until the case is closed.¹³³

104. The Government accepts that this is "a significant sum of money".¹³⁴ However, it states that, given its assessment that the control order regime remains a necessary and proportionate tool to protect the public from a risk of terrorism, it continues to devote the necessary resources to upholding the regime.

131 Second Report of Session 2009-10, *Work of the Committee in 2008-09*, Ev 141; Letter to David Hanson, 17 December 2009, written evidence, p 50.

132 Second Report of Session 2009-10, above n.131, Ev 141-143; Home Office Memorandum, paras 83-85; Letter from David Hanson, 6 February 2010, written evidence p 55-57.

133 Above, written evidence, p 55-7.

134 Home Office Memorandum, at para. 84.

105. It is clear that control orders are an extremely expensive measure. Moreover, 80% of the costs of control orders are accounted for by legal costs. As Lord West candidly admitted in the House of Lords recently after being questioned about some of the legal aspects of control orders by three former Law Lords, “I now understand why 80% of the cost involved in control orders is legal costs. It is due to the complexity.”¹³⁵ We have asked the Minister,¹³⁶ and our Chair recently asked the Prime Minister at Liaison Committee,¹³⁷ whether it is really justifiable to spend so much money on expensive lawyers rather than spend it directly on front-line counter-terrorism measures such as surveillance officers, and whether the latter would in fact be more effective in any event. The Government’s answer, supported by Lord Carlile, is a double assertion: that control orders remain necessary to protect national security (the implication being that so long as this is the case they must be maintained whatever the cost) and that surveillance “would be considerably more expensive”.¹³⁸ An attempt by our Chair to obtain a ball-park figure of the cost per day of 24 hour surveillance has elicited no more information: the Home Secretary’s written answer is that the Government do not comment on the details of terrorism-related operational matters.¹³⁹

106. The detailed information which is now available about the cost of control orders, and in particular the significant amount of public money being spent on litigating them, raises a serious question about whether the cost of maintaining the system of control orders is out of all proportion to the public benefit which they are said to serve. The Government’s response of asserting that their benefits, by disrupting terrorism, outweigh the costs, and that alternatives such as surveillance would be more expensive, is not satisfactory.

107. On the information currently available, we find it hard to believe that the annual cost of surveillance of the small number of individuals subject to control orders would exceed the amount currently being paid annually to lawyers in the ongoing litigation about control orders. We recommend that more detailed and independently verified information about the costs of surveillance be provided to Parliament in advance of the renewal debates to enable parliamentarians to reach a better informed view on this important question.

Conclusion

108. Since the decision of the House of Lords in *AF* there has been much speculation about whether the system of control orders is sustainable.¹⁴⁰ In *AF* Lord Hoffmann, who thought that the Grand Chamber had got it wrong in *A v UK* but reluctantly agreed that it should nevertheless be followed, warned that the House of Lords decision “may well destroy the system of control orders which is a significant part of this country’s defences against

135 HL Deb 3 February 2010 col. 196.

136 Evidence of David Hanson, 1 December 2009, Qs 75-80.

137 2 February 2010, Qs 73-74.

138 Home Office Memorandum at para. 85; Carlile Report, para. 81.

139 HC Deb 9 Feb 2010 col 908W.

140 See e.g. Henry Porter, “Control orders: a dying regime”, *The Guardian*, 24 September 2009; Andy Worthington, “The end of secret evidence?”, *The Guardian*, 2 December 2009.

terrorism.”¹⁴¹ Lord Hope, apparently with greater equanimity, also observed that the result of the decision may be that “the system is unsustainable.”¹⁴² Martin Chamberlain has written “on the limited evidence available so far, it appears that Lord Hoffmann’s predictions of the demise of the control order system may not have been misplaced.”¹⁴³ As pointed out above, the judgment itself does not hold the control orders regime itself to be incompatible with the ECHR. However, now that there has been time to consider that question in each case, it should be possible to assess whether the system is sustainable.

109. The whole point of requiring annual renewal by an affirmative resolution of both Houses is to provide an opportunity for post-legislative scrutiny of how the legislation is operating in practice. In view of the many problems with the control order regime in practice, documented in this report, we find that we cannot agree with Lord Carlile’s conclusion that “the control orders system functioned reasonably well in 2009, despite some challenging Court decisions.” Although strictly speaking the Government is correct to say that the legal framework of control orders is not inherently unlawful, we are firmly of the view that in order to operate the system compatibly with human rights, in the absence of a lawful derogation, would lead to its costs far outweighing its benefits compared to other alternative means of achieving the same ends, and we therefore conclude that the control order system is simply unsustainable.

110. Since the introduction of the control orders regime in March 2005, on all previous annual renewals, we have expressed our very serious reservations about renewal unless the Government was prepared to make the changes to the system we have identified as necessary to render it human rights compatible. We warned that without those changes, the use of control orders would continue to give rise to unnecessary breaches of individuals’ rights to liberty and due process. Our warnings have been echoed by other international bodies charged with monitoring compliance with human rights.

111. The many warnings have not been heeded. As a result, the continued operation of the unreformed system has, as we feared, led to more unfairness in practice, more unjustifiable interferences with people’s liberty, more harm to people’s mental health and to the lives of their families, even longer periods under indefinite restrictions for some individuals, more resentment in the communities affected by or in fear of control orders, more protracted litigation to which there is no end in sight, more claims for compensation, ever-mounting costs to the public purse, and untold damage to the UK’s international reputation as a nation which prizes the value of fairness.

112. For a combination of these reasons, together with serious reservations about the practical value of control orders in disrupting terrorism compared to other means of achieving the same end, we have reached the clear view that the system of control orders is no longer sustainable. A heavy onus rests on the Government to explain to Parliament why alternatives, such as intensive surveillance of the very small number of suspects currently subject to a control order, and more vigorous pursuit of the possibility of prosecution, are not now to be preferred.

141 [2009] UKHL 28 at [70].

142 Ibid. at [87].

143 M. Chamberlain, “Update on procedural fairness in closed proceedings” (2009) *Civil Justice Quarterly* 448.

Conclusions and recommendations

Parliamentary scrutiny

1. We welcome the timely publication of the reviewer's report, in accordance with our previous recommendation that such reports should be published at least a month before the debate in Parliament to which they are relevant, in order to facilitate proper parliamentary scrutiny. (Paragraph 10)
2. We recommend that in future, where the Secretary of State is required by statute to consult certain officers before renewing a counter-terrorism power, at least a summary of the consultee's response be published in order to facilitate parliamentary scrutiny of the justification for the renewal. (Paragraph 13)
3. We recommend that, in future, counter-terrorism powers as extraordinary a departure from principle as those contained in sections 1-9 PTA 2005 be made subject to a proper sunset clause, requiring them to be renewed by primary legislation. (Paragraph 14)

The impact of control orders on controlees, their families and communities

4. We remain extremely concerned about the impact of control orders on the subject of the orders, their families and their communities. There can be no doubt that the degree of control over the minutiae of controlees' daily lives, together with the length of time spent living under such restrictions and their apparently indefinite duration, have combined to exact a heavy price on the mental health of those subjected to control orders. The severe impact on the female partners and children of the controlees, including on their enjoyment of their basic economic and social rights as well as their right to family life, is an example of the "collateral impact" of counter-terrorism measures recently identified by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. These concerns grow more acute the longer a control order against the same individual subsists. (Paragraph 44)
5. We are particularly concerned about the apparent increase in resort to conditions in control orders which amount to internal exile, banishing an individual and, effectively, his family, from his and their community. We have very grave reservations about the use of such historically despotic executive orders, and the contribution they undoubtedly make to "the folklore of injustice." (Paragraph 45)
6. Moreover, the UK has not ratified the Protocol to the ECHR which recognises freedom of movement as a fundamental human right in the ECHR system, but it is already recognised as such within the legal order of the European Union. It seems to us likely that it is only a matter of time before executive "requirements to relocate" in control orders are found to be incompatible with the fundamental right of a citizen to move freely within the territory of one's state. (Paragraph 46)

Basic fairness of control orders

7. By requiring, in effect, the disclosure to a controlled person of the gist of the allegations against him, the decision in AF has gone some way to addressing one of the main sources of unfairness of the control order regime. However, it appears that the impact of the decision on improving fairness in practice may have been limited by the Government's passive and minimalist approach to compliance, and the approach of some lower court judges of requiring only a little further disclosure at a time. We recommend that the Government conduct a more thoroughgoing and proactive review of the material on which it relies to sustain existing control orders with a view to deciding in each case whether more disclosure is required in the light of AF, rather than leave that task to the special advocates in ongoing proceedings. (Paragraph 53)
8. Notwithstanding the rule change which permits special advocates to adduce evidence, it remains the case that special advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Service, assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary. The unfairness identified by the Constitutional Affairs Committee as long ago as 2005 therefore still persists: in practice, special advocates have no means of adducing any evidence which contradicts the evidence relied on by the Secretary of State in closed proceedings, which gives rise to a serious inequality of arms in those proceedings. (Paragraph 59)
9. The special advocates have no means of gainsaying the Government's assessment that disclosure would cause harm to the public interest, and Government assessments about what can and cannot be disclosed are effectively unchallengeable and almost always upheld by the court. (Paragraph 62)
10. Courts inevitably "accord great weight to views on matters of national security expressed by the agencies who are particularly charged with protecting national security." (Paragraph 62)
11. The effect of late disclosure of the closed material to the special advocates is seriously to compromise their ability to discharge their important function, because it leaves them with insufficient time to scrutinise the closed material and to challenge the Government's reasons for the material being closed. (Paragraph 65)
12. By seriously hampering special advocates in their performance of the role they are intended to perform, it creates the risk of serious miscarriages of justice. (Paragraph 65)
13. The inability of special advocates to communicate with the controlee after seeing the closed material, identified as a source of unfairness by the Constitutional Affairs Committee in 2005, remains unchanged, notwithstanding the clear evidence that it seriously affects the special advocates' ability to discharge their function of representing the controlee's interests in the closed proceedings. Lord Carlile's report fails to address the systemic nature of these concerns about the limitation on the special advocates' ability to perform their function: it is a limitation inherent in the

current rules, not something which can be overcome by improved training or co-operation. So long as the rules remain unchanged, this inability of special advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person and therefore the extent to which they are capable of mitigating the unfairness to the controlled person in the closed proceedings. (Paragraph 72)

14. Even allowing for a degree of advocacy in a Government document setting out the Government's own post-legislative assessment of one of its most important pieces of counter-terrorism legislation, we take a serious view of the mischaracterisation of the House of Lords judgments in MB and AF in the Home Office's Memorandum to the Home Affairs Committee. The law in this area is complex and technical and we regard it as positively misleading to say to parliamentarians, most of whom are not legally trained and do not have ready access to legal advice, that the House of Lords has "confirmed" the way in which the control orders regime operates in a manner fully compliant with the ECHR. That is not, on any view, a fair or accurate characterisation of the effect of the House of Lords judgments. (Paragraph 83)
15. We have considered very carefully whether the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and Article 6 ECHR. We emphasise that in previous reports we have always maintained an open mind about this possibility, even while we have expressed our serious reservations about whether the actual design of the regime made this a practical impossibility. Our assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required. In short, it cannot be operated fairly without fundamental reforms which have so far been resisted. (Paragraph 88)
16. We are disappointed by the Government's failure to follow through on its earlier promise to us to arrange a meeting with the special advocates. We regard this failure as symptomatic of the Government's general passivity in the face of widespread concerns about the basic fairness of closed proceedings. We recommend that the Minister responsible meet representatives of the special advocates to discuss their concerns about the fairness of the special advocate system as it currently operates, and specifically to discuss the modifications to the legal framework which we and the special advocates have suggested. We recommend that representatives of the intelligence and security services also attend and participate at this meeting. We recommend that the meeting take place as a matter of urgency, and whatever the fate of the control order regime, as the special advocates' principled concerns are potentially of relevance to all of the growing number of contexts in which special advocates and closed evidence are deployed. (Paragraph 95)
17. We look forward to receiving from the Minister a detailed account of what was discussed at this meeting and a fully reasoned Government response to the special advocates' concerns. We expect this to be a conscientious political engagement with the persistent demands for changes to the legal framework governing closed proceedings, and not merely a repetition of the legal arguments being made by the

Government in the ongoing litigation about the role of special advocates in control order and other proceedings involving closed material. (Paragraph 96)

The cost of control orders

18. The detailed information which is now available about the cost of control orders, and in particular the significant amount of public money being spent on litigating them, raises a serious question about whether the cost of maintaining the system of control orders is out of all proportion to the public benefit which they are said to serve. The Government's response of asserting that their benefits, by disrupting terrorism, outweigh the costs, and that alternatives such as surveillance would be more expensive, is not satisfactory. (Paragraph 104)
19. On the information currently available, we find it hard to believe that the annual cost of surveillance of the small number of individuals subject to control orders would exceed the amount currently being paid annually to lawyers in the ongoing litigation about control orders. We recommend that more detailed and independently verified information about the costs of surveillance be provided to Parliament in advance of the renewal debates to enable parliamentarians to reach a better informed view on this important question. (Paragraph 105)
20. Since the introduction of the control orders regime in March 2005, on all previous annual renewals, we have expressed our very serious reservations about renewal unless the Government was prepared to make the changes to the system we have identified as necessary to render it human rights compatible. We warned that without those changes, the use of control orders would continue to give rise to unnecessary breaches of individuals' rights to liberty and due process. Our warnings have been echoed by other international bodies charged with monitoring compliance with human rights. (Paragraph 108)
21. The many warnings have not been heeded. As a result, the continued operation of the unreformed system has, as we feared, led to more unfairness in practice, more unjustifiable interferences with people's liberty, more harm to people's mental health and to the lives of their families, even longer periods under indefinite restrictions for some individuals, more resentment in the communities affected by or in fear of control orders, more protracted litigation to which there is no end in sight, more claims for compensation, ever-mounting costs to the public purse, and untold damage to the UK's international reputation as a nation which prizes the value of fairness. (Paragraph 109)

Conclusion

22. For a combination of these reasons, together with serious reservations about the practical value of control orders in disrupting terrorism compared to other means of achieving the same end, we have reached the clear view that the system of control orders is no longer sustainable. A heavy onus rests on the Government to explain to Parliament why alternatives, such as intensive surveillance of the very small number of suspects currently subject to a control order, and more vigorous pursuit of the possibility of prosecution, are not now to be preferred. (Paragraph 110)

Formal Minutes

Tuesday 23 February 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Baroness Falkner of Margravine	Fiona Mactaggart MP
Lord Morris of Handsworth	Mr Richard Shepherd MP
The Earl of Onslow	

Draft Report (Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 112 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Morris of Handsworth make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 23 June in the last session of Parliament and 12 and 26 January.

[Adjourned till Tuesday 2 March at 1.30pm.]

Witnesses

Wednesday 3 February 2010

Page

Ms Gareth Peirce , Birnberg Peirce and Mr Sean Mcloughlin , The Rights Partnership	Ev 1
Ms Helen Mountfield , Matrix Chambers, Mr Angus McCollough , One Crown Office Row and Mr Thomas de la Mare , Blackstone Chambers	Ev 6

List of Written Evidence

1	Letter to the Rt Hon Alan Johnson MP, Home Secretary, dated 11 June 2009	p 43
2	Letter from the Rt Hon Alan Johnson MP, Home Secretary, dated 25 June 2009	p 45
3	Letter from the Rt Hon Alan Johnson MP, Home Secretary, dated 15 September 2009	p 45
4	Letter to the Rt Hon David Hanson MP, Minister of State, Home Office, dated 17 December 2009	p 48
5	Letter from the Rt Hon David Hanson MP, Minister of State, Home Office, dated 7 January 2010	p 49
6	Letter from the Rt Hon David Hanson MP, Minister of State, Home Office, dated 6 February 2010	p 53
7	Special advocate's note dated 30 October 2008, submitted to the House of Lords in <i>Secretary of State for the Home Department v OO (Jordan)</i>	p 58
8	Special advocates' submission to Lord Carlile	p 60
9	Special advocates' open note in <i>Secretary of State for the Home Department v AN</i> , dated 20 October 2009	p 64

Written Evidence

Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 11 June 2009

Control orders

I wish to welcome your appointment as Home Secretary. The Joint Committee on Human Rights, which I chair, scrutinises a number of aspects of the work of the Home Office and I am confident we can continue the constructive relationship we have developed over the Parliament with your predecessors.

I am writing to ask how the Government intends to respond to the unanimous judgment of the House of Lords on 10 June that basic fairness requires that people who are subjected to control orders are given sufficient information about the allegations against them to enable them to give effective instructions to those representing them.¹⁴⁴ The Law Lords held unequivocally that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against them.

The House of Lords judgment upholds my Committee's longstanding concern about the fairness of the control orders regime. In its reports on the Counter-Terrorism Bill in the last session, for example, the Committee recommended that there should be an obligation on the Secretary of State to provide a statement of the gist of any closed material on which fairness requires the controlled person have an opportunity to comment.¹⁴⁵ We proposed a specific amendment to the statutory framework to this effect, amending para 4(3)(e) of the Schedule to the Prevention of Terrorism Act 2005 to ensure that the Civil Procedure Rules "require the Secretary of State to provide a summary of any material on which he intends to rely and on which fairness requires the controlled person have an opportunity to comment". The Government rejected this recommendation on the basis that the decision of the House of Lords in *MB* did not require it and that the mandatory provision of the gist of closed material would not be a desirable change.¹⁴⁶

When the control orders regime was renewed in February this year the Committee pointed out to the Government that the recent decision of the Grand Chamber of the European Court of Human Rights in *A v UK*¹⁴⁷ leaves no room for doubt that basic fairness requires that the controlled person be provided with the gist of the closed material which supports the allegations made against them, otherwise the controlled person is not in a position effectively to challenge the allegations against them.¹⁴⁸ It again recommended that to make the control orders regime compatible with human rights the law had to be amended to

¹⁴⁴ *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.

¹⁴⁵ Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50/HC 199 at paras. 65-66; Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL Paper 108/HC 554 at paras 101-103.

¹⁴⁶ Cm 7344, *Government Reply to the Ninth Report from the Joint Committee on Human Rights, Session 2007-08*, HL paper 50/HC 199 (26 March 2008).

¹⁴⁷ Application No. 3455/05 (19 February 2009).

¹⁴⁸ Fifth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders 2009*, HL Paper 37/HC 282 at para. 27.

require the disclosure to the controlled person of the essence of the case against him. Unless the legal framework was amended in this way, the Committee warned that it was inevitable, in light of the recent ruling of the European Court of Human Rights in *A v UK*, that there will be cases in which individuals are denied the right to a fair hearing.

The Government again rejected this recommendation, on the basis that it “continues to disagree with the JCHR” about the correct interpretation of what Article 6 ECHR (the right to a fair hearing) requires.¹⁴⁹ The Government believed that the approach of the Court of Appeal was correct when it found that there is no minimum amount of disclosure that must be made to controlled persons in order for the proceedings to comply with Article 6. That basis for the Government’s rejection of my Committee’s recommendation is no longer tenable, now that the House of Lords has held, in light of the Strasbourg case-law, that Article 6 requires that the essence of the allegations against a controlled person must be disclosed to enable him to give effective instructions in relation to those allegations.

In light of the above I would be grateful for your response to the following questions.

Q1. What steps does the Government propose to take in response to the judgment of the House of Lords in *Secretary of State for the Home Department v AF*?

Q2. Will the Government now bring forward amendments to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules to make it clear beyond doubt on the face of the legal framework

- a) **that individuals who are subjected to control orders are given sufficient information about the allegations against them to enable them to give effective instructions to those representing them and**
- b) **that the absolute requirement of non-disclosure is qualified by the right of the controlled person to a fair hearing?**

Q3. If the Government does not intend to bring forward any amendments to the relevant statutory provisions and Civil Procedure Rules, please explain why not.

Q4. Do you consider that it would be desirable for Parliament to have an early opportunity to debate the appropriate response to the decisions of the House of Lords and the European Court of Human Rights on an issue of this importance?

Q5. Please explain the Government’s assessment of the implications of the judgment in *AF* for the fairness of the current procedure for extending pre-charge detention beyond 14 days.

¹⁴⁹ *Government Reply to the Report by the Joint Committee on Human Rights on the Annual Renewal of Control Order Legislation 2009*, Cm 7625 (May 2009), p. 1.

Letter to the Chair of the Committee from Rt Hon Alan Johnson MP, Home Secretary, dated 25 June 2009

House of Lords Judgment of 10 June 2009 on Control Orders

Thank you for your letter of 11 June regarding the recent law Lords judgment on control orders. The Government is considering the impact of this judgement and our options carefully.

I am afraid that I will not meet your suggested 25 June deadline for providing a substantive response to all your questions, but I will of course send you such a response in due course.

Letter to the Chair of the Committee from Rt Hon Alan Johnson MP, Home Secretary, dated 15 September 2009

HOUSE OF LORDS JUDGMENT OF 10 JUNE 2009 ON CONTROL ORDERS

Further to my letter of 25 June, I now write to respond to your letter of 11 June regarding the recent Law Lords judgment on control orders . Taking your questions in turn:

01. What steps does the Government propose to take in response to the judgment of the House of Lords in *Secretary of State for the Home Department v AF*?

The House of Lords maintained the Lords' October 2007 read down of control orders legislation, but felt obliged to take into account the February 2009 European Court of Human Rights' ECtHR judgment in *A & Others*. It commented that the Court of Appeal's October 2008 judgment on control orders had correctly interpreted the October 2007 judgment of the House of Lords when it endorsed the Government's position - that there was no irreducible minimum disclosure necessary to ensure compliance with Article 6 the right to a fair trial of the European Convention of Human Rights ECtHR.

However, the Law Lords concluded that they now had to replicate the test of the February 2009 European Court of Human Rights judgment in *A & Others* handed down shortly before commencement of the House of Lords hearing for the stringent control orders before them.

Consequently, in order for such control order proceedings to be compatible with Article 6, the controlled person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlled person is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the individual is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be. The three cases before the Law Lords were remitted back to the High Court to consider in the light of this judgment.

The protection of human rights is a key principle underpinning the Government's counter-terrorism work. We need to protect individual liberty whilst maintaining our

nation's security. This is a challenge for any government, but we have always sought to strike the right balance - including by introducing control orders.

As some of the Law Lords acknowledged, this judgment makes achieving the right balance harder in control order cases. Lord Hoffman stated 'I agree that the judgment of the European Court of Human Rights 'ECtHR' in *A v United Kingdom...* requires these appeals to be allowed.

I do so with very considerable regret, because I think that the decision of the ECtHR was wrong... ' Lord Brown commented that 'Some of your Lordships may consider that [the balance between national security and the interests of a fair hearing could and should have been struck differently, perhaps as it was in MB. Plainly there is room for at least two views about this.. . But... the Grand Chamber has now pronounced its view and we must accept it.' Similarly, Lord Carswell observed that 'Views may differ as to which approach is preferable, and not all may be persuaded that the Grand Chamber's ruling is the preferable approach.'

The Government has reviewed all current control order cases in the light of the June 2009 Lords judgment. It is clear that not all control orders will be adversely affected by the judgment. For example, in *Secretary of State for the Home Department v. AT and AW* [2009] EWHC 512 (Admin), the High Court has already held that the test in the European Court of Human Rights judgment in *A & Others*, which has been replicated in the House of Lords judgment on control orders, would be met in AT's case. But the Government recognises that the judgment will require a greater degree of disclosure to be made in other control order cases.

In those cases, the Government is making representations to the special advocates and the court on the extent of disclosure required within the timescales set down by the High Court proceedings in each case. If the Government concludes in relation to any control order that it will not be able to make enough disclosure to the controlled person to comply with Article 6, we will consider revoking the order. As you will be aware I have done this in the case of AF.

Article 6 rulings have been made in relation to the substantive High Court review of two cases since the hand down of the judgment in *AF & Others*. In one case handed down in a closed judgment only, the Secretary of State has been ordered to make further disclosure. We concluded the damage to the public interest caused by revoking the control order would be even greater than the damage to the public interest caused by making further, damaging, disclosure, and so have made the disclosure ordered by the court. The High Court was content that the proposed disclosure ensured compliance with Article 6 at that point.

In the other case - *Secretary of State for the Home Department v AN* [2009] EWHC 1966 Admin - the court ordered the Secretary of State to revoke the control order. This was because the judge had previously ordered the Secretary of State to disclose further material. The Secretary of State was not willing to make that disclosure and so indicated that reliance would be withdrawn on that material. The judge considered it represented the essence of the case as it was put to the Secretary of State when the control order was originally made. The court found that as the decision to make an order had been based

on grounds the core of which could not now be relied upon, the decision must be flawed.

However, the court found that the order was properly made and renewed and therefore the appropriate remedy was to order the Secretary of State to revoke the order rather than to quash it. The court indicated that the Secretary of State was free to decide whether or not to apply for permission to make a fresh control order on the basis of the material disentangled from the withdrawn material, and that the Secretary of State was entitled to take into account material deployed in these proceedings other than that which has been withdrawn. The judge explicitly stated that he had not decided that that material would be incapable of supporting a decision to make a control order; that would be for the court to decide in due course as part of its consideration of any new order. The Government has subsequently made such an order, with the court's permission.

In another case, an individual's control order was modified to relocate him as part of a package of obligations designed to protect the public from a risk of terrorism. The individual appealed and the judge in the modification hearing concluded that further disclosure of the closed reasons for the relocation was necessary to meet the *AF & Others* test. No such further disclosure could be made owing to the damage to the public interest that this would cause. The judge therefore directed the Secretary of State to revoke the modification – see *8M v Secretary of State for the Home Department* 2009 EWHC 1572 Admin. In doing so, the judge commented:

‘On the basis of the closed material, I would have decided that the decision was not flawed and would have upheld the modification, notwithstanding its significant and highly adverse impact upon 8M's family, in particular upon his children.’

‘As will be apparent from my reasoning, the task which I, have performed is not the statutory task set out in subsection 10(5)(a) [of the Prevention of Terrorism Act 2005]:’

.... to determine whether the following decision of the Secretary of State was flawed - (a) in the case of an appeal against a modification, his decision that the modification is necessary..;’.

‘What I have decided is that the open material is not capable of supporting the decision. That is not the test which Parliament intended. Nor is it a satisfactory basis upon which to determine the rationality and proportionality of a decision properly made in the public interest by the Secretary of State. When the Secretary of State made the decision to relocate 8M, her decision properly took into account closed material.’

This illustrates the difficulties created by *AF & Others*.

The High Court will consider the compliance of each individual control order with the right to a fair trial, in the light of the *AF & Others* test. The Government will continue to

keep the policy position relating to control orders under review, as case law following the June 2009 judgment develops. As always, the Government will take all steps we can to manage the threat posed by suspected terrorists.

The Government will in due course publish as a Command Paper a memorandum for the Home Affairs Committee, as part of its commitment to a new mechanism for post-legislative scrutiny of Acts that received Royal Assent from 2005 onwards. This provides an opportunity for the Government to undertake a further assessment of the impact of *AF & Others*.

[I have also asked the independent reviewer of terrorism legislation to consider that judgment as part of his next annual report on the operation of control orders legislation.]

02. Will the Government now bring forward amendments to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules to make it clear beyond doubt on the face of the legal framework

- a) **that individuals who are subjected to control orders are given sufficient information about the allegations against them to enable them to give effective instructions to those representing them and**
- b) **that the absolute requirement of non-disclosure is qualified by the right of the controlled person to a fair hearing?**

03. If the Government does not intend to bring forward any amendments to the relevant statutory provisions and Civil Procedure Rules, please explain why not.

The Government does not intend to bring forward any amendments to the relevant statutory provisions and civil procedure rules in the light of the judgment in *AF & Others*.

Legislative amendment is unnecessary. As a matter of law, the *AF & Others* judgment already has full effect. This is because the House of Lords used section 3 of the Human Rights Act 1998 to interpret the Prevention of Terrorism Act 2005 in a way that is compatible with Article 6. Accordingly, by law the 2005 Act now reads as amended by the House of Lords. Thus, no further corrective action is required by Parliament.

Rather than clarifying matters, amending the law simply to confirm what is already the position may cause unnecessary confusion, as the courts would be required to interpret any new statutory language. This carries the risk of unintended consequences.

Q4. Do you consider that it would be desirable for Parliament to have an early opportunity to debate the appropriate response to the decisions of the House of Lords and the European Court of Human Rights on an issue of this importance?

The Government does not consider it necessary for Parliament to have an early opportunity to debate the appropriate response to the House of Lords judgment in *AF & Others* or the European Court of Human Rights' judgment in *A & Others*. The Law Lords' judgment has confirmed the test for disclosure that must be met to ensure compliance with Article 6 of the ECHR. The Government is considering the impact of the judgment in individual cases, and acting accordingly. The High Court will interpret and implement that judgment in individual control order cases.

We should not pre-empt the High Court's forthcoming case by case consideration of compliance of individual control orders with Article 6 in the light of the Lords' judgment that will now be undertaken by the High Court. Once proceedings for a number of these cases have been held on the basis of the *AF & Others* judgment, we will be in a better position to assess accurately the overall impact of the judgment. The scope for sensible Parliamentary debate at this stage would appear to be limited.

Q5. Please explain the Government's assessment of the implications of the judgment in *AF* for the fairness of the current procedure for extending pre-charge detention beyond 14 days.

It will be for the courts to assess the applicability of the judgment to other closed court proceedings. However, the Government does not consider that there is automatic read across to all other proceedings involving the use of closed material.

We have always accepted that Article 5(4) applies to pre-charge detention extension proceedings, but as the European Court of Human Rights has repeatedly observed, Article 5(4) does not impose an inflexible standard. In the context of extended detention applications, which take place in the circumstances of an on-going investigation, we consider that Article 5(4) does not import the full disclosure requirements as set out in *A & Others*.

Closed hearings are rarely used in pre-charge detention extension hearings and are used even less frequently in the later stages of detention (i.e, beyond 14 days). Sue Hemming, Head of the Counter-Terrorism Division of the Crown Prosecution Service, noted during the Public Committee stage of the Counterterrorism Bill on 22nd April 2007 that:

'The actual application is generally very detailed, and the ex parte part of any application will depend on each individual case. Our experience is that, as time goes on, the ex parte applications become less and shorter. Clearly at the very beginning of an investigation you are in a very different situation that at 14 or 21 days. In only one of the applications that have been made by prosecutors against 17 individuals was there any form of ex parte application and that was a tiny part of it.'

The reality is that suspects are given sufficient information for the hearings to comply with Article 5(4).

In relation to the judgments in *A & Others* and *AF & Others*, we do not accept that the ruling concerning the sufficiency of open disclosure laid down in those judgments applies to proceedings for extended detention under Schedule 8 to the Terrorism Act 2000. Hearings conducted under Schedule 8 are substantially different from proceedings under Part 4 of the Anti-terrorism Crime and Security Act 2001 and from control order proceedings: any closed material that is deployed is not to support detention pending deportation of foreign nationals even if removal is not currently possible, or a control order imposing stringent restrictions on liberty for a period of up to a year. It is to support limited detention for a period of up to 7 days at a time, up to a maximum of 28 days.

Further, the hearing falls within the investigative part of the process and does not involve the determination of the allegations against the person - that is a matter for the criminal trial. Instead, it involves the determination of whether further detention is necessary for the purposes of the terrorist investigation.

In any event, in practice we understand that suspects are given sufficient information about the reasons why further detention is necessary to enable them to contest those reasons.

Letter from the Chair of the Committee to Rt Hon David Hanson MP, Minister of State, Home Office, dated 17 December 2009

Counter-Terrorism Policy and Human Rights

Thank you for your letter dated 10 December following up some of the points covered in our evidence session on 1 December. I note that you will be writing further to the Committee in relation to the other commitments you gave in your evidence and I look forward to receiving that. In the meantime, I am writing in relation to some other points which arose during that session on which we would be grateful to receive more information.

Guidance on detention and interrogation overseas

We asked you and Ms Byrne a number of questions about exactly what guidance has been provided to the ISC and in particular whether it has been provided with unedited versions of all the guidance that existed at the time of the various allegations of complicity. We remain unclear about whether all of the earlier versions have been provided. Ms Byrne said, for example (Q32), that “they have all the sets of material that we were able to give.”

Can you please confirm that the ISC has been provided with all versions of the guidance that were current at the time of the events documented in the Human Rights Watch report, and that nothing has been deleted from those versions of the guidance?

Cost of control orders

You wrote to me on 27 November helpfully providing some of the information we sought about the legal costs incurred by the Government in connection with control orders. I note that you indicated in that letter that you would be writing further in due course about the total number of court hearing since March 2005 and I look forward to receiving that response.

In the meantime, I would be grateful if you could also provide an approximate figure for the cost to public funds of the legal costs incurred by the controlees, and of the court hearings. I recognise that this information will be held by the Legal Services Commission and the Court Service respectively, but I would be grateful if your Department could obtain it. I would also be grateful if you could provide an estimate for any additional costs of control orders, such as the cost of the Control Orders Control Office and the Special Advocate Support Office.

Secret evidence

You were asked by Lord Morris (Q85) if the Government could demonstrate that it has now considered the implications of the judgment of the European Court of Human Rights in *A v UK* for all the other contexts in which special advocates and secret evidence are used, and in response you agreed to provide me with a note to confirm that.

I would be grateful if your note on this could provide a comprehensive schedule of the different contexts in which secret evidence and special advocates are used, and, in relation to each, explain what changes, if any, the Government has decided are necessary in the light of the decision of the European Court of Human Rights in *A* and the decision of the House of Lords in *AF*.

Letter to the Chair of the Committee from Rt Hon David Hanson MP. Minister of State, Home Office, dated 7 January 2010

In my letter of 10 December 2009 I undertook to provide the Committee with further information on the commitments I gave during my oral evidence session on 1 December 2009. You subsequently wrote to me on 17 December 2009 raising a number of further queries.

Further information on control order hearings

In my letter of 27 November 2009 I undertook to provide you with figures of the total number of court hearings relating to control orders since March 2005. A total of 40 substantive hearings under sections 3(10) (review of the control order) and 10 (appeals relating to control orders) of the Prevention of Terrorism Act 2005 have taken place in the High Court. In my letter of 27 November 2009 I said that the figures provided would be separated into substantive hearings under section 3(10) of the 2005 Act and appeal hearings under section 10 of the Act. Unfortunately, it has not been possible to divide the figures in this way, as many of the appeals under section 10 have been heard alongside the section 3(10) reviews. Seven hearings have taken place in the Court of Appeal and two in the House of Lords. As I explained in my earlier letter, these figures do not include the interim procedural hearings that have taken place, such as case management and disclosure hearings, as the Home Office does not hold comprehensive records of these interim hearings.

Further information on costs of control orders

It has not proved possible to provide the further information you requested on the costs of control orders within the time available. I am sorry for the delay and will write to you separately as soon as possible on this point.

Implications of *A & Others* for other contexts in which closed material and special advocates are used

As outlined in the Home Secretary's letter to you of 1 October, the Government has considered the implications of the European Court of Human Rights (ECtHR) judgment in *A & Others* for other contexts in which closed material and special advocates are used.

The powers under Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) were repealed in March 2005 and replaced by control orders under the Prevention of Terrorism Act 2005. Control orders, unlike the provisions of Part 4 of the ATCSA, apply to British citizens as well as foreign nationals and stateless persons.

In *AF & Others*, the House of Lords concluded that they now had to replicate the test applied by the ECHR in *A & Others* (handed down shortly before commencement of the House of Lords hearing) for the stringent control orders before them. The Home Secretary's letter to you of 15 September, and the Written Ministerial Statement on control orders of 16 September, outlines the Government's response to this. I laid the latest quarterly Written Ministerial Statement on control orders before Parliament on 15 December, which provides a further update on the position.

Since the legal regime found by the ECtHR to have violated the ECHR in *A & Others* has been repealed, the Government considers no further general measures are necessary to implement that judgment. The House of Lords found in *AF & Others* that the disclosure requirements of *A & Others* apply in the context of the stringent control orders before them. The Government does not consider that there is automatic read across of the judgment to all other proceedings involving the use of closed material and special advocates. It will generally be for the courts to consider the applicability of the principle to such proceedings. However, we are considering whether changes to the Parole Board's procedures are needed in order to ensure that, where relevant, they comply with the *AF & Others* principle and to regulate the use of special advocates, while safeguarding closed material.

Contexts in which closed material and special advocates are used

There are some contexts in which the use of special advocates is provided for by legislation - often where it is expected that closed material will be used routinely. In addition, the courts have an inherent jurisdiction in England, Wales and Northern Ireland to request that the relevant law officer consider appointing special advocates and in Scotland to consider the appointment of special advocates, if special advocates should become necessary in a particular case where there is no such express provision. It is therefore difficult to provide a comprehensive list of all these contexts. We are aware that special advocates have been or may be used in the contexts listed below. It should be noted that in many of these proceedings, closed material and special advocates are not used routinely. Rather, they have been used on rare occasions - or in some cases have not yet been used at all.

- Control orders;
- Special Immigration Appeals Commission - for example, appeals against deportation on national security grounds.
- Asset freezing;

- Proscribed Organisations Appeal Commission;
- Security Vetting Appeals Panel (SVAP) - appeals relating to the refusal of security clearance on national security grounds;
- Employment Tribunal and the Employment Appeal Tribunal – employment claims arising from the refusal/withdrawal of security clearance on national security grounds;
- Race discrimination claims under the Race Relations Act 1976;
- Naturalisation judicial reviews - challenges to a decision to refuse naturalisation on national security grounds;
- Parole Board - hearings relating to prisoners' applications for parole or relating to recall decisions;
- Pre-charge detention hearings - applications for extended pre-charge detention of terrorist suspects under Schedule 8 to the Terrorism Act 2000;
- Production order hearings - applications under Schedule 5 to the Terrorism Act 2000 for an order for an individual to produce material for the purposes of a terrorist investigation;
- Planning inquiries where parties are prevented from hearing or inspecting evidence on grounds of national security, under section 80 of the Planning and Compulsory Purchase Act 2004;
- Family proceedings - special advocates can act in the interests of family members in relation to material withheld on (generally) non-national security grounds;
- Mental Health Review Tribunal - reviews cases of patients detained under the Mental Health Act 1983. A special advocate was appointed for a hearing in the High Court to consider a Data Protection Act 1998 request for information relating to the applicant's hearing before the MHRT;
- Criminal prosecutions where closed material (whether national security related or, most typically, relating to witness anonymity) is relied upon;
- Information Tribunal - primarily hears appeals under the Freedom of Information Act 2000;
- Judicial reviews of the refusal of the Government to provide exculpatory material relating to Guantanamo detainees on Norwich Pharmacal/Public Interest Immunity grounds;
- Private law compensation claims from ex-Guantanamo detainees. The court has cleared the way for closed defences so it is likely that special advocates will be required;
- Other judicial reviews where closed material is used (for example relating to military matters);

- Decisions on release/recall of prisoners involving the use of closed material under various statutory provisions in Northern Ireland, including in relation to the early release scheme under the Belfast Agreement;
- National Security Certificate Appeals Tribunal Northern Ireland see for example the decision in *Lockright*, a case where the Northern Ireland Secretary refused to grant a licence for the provision of security guarding services .

The UK threat level and a 'public emergency threatening the life of the nation '

I thought I should clarify some of the discussion at my evidence session relating to the UK threat level and the test to be met in order to derogate from the ECtHR. The test is set out in Article 15(1) of the ECHR: *'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'*. As I explained to the Committee, JTAC sets the UK threat level - currently SUBSTANTIAL. But whether the test for derogation is met is a decision for the Government (albeit one that can be tested in the courts) - taking the advice , of course, of the security and intelligence agencies. The two decisions are independent of each other. It is therefore possible that the Government could consider there to be a public emergency threatening the life of the nation even if JTAC lowered the threat level to one of those below SUBSTANTIAL. In their judgments in *A & Others* , the Law Lords and the ECHR both endorsed the Government's view that there was a public emergency threatening the life of the nation.

Pre-Charge Detention

We do not consider it necessary to amend Schedule 8 of the Terrorism Act. It is appropriate to apply a standard of proof in certain circumstances where allegations have to be proved - in particular in a criminal trial where the standard is 'beyond reasonable doubt' . However, in pre-charge detention extension hearings, the allegation against the individual is not itself being determined; rather the court must be satisfied of the matters set out in paragraph 32 of Schedule 8 (Grounds for extension) before it may authorise further detention. The test of being 'satisfied' is one the courts are familiar with and is one that is found for example in the Bail Act 1976.

The police are fully trained on the lawfulness of arrests. Suspects are told as much as possible about the reasons for their arrest and the allegations against them within the confines of an ongoing terrorist investigation and that this is in accordance with Article 5(2).

Part I of Schedule 8 (paragraphs 1 to 20) contains provisions about the treatment of persons detained under section 41. This includes provision about the audio and video recording of interviews (paragraph 3) and the right of the detained person to have a friend or relative informed of his detention and to consult a solicitor (which rights may be delayed on specific grounds for up to 48 hours) (paragraphs 6 to 9).

In addition to the measures contained in Part I of Schedule 8, PACE Code H applies to people in police detention following arrest under section 41 Terrorism Act 2000 . This Code of Practice already deals with matters such as: access to legal advice (Part 6), conditions of detention (Part 8), care and treatment (Part 9) and the transfer of detainees to a designated prison after 14 days' detention other than in specified circumstances (Part 14.5).

We have never promised to specifically review the pre-charge detention of the individuals who were arrested in relation to Operation Overt (the Heathrow Airline plot) . We are also unable to pass further comment surrounding Operation Overt due to ongoing related trials - including awaiting a judgment in the second re-trial and the commencement of two further separate trials. The case is therefore not complete.

Guidance to the Security and Intelligence Agencies on the Detention and Interviewing of Detainees Overseas

You enquired again about the details of guidance on the detention and interviewing of detainees overseas that have been provided to the Intelligence and Security Committee (ISC). Unfortunately, I am not in a position to add to what I set out in my letter of 10 December 2009 as the ISC does not discuss evidence provided to it except through its published reports . However, I can re-confirm that following the Prime Minister's statement in March this year, all current versions of relevant guidance were provided to the Committee in May. These were then consolidated into a single version which was provided to the ISC on 18 November 2009.

As my previous letter highlights , you will also want to refer to the ISC reports on *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (Cm 6469, published 2005) and *Rendition*(Cm7171, published July 2007) which clearly show that the ISC has previously been provided with earlier guidance material.

Review of the Community Impact of Counter-Terrorism Legislation

I apologise that the review has not yet been published. We will endeavour to finalise and publish the report as soon as possible of the community impact of counter-terrorism legislation .

Evidence from the Director General of the Security Service

Finally, while I understand the Committee's disappointment that the Director General of the Security Service is unable to give formal evidence to the Committee, I am pleased to confirm that Jonathan Evans has offered to give the Committee an off-the-record confidential briefing on the current terrorist threat.

Letter to the Chair of the Committee from Rt Hon David Hanson MP, Minister of State, Home Office, dated 6 February 2010

In my letter of 13 January I undertook to provide further information in relation to the costs of control orders. This letter provides the relevant information that has been supplied to the Home Office. I am also taking this opportunity to respond to certain questions from

the Committee's Eighteenth Report of Session 2008-09 (Counter Terrorism and Human Rights (Fifteenth Report): Annual Renewal of 28 days).

Further information on costs of control orders

In your letter of 17 December 2009 you requested that the Home Office obtain figures on legal costs incurred by persons subject to control orders from the Legal Services Commission (LSC) and on the costs of control order court hearings from Her Majesty's Court Service (HMCS).

The Home Office has been informed by the LSC that between April 2005 and December 2009, £1,965,445 was attributed to control order legal proceedings. However, the actual total figure spent on legal representation on behalf of controlled persons in this period is likely to be higher. When solicitors apply for legal aid on behalf of their client, they receive a certificate from the LSC stating that the LSC will pay legal costs in that case. The solicitors will then incur expenditure, but will not necessarily invoice the LSC until the case is closed. The great majority of certificates issued by the LSC in relation to control order proceedings remain live, and therefore the £1,965,445 figure does not reflect the full extent of the legal costs of controlled person's open legal representation.

Whilst an exact figure cannot be provided, it is likely that a proportion of the LSC costs may also overlap with the costs to the Home Office of control order legal proceedings of £8,134,012.49 (between April 2006 and October 2009) provided to the Committee in my letter of 27 November 2009. This is because, as set out in the letter of 27 November 2009, the figure of £8,134,012.49 provided by the Home Office included the amount spent on paying the legal costs of the controlled persons where this has been ordered by the court. The LSC will only usually be made aware that the Home Office has been ordered to pay all or part of the costs in a case at the point that a case is closed. Therefore, the LSC figure may include some costs already paid by the Home Office that are yet to be recouped.

At the JCHR evidence session on 1 December 2009, you stated that the legal costs of controlled individuals were likely to be of a similar magnitude to those of the Home Office. Although the figure provided by the LSC is unlikely to reflect the full extent of the costs of the open legal representation of controlled persons, it does not follow that the full figure will be of the same magnitude as the costs to the Home Office. As set out in my letter of 27 November 2009 the figure of £8,134,012.49 for legal costs incurred by the Home Office included the costs of the special advocates, the Special Advocates Support Office and the cost of meeting the costs of the controlled persons where this has been ordered by the court as well as the costs of the Home Office's own legal representation and advice. It is therefore anticipated that the cost of control order proceedings to the LSC, which covers the costs of the controlled persons' open legal representation (where the Home Office has not been ordered to pay costs) only, will be substantially lower than the costs of control order proceedings to the Home Office.

HMCS has confirmed that it does not hold figures on the cost of control order proceedings. Nonetheless, HMCS is compiling an estimate of the relevant costs. Due to the quantity of data to be examined to provide the Committee with an informed estimate, it has not been possible for HMCS to provide this figure to the Home Office for inclusion in this letter. HMCS will write directly to the Committee with this estimated figure as soon as

possible. It should be noted that HMCS does not have responsibility for the cost of hearings in the Supreme Court! House of Lords and therefore this will not be reflected in their estimate. There have not yet been any control order proceedings in the Supreme Court. Details of the cost of the two hearings on control orders that took place in the House of Lords in 2007 and 2009 may be held by the House authorities.

In your letter of 17 December 2009 you request an estimate for any additional costs of control orders, such as the costs of the Control Orders Control Office and the Special Advocate's Support Office. I refer the Committee to the Memorandum to the Home Affairs Committee: Post-Legislative Assessment of the Prevention of Terrorism Act 2005 dated February 2010 (Cm 7797). That document sets out that the total cost of control orders to the Home Office between April 2006 and August 2009 was £10.8 million. This figure includes the cost of Home Office staff working on control orders (which is what we assume you mean by 'the Control Orders Control Office'); administrative costs relating to the management of control orders; legal advice and other legal costs; accommodation; subsistence; council tax and utility bills and telephone line rental/phone cards provided to controlled persons in the course of the administration of the control order; and the fees paid to Lord Carlile in his role as Independent Reviewer of the Prevention of Terrorism Act 2005. For the avoidance of doubt, this total includes the figure of £8,134,012.49 for legal costs provided to you in my letter of 27 November 2009 (as set out in that letter and above, the figure of £8,134,012.49 figure includes the cost of the Special Advocates Support Office). As such a figure of roughly £2.7 million has been spent by the Home Office on the administration of control orders on top of legal costs. This is an approximate figure as the periods in which costs have been measured are slightly different.

Response to questions contained in the report on the annual renewal of 28 days

1. Better information so Parliament can decide whether to renew the power

"We therefore reach the same conclusion as last year on the question of the necessity for the renewal of the power to detain terrorism suspects for more than 14 days: in the absence of the information required to make that assessment, we are unable to reach a view as to whether the Government has made out its case. We also repeat our call for a thoroughgoing review of all those cases where the power has been exercised to date, with a view to ascertaining whether those released could have been released earlier and those charged could have been charged earlier on the threshold test"

The Home Office welcomes the comment that the May 2009 statistical bulletin on terrorism arrests and outcomes for Great Britain was helpful. A further report on the operation of police powers under the Terrorism Act 2000 and other legislation: 'Arrests, Outcomes and Stops and Search' was published on 26 November 2009 and can be viewed on the Home Office Website: <http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf>

There has already been independent analysis of pre-charge detention. The review in 2009 by Her Majesty's Crown Prosecution Service Inspectorate (HMCPPI) highlighted that in all the cases they reviewed there was clear evidence on file that pre-charge detention had been properly monitored and reviewed by the CPS and the applications for extension were entirely appropriate. At least one of the cases examined involved detention beyond 14 days. This was an important independent assessment, and clearly shows that HMCPPI

consider that the CPS charge at the earliest possible moment based on the evidence at hand.

Where the charging decision is to be made, the standard to be applied in reaching the charging decision will be the Full Test under the Code for Crown Prosecutors: namely that there is enough evidence to provide a realistic prospect of conviction and that it is in the public interest to proceed.

In cases where it is determined that it would not be appropriate for the person to be released on bail after charge and where the full evidential material required for charge is not yet available but there is reason to believe it will be shortly, the Crown Prosecutor will assess the case against the Threshold Test and a review date for a Full Code Test will be set as part of an action plan.

There is also the independent oversight of Lord Carlile's annual reports on the operation of the terrorism legislation, including pre-charge detention under Schedule 8 to the Terrorism Act 2000.

Lord Carlile has also conducted a review into the Operation Pathway arrests made in the North West of England. The report can be viewed on the Home Office site: <http://security.homeoffice.gov.uk/news-publications/publicationsearch/terrorism-act-2000/operation-pathway-report.html>. As part of this review Lord Carlile looked at the circumstances surrounding the detention of the individuals involved.

2. Compatibility with right to a judicial hearing

“We repeat our recommendation that the legal framework governing judicial authorisation of extended detention be amended to provide stronger procedural safeguards such as those we suggested as amendments to the Counter-Terrorism Bill. Unless those amendments to the statutory framework are made, we remain of the view that the renewal of the maximum extended period of 28 days risks leading in practice to reaches of Article 5(4) ECH”

The House of Lords in the case of *Ward v. Police Service of Northern Ireland* [2007] UKHL 50 found that the pre-charge detention regime in Schedule 8 to the Terrorism Act 2000 is compatible with Article 5(4). The Government does not accept that there is automatic read across of the decisions in *A & Others* and *AF & Others* to all other proceedings involving the use of closed material. In particular it does not accept that the disclosure test laid down in those cases applies to pre-charge detention applications which involve a different context to both Part 4 of the 2001 Act and stringent control orders. We have argued this in the case of *Duffy & Others* which was heard by the High Court of Northern Ireland in September 2009 (Judgment awaited). Closed hearings are used very rarely in pre-charge detention extension hearings and are used even less frequently in the later stages of detention i.e. beyond 14 days.

As regards whether the judge is empowered only to consider the conduct of the investigation in determining whether extended detention should be granted, not the legality of the original arrest - we have always maintained that the judicial authority determining the application for extended detention may consider the legality of the original arrest where this is questioned by the detainee. The High Court in Northern

Ireland has confirmed that the judicial authority does indeed have the power to examine the basis for the original arrest (*Duffy & Others* [2009] NIQB 31)

3. Impact on suspects and communities

“We welcome the Government’s continued commitment to assessing the impact of counter-terrorism legislation, including pre-charge detention , on the communities most directly affected and we look forward to publication of that research report. However, very little is known about the impact of extended pre-charge detention on the individuals concerned: the impact on their mental health, on their families, and on their employment for example. Such an assessment could already have taken place in the case of those who have been held for more than 14 days and then released without charge. We recommend again that the Government obtain and make available to Parliament such an impact assessment”

During the debate in June 2008 on the proposal in the Counter-Terrorism Bill concerning 42 days, the then Home Secretary made a commitment in the House of Commons, which was reiterated by Lord West, to review the impact of counter-terrorism (CT) legislation on British communities, not individuals or suspects. An impact assessment on the whole community would gain a more representative view on the effect of CT legislation on society rather than a limited sample of individuals.

Ministers decided that this should be approached through a synthesis of existing relevant work and a small research team in the Defence Scientific and Technical Laboratory (DSTL) was commissioned to undertake a rapid evidence assessment (REA) project. I have recently commented (1 Dec) in the JCHR Oral Evidence Session that the report will be published in relatively short order.

4. Presumption of innocence

“In our view, the DPP should draw up and consult on draft guidance on how to avoid prejudicial comment following the arrest of terrorism suspects.”

While this is more a matter for the Attorney General’s Office to consider as they would be responsible for any prosecution, Government departments already provide advice to ministers on such issues . Home Office ministers and officials are already advised by legal advisers to be circumspect in making public comment on individual cases because of the significant legal risks involved.

The Government is well aware that there are particularly serious risks in commenting publicly on matters concerning active legal proceedings: this includes comments about the individuals or suspects involved and about any issues in the case.

Special Advocate's (Angus McCollough) note dated 30 October 2008, submitted to the House of Lords in *Secretary of State for the Home Department v OO (Jordan)*, dated 30 October 2008

IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)
(ENGLAND AND WALES)

BETWEEN:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Appellant

-and-

OO (JORDAN) Respondent

SPECIAL ADVOCATE'S NOTE

1. The Special Advocate for OO seeks to submit this Note in relation to a point raised in the Respondent's Speaking Note distributed on 29 October 2008, at paragraphs 9.5 to 9.8 [pp.55-58]. The point arises in the context of the ground of the cross-appeal addressing the impermissibility of SIAC's reliance upon closed material on issues of safety on return to Jordan.

2. At paragraph 9.5 of the Speaking Note it is submitted on behalf of OO:

"... non-disclosure of such material into the open hearing will create a particular problem because the Special Advocates will not be able to call an expert witness, or otherwise seek expert advice, to challenge the views of an FCO witness to whose evidence deference may be given on the basis that he embodies FCO expertise."

3. That submission relates to the practical discharge of the role of Special Advocate. On this basis OO's Special Advocate would respectfully request the Committee to consider this Note¹⁵⁰. As appears below, from the perspective and experience of the Special Advocate in this case, it is submitted that OO's submission is demonstrably well founded.

4. With effect from 1 December 2007, rule 44 of the SIAC Procedure Rules 2003 was amended to insert the following paragraph¹⁵¹

"(5A) The special advocate shall be entitled to adduce evidence and to cross-examine witnesses."

5. Thus, at the time of the hearing of OO's appeal to SIAC in May 2006 the Special Advocates had no entitlement to adduce evidence, as was expressly recognised by SIAC in its preliminary ruling of 12 July 2006:

¹⁵⁰ As will be apparent, although the Note considers the circumstances in which the Special Advocate operates, it is unnecessary to refer to, or rely upon, any closed material in order to make the submission.

¹⁵¹ See the Special Immigration Appeals Commission (Procedure) (Amendment No.2) Rules 2007 [Auths Vol 25, Tab 205]. Rule 44 of the Special Immigration Appeals Commission (Procedure) Rules 2003, as amended, appears at Appendix Part 1b, p.685.

“The Special Advocates cannot call evidence although they can and do undertake certain researches. So if a point arises only in closed material the Special Advocates are not able to rebut it by directly calling evidence.” [BV, App Part 1A, p.70 at paragraph 55¹⁵²].

6. Even since the entitlement introduced by rule 44(5A), no Special Advocate has adduced evidence from an expert in relation to safety on return issues – or any other issue. The main practical difficulties are:

- (i) If the expert (or other witness) were to give evidence in a closed hearing about closed matters, he or she would need to have been subject to developed vetting (DV). The cost, delay and issues of funding for DV clearance render this impractical.
- (ii) The identification and instruction of a suitable expert poses further profound – and thus far insuperable – difficulties.

7. The issue was addressed in the evidence given by four Special Advocates to the Joint Committee on Human Rights (evidence given on 12 March 2007 and annexed to the 19th Report of Session 2006-7, printed on 16 July 2007). The following answers were given by Andrew Nicol QC, a Special Advocate:

***Q77 Mark Tami:** Do you think there has been any progress towards enabling Special Advocates to call evidence from security cleared experts?*

***Mr Nicol:** Yes, the point has been discussed and we have raised it as Special Advocates with the appropriate authorities. Nothing further has come forward in terms of response. There are real difficulties, which are not to be dismissed as just trying to brush us off. One is that, if it is to be of any use, it needs to have somebody who is of expertise, who has inside knowledge and which is recent. There is a very small pool of people who could come within that category, and the pool shrinks very much more when you look for some element of independence for the expert rather than simply somebody who is going to confirm the line which is being put forward on the Secretary of State's side.*

***Q78 Mark Tami:** So how would you see that working in practice?*

***Mr Nicol:** I do not have an answer to offer to you to that question, so we struggle on as best we can without the assistance of some outside help. It is possible, I suppose, although I do not know the detail of the response that would be given to this, to try and find somebody who has been in the Security Service or one of the intelligence services but has recently, say, retired. At least for a limited period after their retirement they would have the characteristics that I have just described, although even in that case there might be an overhanging question as to whether their independence would be sufficient.*

[Auths Vol 36, Tab 315 at p. Ev 19-20]

8. The efforts by Special Advocates to gain access to such expert assistance have continued since the hearing before the JCHR, but with no material result.

9. The suggestion is made on behalf of OO (at paragraph 9.6 of the Speaking Note) that the Special Advocates' ability to instruct and call an expert to challenge the Secretary of State's case on safety on return is "entirely fanciful". In the light of the matters set out in this Note, the Special Advocate submits that this suggestion is by no means over-stated – and that remains the

¹⁵² The reference at paragraph 9.6 of the Speaking Note seems to be erroneous.

position even since rule 44(5A) has been introduced into the SIAC (Procedure) Rules 2003 subsequent to SIAC's hearing of the case before the House.

SPECIAL ADVOCATES' SUBMISSION TO LORD CARLILE, INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

Introduction

1. On 29 October 2009 a group of four Special Advocates (SAs), together with Joe Sullivan of the Special Advocates' Support Office, attended a meeting with Lord Carlile QC at his chambers. The SAs are most grateful to Lord Carlile for agreeing to this meeting, and for the discussion and consideration of the various points raised.
2. This Note is the response to Lord Carlile's request that the SAs set out their concerns in writing on one issue discussed at the meeting: namely, the inability of SAs to communicate with the open representatives.¹⁵³

The rule prohibiting communication with the appellant or his representatives following receipt of the closed material

3. Following receipt of the closed evidence, the SA is prohibited from communicating with the appellant¹⁵⁴ and his representatives, other than in writing and with the permission of the court. The permission of the Court is obtained by application, which is required to be on notice to the Secretary of State. This is the effect of r. 36(2) of the SIAC (Procedure) Rules 2003 and CPR r. 76.25(2), as well as some other statutory schemes providing for special advocates¹⁵⁵.
4. The practical effect of this rule was explained by the nine SAs who submitted evidence to the House of Commons Constitutional Affairs Committee (CAC) in 2005, as follows:

“There is in fact no contact between the Special Advocates and the appellant's chosen representatives in relation to the closed case... Under the SIAC (Procedure) Rules 2003, Special Advocates are permitted to communicate with the appellant and his representatives only before they are shown the closed material... Once the Special Advocates have seen the closed material, they are precluded by r. 36(2) from discussing the case with any other person. Although SIAC itself has power under r. 36(4) to give directions authorizing communication in a particular case, this power is in practice almost never used, not least because any request for a direction authorizing communication must be

153 This Note has been drafted principally by Angus McCullough and Martin Chamberlain, and much of it is based on a paper previously produced by Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings', (2009) 28 CJQ, issue 3, pp. 314-326. However, a draft was circulated among all current Special Advocates, leading to some suggestions which have been incorporated. The list of those subscribing to the final version of this Note consists of almost all current special advocates who are regularly appointed or have significant past experience in the role.

154 i.e. the person whose interests the SA has been appointed to represent, for which 'appellant' is used as a shorthand, although strictly speaking, in many contexts that person will not in fact be an appellant.

155 However, see in particular the provisions relating to Employment Tribunals referred to at footnote 12 below, which are significantly different.

notified to the Secretary of State. So, the Special Advocate can communicate with the appellant's lawyers only if the precise form of communication has been approved by his opponent in the proceedings. Such a requirement precludes communication even on matters of pure legal strategy (i.e. matters unrelated to the particular factual sensitivities of a case)."¹⁵⁶

5. The relationship between the Special Advocate and the appellant is therefore quite unlike that between the appellant and his open lawyers, in which communication is unconstrained, and protected by legal professional privilege and confidentiality. These features of the lawyer/client relationship are part of the fundamental constitutional right of access to a court, both in domestic law (*R v Secretary of State for the Home Dept, ex p Daly* [2001] 2 AC 532) and under Article 6 (*Campbell & Fell v United Kingdom* (1985) 7 EHRR 165, paras 111-113). The absence of these features where a SA has been appointed and received closed material is striking, and requires to be critically examined: as indicated below, the SAs submit that the scope of the current prohibition is unjustifiably broad.

Comments on the rule by Parliamentary Committees

6. The operation of the SA system in national security cases has been considered on three occasions by Parliamentary committees. The CAC in 2005¹⁵⁷ and the Joint Committee on Human Rights (JCHR) in 2007¹⁵⁸ and 2008¹⁵⁹ each identified the prohibition on communication as a problem with the system.

7. The CAC expressed the view that:

“85. This [i.e. the bar on communication] matters, because in many cases only the appellant may be aware of information that may prove his innocence, but is unable to provide it because he is not able to have sight or knowledge of any allegations based solely on closed material. The Special Advocate may also wish to discuss some element of legal strategy with the appellant's legal representatives.

86. We recommend that the Government reconsider its position on the question of contact between the appellant and Special Advocate following the disclosure of the closed material. It should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the Special Advocate system.”

8. The JCHR in 2007 heard evidence from four SAs that the court's power to give permission for questions to be asked was

“rarely used in practice, partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was discuss anything to do

¹⁵⁶ 7th Report (2004-5), §84.

¹⁵⁷ 7th Report (2004-5), 3 April 2005.

¹⁵⁸ 19th Report (2006-7), 30 July 2007.

¹⁵⁹ 9th Report (2007-8), 7 February 2008.

with the closed case, and partly because the Rules require any application for such permission to be served on the Secretary of State, which is not considered tactically desirable because of the risk that it might give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation.”¹⁶⁰

9. The JCHR noted that the Special Senate Committee of the Canadian Parliament on the Canadian Anti- Terrorism Act had recently recommended that Special Advocates should be able to communicate with the party affected by the proceedings and his counsel after receiving closed material and made reference to the CAC’s recommendations.¹⁶¹ The JCHR concluded:

“In our view, it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocates and the controlled person. We were impressed by the preparedness of the Special Advocates to take responsibility for using their professional judgment to decide what they could and could not safely ask the controlled person after seeing the closed material. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the controlled person has seen the closed material.”¹⁶²

10. The JCHR returned to the topic in 2008, this time having heard evidence from Neil Garnham QC, another SA. The JCHR accepted Neil Garnham’s suggestion that SAs should have power to apply *ex parte* to a High Court judge for permission to ask questions of the controlled person, without being required to give notice to the Secretary of State.¹⁶³

11. In the event, none of these suggestions has been accepted. The position therefore remains that SAs can communicate with the controlled person only with the permission of the court and that applications for permission must be made on notice to the Secretary of State. Such permission is very rarely sought.

Proposals for relaxation of the rule

12. The SAs continue to consider that a relaxation of the current rule prohibiting communication is necessary – or “essential” as the JCHR put it in 2007. The following proposals are maintained:

(i) To allow communication on matters of pure legal strategy and procedural administration (i.e. matters unrelated to the particular factual sensitivities of a case). If necessary, it could be required that all such communications be in writing. It may be noted in this regard that the provisions which govern the position of SAs in the

160 19th Report (2006-7), §201

161 *Ibid.*, §202.

162 *Ibid.*, §205.

163 9th Report (2007-8), §§67-69.

Employment Tribunal do appear to permit communication on open matters even after service of the closed material.¹⁶⁴

(ii) To give SAs power to apply *ex parte* to a High Court Judge for permission to ask questions of the appellant, without being required to give notice to the Secretary of State. If the Judge considered that the proposed communication gave rise to any possible issue of national security, then it could be directed that the Secretary of State be put on notice of the communication, if the SA wished to pursue it, so as to enable any objection to be considered. We understand from the Canadian SAs who visited last month that this procedure is used extensively in Canada.

3 December 2009

Michael Birnbaum QC - 9 -12 Bell Yard	Zubair Ahmad - 2 Hare Court
Charles Cory-Wright QC - 39 Essex Street Chambers	Paul Bowen - Doughty Street
Neil Garnham QC - 1 Crown Office Row Chambers	Martin Chamberlain - Brick Court
Hugo Keith QC - 3 Raymond Buildings Chambers	Stephen Cragg - Doughty Street
Mohammed Khamisa QC - Charter Chambers Chambers	Thomas de la Mare - Blackstone
Mark Shaw QC - Blackstone Chambers	Anuja Dhir - 5 Paper Buildings
Michael Supperstone QC - 11 Kings Bench Walk Chambers	Judith Farbey - Doughty Street
	Martin Goudie - Charter Chambers
	Jeremy Hyam - 1 Crown Office Row
	Jeremy Johnson - 5 Essex Court
	Angus McCullough - 1 Crown Office Row
	Cathryn McGahey - 1 Temple Gardens
	Rupert Pardoe - 23 Essex Street
	Melanie Plimmer - Kings Chambers
	Shaheen Rahman - 1 Crown Office Row
	Philippa Whipple - 1 Crown Office Row

¹⁶⁴ See para. 8(4) of Sch. 2 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861). SAs in the Employment Tribunal may have to deal with material of equivalent sensitivity to that involved in control order proceedings

Special advocates' (Angus McCulloch and Paul Bowen) open note in *Secretary of State for the Home Department v AN*, dated 20 October 2009

SPECIAL ADVOCATE'S OPEN NOTE
For Hearing on 21.10.09, before Collins J

1. A disclosure hearing to consider r.29 and Article 6 issues, has been listed for 21.10.09, to be heard by Mr Justice Collins.
2. The efficacy of the hearing has been seriously compromised by the SSHD's conduct and disregard of the Court's directions, as demonstrated by the procedural chronology set out below.
3. In Particular:
 - (i) There has been a failure by the SSHD to produce substantive responses to the majority of the SAs rule 29 submissions. These were due on 28.8.09 but the partial document served then has not been supplemented; no further instructions were available to the SSHD's counsel for the meeting with SAs 19.09.09 and are still not available to the SAs at the time of writing (20.10.09) although it has been indicated that a further response is to be produced later today, the day before the substantive hearing.
 - (ii) There has been a failure by the SSHD to particularise his case in relation to Article 6 (due 28.8.09). The SAs have been told that the position set out in the SSHD's submission of 8.9.09 – contending that no further disclosure was necessary – is to be modified but no document setting out the modified position has been received at the time of writing. Again, it has been indicated that a further response is to be produced later today.
 - (iii) The result of the exculpatory review (due on 2.10.09) was only received by the SAs on the morning of 20.10.09. It is incorporated in a second Closed Statement, which has been served too late to be subject to any effective r.29/Art 6 process itself
4. For obvious reasons, an adjournment would not be a satisfactory way in which to deal with the SSHD's default, given AN's position and continuing subjection to a control order. Nevertheless, the SAs record their profound concern that their ability to discharge their functions has been, and continues to be, compromised by the SSHD's serial failures to comply with the Court's directions.

Chronology – Second Control Order

30.7.09

Second Control Order made

31.7.09

Mitting J: Directions in relation to the Second Control Order

- For some reason this order was not sealed until 13.10.09

The following timetable was provided in relation to closed proceedings:

- SSHD to serve new closed statement by 3.8.09 *[done]*
- SA to serve r.29/Art 6 submissions by 7.8.09 *[done]*
- SSHD to serve r.29/Art 6 response by 28.8.09 *[only incompletely done – see below]*
- SSHD to serve product of exculpatory review by 2.10.009 *[done, but very late: received by SAs on 20.10.09, as part of CS2]*

7.8.09

SAs' submissions on disclosure

- Open body of submissions (but not closed Schedule) disclosed to open representatives on 10.9.09, pursuant to SAs' request and SSHD's approval
- Open representatives have made not comment or dissent from the SAs' open position on r.29/Art 6

28.9.09

SSHD's submissions in response: rule 29 only

- Very limited substantive response
- Many items said to be the subject of "further consideration" by the SSHD
- "The SSHD will inform the SA of his decision as soon as possible" (response to para 27_ - *still awaited in relation to all outstanding items*)

8.9.09

SSHD's submissions on Article 6

10.9.09

Collins J: Allowed AN's modification appeal under s,10 (3)

Discussions on listing of Article 6/rule 39 hearing:

- SSHD contends for date in December to suit the availability of Robin Tam QC (and notwithstanding Mitting J's order that the hearing should be in w/c 12.10.09)
- Mitting J considers correspondence and lists hearing for 21.10.09

19.10.09 (Monday)

Am: Meeting between counsel for SSHD (Andrew O'Connor) and SAs

- AO'C had no further instructions either in relation to the rule 29 or Article 6, so very little could be achieved by way of narrowing, or even identifying, specific issues.

Late Pm (after 17;00): SSHD serves product of exculpatory review and CS2; received by SAs on morning of 20.10.09

21.10.09

Hearing to determine r.29/Art 6 issues before Collins J

List of Reports from the Committee during the current Parliament

Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008-09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 183

Session 2008-09

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill;	HL Paper 78/HC 414

	Health Bill	
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 nd , 4 th , 8 th , 9 th and 12 th reports of Session 2008-09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882
Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008-09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230
Twenty-fourth Report	Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims	HL Paper 153/HC 553
Twenty-fifth Report	Children's Rights	HL Paper 157/HC 338
Twenty-sixth Report	Legislative Scrutiny: Equality Bill	HL Paper 169/HC 736
Twenty-seventh Report	Retention, use and destruction of biometric data: correspondence with Government	HL Paper 182/HC 1113
Twenty-eighth Report	Legislative Scrutiny: Child Poverty Bill	HL Paper 183/HC 1114

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I

Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527

Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

Oral evidence

Taken before the Joint Committee on Human Rights on Wednesday 3 February 2010

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Dubs, L
Falkner of Margravine, B
Onslow, E

Dr Evan Harris
Fiona Mactaggart
Mr Virendra Sharma

Witnesses: **Ms Gareth Peirce**, Solicitor, Birnberg Peirce, and **Mr Sean Mcloughlin**, Solicitor, The Rights Partnership, gave evidence.

Q1 Chairman: Good afternoon, everybody. This is an evidence session of the Joint Select Committee on Human Rights looking at Counter-terrorism Policy on Human Rights, and this session is looking at the question of control orders in advance of the control order renewal debate which will be taking place I understand probably towards the end of the month. We are joined for our first panel by Gareth Peirce, solicitor at Birnberg Peirce with extensive experience of acting in terrorism cases, who has represented a number of individuals subject to control orders, and Sean Mcloughlin, who is a solicitor at The Rights Partnership in Birmingham, who has also represented individuals subject to control orders. We would like to start by trying to get a feel for what it is like for somebody who is subject to control orders, so perhaps you could give us some practical examples of the sorts of difficulties that a controlee faces as a result of being under a control order?

Ms Peirce: Probably the primary sensation is of despair and of feeling utterly impotent in a situation to contest it, to cope with it, and to understand the implications, because it descends on the person and usually the family overnight and unexpectedly. To simply illustrate the extent of the despair, there was at one time in Belmarsh Prison in the healthcare section three men whom I represented, all of whom had made serious attempts on their lives, all under control orders, all of them imprisoned because they were in breach—a criminal offence—of the control order; all of whose wives had left them temporarily or permanently, and that statistic woke us up to the enormity, if we needed waking up, of the effect. It affects not merely the man—it has always been men up to this point—but his wife if he is married and his children, all of whom are subject to the same conditions. They are all debarred from having visitors, if that is a condition, unless they are cleared; there are prohibitions on the use of phones; an inhibition on arrangements for family meetings; and often what strikes particularly at the heart of those with anything up from seven year old children is the restriction on having a computer or the internet in their house because now, in this country, much of children's curriculum is based on use of the internet, so there are repeated situations where children have been in trouble at school because they—bright,

academically high achieving children—have fallen by the wayside and been in trouble despite repeated requests to have access for the children, even in one case where the man could not read or write in English and was completely computer illiterate. So, in summary, the impact can be, and usually is, colossal on the person himself and his family.

Mr Mcloughlin: I echo Gareth's comments, the impact is massive on the whole family. One of the other aspects is that people under control orders are often told where they have to live. My clients came out of deportation proceedings, I am an immigration lawyer so I act for a number of individuals in deportation proceedings, and when those deportation proceedings were no longer sustainable and government lost the challenge, the individuals placed on control orders, and the families, have to up sticks and move to other areas, and that of course involves taking the children from schools, friends and communities, and that has had a massive impact certainly for my clients. For example, one client had children who were at a private school in Birmingham and doing very well there supported by a charity who paid for the fees, but in order for them to be reunited and cohabit together as a family they had to move elsewhere and that meant the children leaving that school, but it applies to all the families and all the clients I have had. The impact is horrendous and, of course, is so difficult for people to understand because of the scheme that people are put under control orders and are not told why in any great detail and then, of course, comes the challenge and our position trying to represent people who are in this predicament, but I should emphasise the daily impact on the clients and their family members is something which affects them every single day in so many different ways, and we have to deal with that. Our offices are so very busy because every time a client wants to go outside the boundary perhaps to visit us for an appointment, or to do something like attend a hospital appointment, everything has to be done by correspondence to get approval from the Secretary of State and from the Home Office, and they find that incredibly frustrating. Perhaps we will talk a little bit later about those issues and how problematic even those issues are for us.

Q2 Chairman: When we look at the independent review of Lord Carlile and all the Government statements they say that account is taken of the impact on the controlee and the family of the control order itself. Does that correspond with your experience?

Mr McLoughlin: No, it does not. The control order is made and everything else is as a consequence of that, so in our experience in dealing with the issues that arise for our clients and their family members it seems that these things are just managed as a result of the control order being made; they do not seem to feed into whether a control order should be made. These issues seem to be secondary, if not appearing further down the list, but they are real problems for our clients and their families.

Ms Peirce: I think the box gets ticked where you have taken into account but what may have been sent may have been extensive psychiatric reports about the whole family, child psychology reports, reports of how children are bed-wetting, reports of how well-behaved children become severely disturbed at school, and there is a further growing use of a form of internal exile, which Sean referred to, and that is not just in relation to people who are formally the subject of immigration detention: it is being applied to British citizens who have grown up, for instance, in east London all their lives, whose grandparents are there, whose wife's grandparents are there, who are suddenly parachuted into a place in Nottinghamshire, in Gloucestershire, where the man is told from there on in he has to live there, that it is a modification of his control order, and, to be frank, the women in this are treated with complete contempt. It is as if they do not exist. The man is told: "Your wife, if she works, can find another job; she can join you if she wants to or she can stay in east London. We know that you can find schools for the children in the area", and the effect of this on a number of families, and more recently, is quite extraordinary. The Home Office in its report talked about managing the Muslim community and reassuring them. This may affect only a small group of people but in terms of its contribution to what one might call the folklore of injustice it is colossal. It is not something that other people in the community are in ignorance of: it is highlighted because of the perception of the extent of the injustice, so it has a wide effect.

Q3 Chairman: Is it the norm for people to be moved to another location altogether, or are they the exceptions? You have mentioned two cases. We know at the moment, for example, there are twelve control orders extant. Would you have any idea how many of those twelve have resulted in removal to another part of the country?

Ms Peirce: I am thinking of five recently where there have either been removals or a notification of an immediate removal which has been challenged, but in the way that the courts are now dealing with it there has to be the modification before the challenge can be made, so an attempt to obtain an injunction in anticipation the courts have said was not an appropriate way to deal with it.

Q4 Earl of Onslow: Lady Kennedy told me the other day she was representing somebody and she used those words "internal exile", which is something normally only applied to the Romanov Tzars in Russia, and we are the only country that seems to be copying the Romanov Tzars in internal exile. Can you tell me how that court case went, whether there was a modification and whether the courts came out and said "Up with this we will not put"?

Ms Peirce: I know the case you are referring to and in the end the court did not allow that person to be moved. It was a particularly extreme case where the person concerned had an exceptional and life-threatening medical condition, and arguments were accepted that he and his wife needed to be within immediate range of their consultant treating doctors. But for that he might well—I think he would—have been moved to a very long distance away from the place where he had grown up.

Q5 Chairman: Coming on to some of the practical problems from your point of view as representatives of controlees, can you describe some of the difficulties you have experienced both in general terms of representation, in making appointments, for instance, and also specifically because of closed material?

Mr McLoughlin: It is not rocket science, and the Committee is fully aware of how these things work. The evidence we get justifying the control order is limited, and for us to take instructions from a client to address the assertions is very difficult, and for that client to be able to respond in any meaningful way. In essence his evidence is given in a vacuum because he does not know quite a lot of the case that is being alleged against him. Equally the client will be suspicious of how any information he gives may be used, and clearly if you are trying to challenge an allegation against you the allegation needs to be made to you. That is not, as I say, rocket science, and it obviously builds the frustration for the clients and is frustrating for representatives such as ourselves trying to represent the client with limited information.

Ms Peirce: I think the process is so prolonged there is not an immediate remedy. Because of slow service of evidence, if it is a civil proceeding, then there is the interjection of special advocates, secret hearings—it is an extraordinarily prolonged process. There have been victories won in the courts but the interminable back and forth, back to the High Court after the House of Lords has decided in your favour, in the end breeds bleak cynicism, that whatever happens the goalposts will be moved. One man in particular was detained for three and a half years under the Anti-Terrorism Crime and Security Act, one in the House of Lords once, one in the House of Lords twice on the basis that evidence derived from torture could not be used in his case, one in the European Court of Human Rights on the basis, relevant to this, that he had never had anything disclosed to him that was sufficient to provide due process; then was on a control order which is still in being today on the same evidence, the House of Lords having decided it was insufficient. That is a very long time to have won

successive legal victories and yet remain in that position, and it does nothing to reassure those who are affected that the law, or the lawyers, can help them at all.

Mr Mcloughlin: Can I just add that a client of mine had his control order quashed because the Secretary of State was misled on the evidence presented when the control order was made, and Mr Justice Mitting quashed that control order. Two days or so before the judgment was handed down the Home Office made another control order, so for him he had a victory on the grave basis that the Secretary was misled as to the evidence, and yet he finds himself in exactly the same position, even though he succeeded, and life did not change for him. The same control order was made, the same conditions applied, and he then has to fight that second control order, again through the same proceedings. I should just add that his case was to be heard just after *AF* in the House of Lords, and so shortly before his hearing his record was revoked. Nevertheless, he spent all of that time having won once—

Q6 Chairman: How long was he under the control order, in total, from start to finish?

Mr Mcloughlin: I think it was April '08 and then the second control order was revoked in about June '09.

Q7 Chairman: So for 15 months or so he was under a control order?

Mr Mcloughlin: Yes, and he was none the wiser as to why he was on a control order, so that sense of frustration which we mentioned in the opening continues.

Q8 Chairman: Lord Carlile in his report says he has received no complaints from controlees or their lawyers about the procedures not working satisfactorily. Is that right? Have you not complained?

Ms Peirce: I do not think I have complained to Lord Carlile; I do not share my reasons for that with this Committee. We complain daily in the courts, where we are meant to be complaining: we complain to the Treasury solicitors; we complain to the Home Office; we in every way seek to raise the immediate circumstances.

Mr Mcloughlin: Can I add that in terms of the modification appeals, and I read Lord Carlile's comments about the lack of complaints to him, Lord Carlile did visit the clients I acted for on control orders, but one of the clients made an application for various conditions of his control orders to be varied to include attending a college course and having a particular dentist where his wife and children were registered just outside his boundary and it was not a great distance but all of these requests were refused, so we lodged an appeal to bring it before the court and the appeal was lodged, I recall, in February of last year and the court heard the case in July. Now, of course, because the procedures are so prolonged in terms of the Special Advocates being involved and hearings, he waited so many months for that hearing to come up to have those issues adjudicated upon that, of course, the college course was done and

dusted and he presumably found another dentist in the interim, so the court procedures are not swift and that is a major failing.

Q9 Chairman: Have you made a complaint to Lord Carlile?

Mr Mcloughlin: No. I have not spoken to Lord Carlile, nor has he spoken to me.

Q10 Chairman: I would like to come back to Gareth, because she left her coat tail trailing a bit there. Is the problem here you have no confidence in Lord Carlile as an independent adjudicator? Basically has he been in the job too long?

Ms Peirce: I think at the beginning, a long time ago, when the Anti-Terrorism Crime and Security Act came into force Lord Carlile was in appointment then, newly in appointment, I think, but there was also a Privy Council Committee in parallel, and this is not a comment on Lord Carlile but I think it is inappropriate perhaps for one person to have a sustained sole application after the Privy Council has put in a trenchant criticism of the Anti-Terrorism Crime and Security Act—very thoughtful and they came to SIAC hearings and so on—but then the Government abolished their existence in that supervisory role, so that is said regardless of Lord Carlile as an individual.

Mr Mcloughlin: I am too busy getting on with my daily practice really to worry about who is monitoring it. It does not change the situation. All my clients' control orders have been revoked so it is not really for me to make waves about who is reviewing it. I represent my clients to the best of my ability.

Q11 Chairman: The reason I raise it is that one of the concerns I have is that if somebody does such a very important and sensitive job for so long inevitably they can lose some of their objectivity because they are dealing with those same issues and the same people in the security services all the time, and I just wondered if such objectivity after such a long period of time may have worn a little thin.

Ms Peirce: I think there is a history of perhaps frank but unfortunate assessments, beginning with those who were interned, in which Lord Carlile had stated: "I have seen everything that is in the secret evidence, I am completely satisfied the Home Secretary appropriately certificated the individual", even in cases where SIAC itself came to an opposite view, in cases where ultimately the House of Lords condemned the process twice, where the European Court said "This was utterly inadequate information", and now we are into a different regime of control orders and Lord Carlile is again making assessments of the evidence and giving a view as to whether they are justified, and those who are on the receiving end of that simply see that as an extension of an unfairness when they do not know the position.

Q12 Baroness Falkner of Margravine: What I would like to hear from you is, leaving aside the person Lord Carlile, whether you think that there is a danger, in areas where public information is not

available, that any individual who does that job might tend to “go native” after a period of time? In other sensitive areas of life you have term limits. Do you think that a term limit would be a good idea in terms of an independent reviewer? That somebody coming every few years fresh to the role with the accumulation of new findings behind them might be more beneficial in a role than someone who has been doing it for quite long?

Ms Peirce: One of the particular vices here is the secret nature of the evidence; the second is the arbitrariness of the decision, and the third is that, to the rest of us and to the person involved, it seems like a sledge hammer to crack a nut. Simply because we represent individuals to the best of our ability does not mean that we are necessarily utterly naive about what is alleged, and we can see clearly in case after case it is inappropriate, but Lord Carlile gives a further veneer to the Government’s in our view exercise of arbitrary measures—

Q13 Baroness Falkner of Margravine: Can we refer to him as the “independent reviewer” rather than in person? Would any independent reviewer fall into that trap, do you think?

Ms Peirce: I think it has become more significant. There was always an independent reviewer of terrorism legislation, it was Lord Lloyd and I have forgotten who his predecessor was, and they were very much looking in a much more restricted way at the ways in which the legislation itself was working. This has become far more significant. This is effectively social control of mechanisms that appear to us incredibly petty on a daily basis, petty interferences that seem to have nothing to do with national security, whether a person comes to our office and they walk on the right side of the street to get there or not, and our work is dealing with these restrictions that seem inappropriate. It has to be a wider spread of personnel reviewing it, I think. The ability to have a body that is independent, maybe bringing in psychiatrists or social workers who have an extended understanding of social control.

Q14 Earl of Onslow: Having read your essay in the London Book Review I must admit I came out of it feeling faintly sick about some of the things you told me about. I get the impression from what you just said that what is happening is that a game of cat and mouse is being played, and if somebody wins a victory it is not even pyrrhic. It goes into the damage done and, I thought very accurately, the folklore. I also got the impression that you are saying that Lord Carlile possibly clothes the nakedness of government. I am interested that you told me—which I did not know and possibly should have done—that Lord Lloyd of Berwick was the previous reviewer, and I trust Lord Lloyd of Berwick with my right arm because he understands the grandeur of the liberty of the subject which is something which appeals to me. I was quite shocked by Lord Carlile voting for 42 days, for instance—

Baroness Falkner of Margravine: I do not think he voted. He spoke for, but did not vote.

Q15 Earl of Onslow: The question I am going to ask—and I have almost answered it myself—is this. In practice have any of the court decisions upholding controlees’ arguments helped to make the process fairer from the controlees’ point of view?

Ms Peirce: In theory the requirement that there be an irreducible minimum of information is, of course, important, but even so you are left with a very impoverished procedure for such a restriction on a person’s life which consumes and takes over, and therefore the victories in the courts are on procedural issues—critically important—not on the impact. In fact, however strong the arguments and the evidence that one has that this is destroying someone, he is going to kill himself, his life is in danger, those arguments do not win in the courts as being disproportionate to the measures and the reasons given for them. So in that sense very little is felt by the person on the receiving end.

Q16 Earl of Onslow: I think I read in these papers about somebody who is deprived of money where even the children had to account for the price and cost of an apple. Was that in here?

Ms Peirce: Yes, but that is a different form of legislation. It is the assets freezing legislation.

Chairman: We are not dealing with that today.

Q17 Earl of Onslow: I am sorry. The reason I brought it up was it struck me as being a pretty repellent way of behaving.

Ms Peirce: It is pretty repellent. The Supreme Court struck it down a couple of days ago but I understand new legislation is being rushed forward.

Q18 Earl of Onslow: To re-introduce it?

Ms Peirce: I believe so.

Q19 Earl of Onslow: What difference has the House of Lords decision in *AF* made in practice?

Ms Peirce: In all cases in which it applied the arguments are still going on in court in different ways. Some control orders have been revoked; some have been quashed. The Home Office says quashing should not apply because that has a completely retrospective effect which means they were always unlawful, so there is still further argument. Some of those people are still under control orders because the Home Office has sought a different basis on which to impose them.

Q20 Earl of Onslow: So you are back to the cat and mouse game again?

Ms Peirce: We are entirely in the same game.

Mr McLoughlin: All of the control orders on the three clients that I had have now been revoked, one last month which was the last one, so in that sense for my part it has had an impact. Whether the Home Office will sit in front of the Committee and say it was because of *AF* that they revoked them, or some other exit strategy that they were always planning towards, I do not know.

Q21 Earl of Onslow: Is the system of control orders sustainable following the decision of the House of Lords in *AF*? Is the whole system of control orders on its last legs, or should it be?

Ms Peirce: It was abusive legislation stamped through Parliament in a rush in February/March 2005 when internment came to an end. It was deployed for that bunch of foreign nationals only. It has been subject to sustained intellectual attack primarily on procedural grounds and, yes, it is on the rocks, but the Home Office clings to the wreckage and it will construct some other vessel out of it, or it will attempt to.

Q22 Chairman: That begs this question. You said earlier on that you are not naïve, and we may be dealing with some dangerous people, we may not. What is the alternative to control orders? We know we cannot lock them up indefinitely because that was a Belmarsh decision; we know we cannot, if they are foreign nationals, remove them if they are going to face torture and if they are UK nationals we obviously cannot remove them anyway. What is the alternative from a public safety point of view to control orders?

Ms Peirce: The primary weapon, if one calls it that, would simply be the common sense approach to go to a person and say: "We suspect that you are involved in something that might be linked to terrorist activity; we are telling you this is what we suspect; you will appreciate that we are going to be keeping our eye on you; perhaps you would like to talk about it, let's talk", and if you have a reasonable suspicion you arrest the person and question them, and the police are entitled to do that. Even if you do not have evidence that you ultimately can use in court, you can detain someone for the purpose of questioning. The interesting aspect of this is almost none of these men has ever been questioned or spoken to, and I believe many of them would welcome it and say: "That is exactly what we would have liked, that someone would have come to us", and surely, if you are tipped off that you are under suspicion, you will be very careful about it. The other point I perhaps should mention, which has not to the best of my knowledge happened in all the cases at all, is that there is a concern in some cases that it is a kind of coercion. More than one person has reported being told: "You know, you could make all of this go away if you co-operated and gave information", and I know specifically and directly from one such encounter on which I was called upon to be involved that it was very much: "We want something, you can give it, and then the control order can go away", and that is coercive and improper use.

Q23 Chairman: Completely improper, if that is the case. Presumably from what you are saying, then, you would see in the extreme case where you could not prosecute surveillance as being the alternative?

Ms Peirce: Surveillance but simultaneously with informing someone.

Q24 Chairman: Of course, yes. I am assuming that that happened and there were still suspicions after all of that. Would surveillance be an alternative in your view?

Ms Peirce: Yes. In fact, surveillance, to be blunt, is exercised on these people, and if someone strays outside the boundary or breaches a condition, the term has been used on arrest "Gotcha".

Mr Mcloughlin: In paragraph 51 of Lord Carlile's report he says that control orders are a targeted tool of last resort used to plug what is perceived to be a gap in the absence of viable alternatives. For my part that is a political illusion because there is no hiatus between guilty and innocent, and that is where we, as lawyers, come from but, as I say, I am an immigration lawyer and Gareth is much more experienced in criminal law than me, so surveillance is the answer in my view, and I note from the Secretary of State's memo in the final paragraph, paragraph 85, that the cost issues are set out, and it says that the control order regime has cost £10.8 million to administer with legal costs associated with that process of over £8 million. If you cut out the lawyers then the spend is £3 million on whatever it is that they do, and surely if that money can be spent, or I suspect less money can be spent, on surveillance, then, as Gareth says, people know they are under surveillance and it has the same effect and does not create this political problem and imposition. Many people are concerned about the whole regime. I penned some figures, and I am not an accountant, but if you have 12 control orders outstanding and you have three officers or people on 8-hour shifts monitoring these people full-time, just following them round like a lost dog, then you need 36 staff and even if you pay them £50,000 a year, which I am sure will raise an eyebrow or two, that is around £2 million a year, so if you have two people following them it will be around £4 million, and obviously £3 million is the spend at the moment excluding legal costs. I do not know if those figures mean anything at all but the point is that huge amounts of money at the time are being thrown at the legal issues and just under 50 control orders have been made with great political debate on these issues, and I think that it is a hammer to crack a nut and there are other ways. Can I just say that the Secretary of State in his conclusion, paragraph 85, said that surveillance would be considerably more expensive, but he does not give any figures or explain how or why that might be. There are many things I do not know about in that arena, of course, but that information could at least inform the Committee as to whether surveillance is a possible alternative.

Q25 Chairman: You are ahead of me because that was the next point I was going to put to you and, in fact, I raised this with the Prime Minister yesterday in the Liaison Committee, suggesting that the amount spent on lawyers could be better spent on police officers.

Mr Mcloughlin: Absolutely.

Q26 Chairman: And, of course, that £8 million you refer to is just the cost to the Home Office of defending the cases brought where the meter is still running.

Mr Mcloughlin: In that case then there are the Home Office costs. Then there are all the legal aid costs involved and the court costs, which must be significant with all of the judicial challenges through the administrative court, the Court of Appeal and the Supreme Court, so the spend must be huge and maybe the Committee would be interested to find out what the overall spend is.

Q27 Chairman: We have been trying to.

Mr Mcloughlin: Good luck.

Q28 Chairman: We have not got the answers yet but we have been trying to find out. Can I go back to reviewing the material? Did the Home Secretary carry out a thorough review of all material relied on for the existing control orders to ascertain whether they needed to have further disclosure after the *AF* case?

Mr Mcloughlin: You are asking if the Secretary of State's response deals with everything?

Q29 Chairman: Yes.

Mr Mcloughlin: For my part it says what I expected it to say. One thing I do take issue with is the reliance on the fact that there is rigorous judicial scrutiny of the control order regime through the challenges. That is, I am afraid, misleading to the lay reader perhaps because as a lawyer representing people in these proceedings you have got one arm tied behind your back, and special advocates, whom you will hear from later, in my view have two arms tied behind their backs. Although the court can do everything within their remit it does not mean objectively that the scrutiny is rigorous because the whole case is premised on evidence we do not see and we cannot meet.

Q30 Chairman: Are you getting anything more disclosed in practice?

Ms Peirce: No.

Mr Mcloughlin: I will be corrected but I do not think I ever have had.

Q31 Chairman: Gareth has given us a very clear answer to that, unqualified.

Mr Mcloughlin: The special advocates will correct me if I am wrong but I do not recall getting anything of any substance through the procedures which allow the special advocates to assess the material and try and argue that X, Y and Z should be made available to the open lawyers, as we are now called. We used to be called lawyers; now we are called open lawyers, and closed lawyers behind us. Nothing of any substance has come from that process and, whilst they will do their best, the special advocates, it is meaningless.

Q32 Chairman: It is probably a better question to put to them. I think we have finished our questions. Is there anything you want to add to anything you have said to us?

Ms Peirce: No, thank you.

Mr Mcloughlin: No, thank you.

Earl of Onslow: Again, going back to your book and article, I was rather struck by the saying of the prophet Mohammed, and I wrote it down, "Fight the unbelievers with your wealth, yourselves and your tongues". Can you tell me what is the difference between that and the Christian hymn *Fight the Good Fight with All Thy Might*?

Chairman: I do not think that is a question for the witnesses.

Earl of Onslow: It is. If people are attacking people for saying that, you should attack Christians for saying exactly the same thing.

Chairman: I think that is a debating point, not one for the witnesses. Thank you very much.

Witnesses: **Ms Helen Mountfield**, Barrister, Matrix Chambers, **Mr Angus McCullough**, Barrister, One Crown Office Row, and **Mr Thomas de la Mare**, Barrister, Blackstone Chambers, gave evidence.

Q33 Chairman: We have now been joined by our second panel of witnesses, Helen Mountfield, who is a practising barrister at Matrix Chambers and acts as special advocate for control order cases, Angus McCullough, who is a barrister at One Crown Office Row, special advocate, and Thomas de la Mare, a barrister from Blackstone Chambers, also an experienced special advocate. Welcome to all three of you; thank you for coming. Is there anything you would like to say before we start?

Mr McCullough: No, I do not think so, thank you, except thank you for inviting us.

Q34 Chairman: Perhaps I can start where I left off with the solicitors. Do you think the Home Office carried out a thorough review of all the material

which had been relied on for the existing control orders to ascertain whether they should give you further disclosure?

Mr McCullough: I think it is probably difficult to comment from the perspective of an individual special advocate who sees only the small number of cases that one is involved in personally. Of the three cases that found their way to the House of Lords in the *AF* decisions, two were abandoned by the Government, the control order was abandoned, and the third the Government is seeking to maintain, and the substantive hearing to determine that has yet to occur. In terms of the review of the material the Government seems to take an approach that all the closed material is relied upon in seeking to obtain a control order and they await the decision of the courts with the involvement of the special advocates

as to what it is they can continue to rely on to uphold that control order in the courts, which—and it is a slightly oblique way of answering your question—seems, at least from my individual perspective, to be the approach that has been taken following *AF*.

Ms Mountfield: I have one outstanding post-*AF* control order, and when *AF* was decided a letter was written to say that the evidence would be reviewed to consider what ought to be made open. If that happened I am slightly surprised. I would say a minimalist approach was taken if it did happen, but what in fact then happened was that that control order was revoked and replaced by a so-called light touch control order. There has still been no more disclosure. It is being argued, by the Secretary of State, that you do not need disclosure, *AF* does not apply to more limited controls. That argument failed in the High Court and is going to the Court of Appeal.

Mr de la Mare: I was involved in one of the appeals that went to the House of Lords and then was remitted to the High Court afterwards. My impression was that the Secretary of State's attitude was that it was for the special advocates to make the running as to what should be disclosed in relation to the evidence base and not primarily for the Secretary of State to review the evidence base and make proposals with a view to disclosing certain information. Indeed, the position was yet more extreme. The Secretary of State was unwilling to comment as to whether or not they would exercise their decision to withdraw the evidence and the allegations in question. One will need to make a decision upon that until such time as the court has ruled finally as to the totality of the evidence and what should be disclosed, and only then would the Secretary of State decide whether or not to proceed with the case at all, whether or not to drop certain allegations or whether or not to make disclosure. As it turned out, after an extensive review by the special advocate of the evidence and submissions made in relation to that, the Secretary of State then decided that he would drop the control order in question. Their attitude is, "You make the running".

Q35 Mr Sharma: How has the decision of the House of Lords in *AF* affected the Government's position in current control order proceedings?

Mr McCullough: I think the proof of the pudding is still being eaten, as it were. A number of the control orders have been voluntarily revoked by the Government, a number have been quashed or revoked by the courts, and a number are still awaiting the court's determination. As far as I am aware only one control order since the House of Lords decision in *AF* has been upheld by the courts in the face of a challenge.

Ms Mountfield: What *AF* decided was that somebody had the right to know the essence of the case against them. What that means in practice is quite difficult to determine in an individual case and I think the Home Office has taken quite a minimalist view, headline allegations only, "You are involved in terrorist fund-raising", or whatever, to take a hypothetical example. If you look at the decision of

the European Court of Human Rights, in *A v UK*, and the *AF* decision in the UK, they suggest a greater degree of detail than that is needed. In that case, *A v UK*, the court gave the example that if you are going to say somebody has undertaken the court gave terrorist training you need to tell them when and where, and that is not the level of detail, as I perceive it, that is being given at the moment.

Mr de la Mare: I think it is important to understand that control order cases do not fit one particular type. They are potentially very different. At one end of the spectrum you have a case which is effectively a glorified intelligence assessment based upon a disparate series of sources and information intended to build a picture. That is described in various open materials as "mosaic" type cases. There is no centrepiece necessarily to the evidence against an individual in those types of cases. It is a variety of different strands woven together to build a case. At the other end of the spectrum you have cases that are effectively proxies for criminal prosecution where there may be one grandstand allegation and effectively that allegation may even be substantially in open and you have evidence that can or cannot be adduced for those reasons. My judgment is that mosaic type cases are the ones that are being affected most by the House of Lords judgment because in those cases each little chink of the mosaic is an allegation and the logic of the House of Lords ruling is that each bit of that mosaic therefore must be disclosed in some form, whereas the cases that are proxies for criminal prosecutions, and I believe *AF* is a case nearer that end of the spectrum, it is possible to get closer to saying, "Disclose the allegations but not the evidence underpinning it". It is very important to realise that different types of case are structured in different ways and may lead to different conclusions under the *AF* analysis.

Q36 Chairman: What proportion of the control orders do you think are these jigsaw/mosaic type things and what proportion are the one big thing that is the surrogate prosecution?

Mr de la Mare: That is very difficult to answer, being myself only a little chink in the wider mosaic. It is a very impressionistic matter but I suspect the great preponderance of cases tend to be mosaic cases rather than proxy criminal prosecution cases.

Q37 Mr Sharma: Is the Government's approach to disclosure since the decision in *AF* in keeping with the spirit of the decision in your view?

Mr McCullough: It is probably no surprise that the Government seeks to restrict the impact of *AF* and the arguments in disclosure hearings whereas the special advocates argue for a broad approach and as much detail as possible requiring to be disclosed if an allegation is to be relied upon, so I suspect the Government would say that they are reflecting the true spirit of the judgment and, likewise, those on the other side of the argument say they are as well, so it is probably a debate. "No" is the straight answer to your question from the point of view of the special advocates.

Q38 Chairman: And those across the table?

Ms Mountfield: Yes.

Q39 Mr Sharma: Consensus there. Can you explain what a “light touch” control order is?

Ms Mountfield: An ordinary control order tends to have somebody required to remain at home for perhaps between nine and 13 hours a day, not to have internet access, not to have visitors without prior approval and so on. The light touch control orders no longer have that house arrest element in them but they restrict people from travelling abroad, from having more than one mobile telephone, from going away from home for a night without giving 48 hours’ notice, that sort of control.

Q40 Baroness Falkner of Margravine: Are they allowed to have visitors in light touch regimes?

Ms Mountfield: I cannot immediately remember and I am not sure I am aware of all the light touch control orders. They are less restrictive but certainly in my view still sufficiently restrictive to have a serious effect on people’s everyday lives.

Q41 Chairman: I think it was you, Angus, who said that you had a control order that was dropped after *AF*.

Mr McCullough: I think it was Tom.

Q42 Chairman: Is that right?

Mr de la Mare: Correct.

Q43 Chairman: We know that a couple were dropped after *AF* altogether. What happened to the two contolees concerned? Are they simply not subject to any controls at all or are they subject to surveillance?

Mr de la Mare: I must admit I am not entirely *au fait* with the current position. There has been a fairly protracted debate before Mr Justice Silber as to whether or not the order in question should be technically revoked or quashed. A similar debate has occurred in another case. That has implications for any potential criminal proceedings brought in relation to alleged breaches of the control order and it may have cost implications. I may be incorrect but I believe that the control order has simply been revoked and nothing put in its place.

Q44 Chairman: So as far as these two were concerned, if they were a threat to public safety they are not subject to control orders. They are still a threat to public safety, I suppose, with no controls over them, so it begs the question of whether the control order was necessary in the first place. Could I ask you how *AF* is being used in the lower courts now because you have got this rather bizarre comparison between what the law says in the statute and how the law is applied by the courts, which seem to be mutually exclusive? Is the approach of the lower courts creating any practical problems for you?

Mr McCullough: I have already alluded to the Government’s basic approach, which is to rely on everything without taking into account *AF* and then leave it to the courts to tell them what they are

allowed to rely upon as a result of *AF*. I think it is fair to say that the court’s approach is still bedding down and no universal approach as yet has emerged. There is a strand of judicial thinking which applies what has been termed the “iterative approach” whereby a bit of disclosure is given to a controlled person, the idea being that that may be enough for them to respond effectively and give effective instructions to their own lawyers and the special advocates, and if it turns out that it is not then to give a bit more, which I think leads to two difficulties. One is of a practical nature, which is that there is not really time in the already protracted court procedure to accommodate an iterative approach, and you find yourself up at the substantive hearing having then to re-address disclosure issues. The second difficulty is probably one of principle, as to whether it is really fair to adopt this iterative approach, to require a controlled person to respond to part of the case before letting him know the full part that he would ultimately be entitled to. I think those are the sorts of practical problems that are currently being grappled with.

Mr de la Mare: It is worth emphasising that the protracted history of these cases means that there are certain difficulties in interpreting what is happening in the particular cases for this reason. Almost all of the cases which have been remitted for reconsideration had at an earlier stage contested hearings at which, either under the pre-*MB* test or under the *MB* test, the question was first asked, “Can this material be disclosed without there being damage to the public interest?”, and invariably the answer in relation to the remaining material is that it cannot be disclosed without damage to the public interest in the view of the Secretary of State. Then, when one comes to apply the *AF* test, which is a separate, over-layering test of fairness that seeks to say, “Notwithstanding the damage to public interest that would be caused by this material, does fairness require it to be disclosed?”. The inevitable consequence when the court says, “Yes, it must be disclosed”, is that the Secretary of State withdraws the allegation in question rather than disclosing material which will cause damage to the public interest. That is why, from the perspective of a contolee, you have this scenario where it seems as if nothing is happening, and indeed from their perspective nothing is happening because what is the most that the special advocates achieve is a reduction of the evidence base rather than concrete disclosure of the allegations in question to the contolee, and in the most extreme example the net result is the evidence base collapses and the order is revoked. One can well see why such a process, which is potentially very protracted, particularly if the iterative approach is adopted, leads to frustration from the perspective of people outside the process. They see nothing concrete happening.

Q45 Baroness Falkner of Margravine: What you say is rather depressing, but, anyway, staying with the procedural rules, has the rule change which permits special advocates to adduce evidence made any

difference in practice to your ability to ensure fairness? You have more or less all touched on that but is there anything else you want to add to that?

Mr McCullough: The answer is a resounding “no”. No special advocate, as far as I am aware, in any case, notwithstanding the rule change, has ever been in a position to adduce evidence him or herself.

Q46 Baroness Falkner of Margravine: How effectively are you able to challenge the Government’s objections to disclosure in these closed cases?

Ms Mountfield: *AF* has made it easier to have a principled basis for making such a challenge but, in terms of challenging the Government’s argument that disclosure would damage national security, we are not in a position to do it because we do not have access to expertise and because that is, I think invariably, dealt with on a class basis; disclosure of the fact that a particular kind of intercept is possible may damage the public interest. There is no question of what is or is not damaging in this particular case and therefore it really is not something you are in a strong position to rebut.

Mr de la Mare: There is only a limited number of tools in your arsenal in that context. One is finding material that has already been put into the public domain in another context, say, another criminal prosecution, even in another country in a related case. Occasionally that works, and the other main technique is to seek gisting of the allegation in question, which is to try and divorce the substance of the allegation from the supposedly sensitive detail that surrounds it, and that, whilst it may produce more information, nevertheless may result in an allegation of such vagueness being disclosed as to merely compound the frustration of those sitting outside the process because it does not necessarily leave them any the wiser.

Ms Mountfield: “Gisting” may be a verb we made up; I do not know.

Mr de la Mare: We have been using “gisting” for quite a long time.

Q47 Baroness Falkner of Margravine: Lord Carlile’s report says that improved training and closer co-operation should resolve the concerns the special advocates raised about the fairness of control order proceedings. To what extent do you think his report addresses the concerns you expressed to him about the limitations in your functions?

Mr McCullough: The particular problem that Lord Carlile refers to as having been highlighted to him by the special advocates is, of course, one of communication. Following receipt of the closed evidence the special advocate is prohibited from communicating with the open representatives of the controlled person himself other than in writing and through the court and in the full knowledge of the Secretary of State. That is the effect of the rules, both the SIAC rules in that context and Part 76 in the control order context. That feature of the rules, as this Committee will be well aware, has been the subject of criticism not only from this Committee but other bodies as well, and it remains a profound

concern of the special advocates. The position has, at least in theory, been slightly alleviated by the House of Lords decision in *AF* but the existing prohibition in our view (and I think, for reasons I will explain in a moment, that I can speak reasonably collectively here), remains a significant constraint on the special advocates’ ability to discharge their role effectively even in control order proceedings, and, of course, the *AF* principle does not, at least currently, apply in SIAC proceedings, so it is even more acute there. I was one of four special advocates that went to see Lord Carlile last October and we were very grateful to him for seeing us and we raised a number of concerns, of which this was a major one. Lord Carlile expressed himself to be sympathetic to our concern and asked for a note to be produced setting out our position in writing, and another special advocate, Martin Chamberlain, and I produced a note which was circulated around the special advocate community, as it were, and subscribed to by, I think, 23 special advocates, and I think it is fair to say that the names appended to that note consist of almost all the special advocates who are regularly appointed or have significant past experience, although the total number of special advocates is rather greater. Many of those do not have significant experience, or indeed have possibly never discharged the role at all. It is, therefore, I think, a reasonably collective view that is represented by this concern and the Committee may have been supplied with a copy—

Q48 Chairman: That is my next question because I do not think we have.

Mr McCullough: Your secretary will be in a position to supply it. There is no reason why you should not have it. It is fair to say that Lord Carlile’s fifth report accurately reflects the basis of our concern in this respect in the passage which starts at paragraph 130, and the specific proposals put forward by the special advocates are recorded by him at paragraph 139, but I have to say that we are bemused by his conclusion at paragraph 140, having expressed himself to be broadly sympathetic to our concerns or complaints. He says that “improved training and closer co-operation should resolve the concerns recorded above”. I do not know if that is concerns about leakage of sensitive material or the special advocates’ broader concerns, but, as we see it, and as is apparent from the nature of the concern recorded by Lord Carlile himself, the problem is hardwired into the current rules, so we do find it hard to understand why Lord Carlile concludes by doubting that any rule changes are necessary. In our view rule changes are necessary in order to address this problem and we have made our suggestions relatively modest and unambitious, as we see them, as to ways in which the present system could and should be relaxed.

Q49 Chairman: While you are on that part of the Carlile report, you will see the recommendations we made at paragraph 136 previously, which we

subsequently repeated and none of those were accepted. Do you think those recommendations still stand?

Mr McCullough: I do, and you will see that we had them very much in mind in formulating our own proposals, so we would respectfully entirely echo those views. Indeed, the way in which the Committee put it, I think on the last occasion, was that it was “essential” that the existing rules should be relaxed. I am sorry; I have answered at some length, but there are two further points in relation to that which it may be worth drawing to the Committee’s attention. The first is that notably a less restrictive regime than that which is “enshrined” in the SIAC rules and in the control order rules appears to apply in the context of the use of special advocates in employment tribunal proceedings.

Q50 Chairman: We will come on to non-control orders later on.

Mr McCullough: It is simply by way of demonstrating that in that context, where material of probably equal sensitivity may be involved, it has not been thought necessary to have the same absolute prohibition on communication between special advocates and the open representatives. And the second point is simply to point to what has been adopted in Canada after the Canadians examined the British system and the British experience, and they have adopted a system which permits discussion between open representatives and special advocates on open matters, and have deployed a regime whereby the *ex parte* procedure may be used if there is a desire to communicate from the special advocates to the open advocates on anything that may impinge on closed material.

Mr de la Mare: Can I just add that in the United States, where I suppose the security concerns are every bit as great as in the United Kingdom, the system they have used, even in Guantanamo Bay, has been one in which open lawyers see all of the material and yet remain free to communicate with their clients. Training only has a rational connection to this issue if the training in question is training to ensure that lawyers who see both open and closed material do not inadvertently disclose matters of sensitivity in the courts of such exchanges with their clients. Otherwise, as Angus says, it is, with respect, irrelevant to the issues. The problem is one of fundamental bar.

Q51 Baroness Falkner of Margravine: Would it be fair of me to assume from what you have just said that your inability to communicate with the controlee affects your ability to represent their interests?

Mr de la Mare: Yes.

Mr McCullough: Yes.

Q52 Baroness Falkner of Margravine: How far does the decision in the House of Lords in *AF* affect any of these systematic limitations on your ability to ensure a substantial measure of procedural justice to the controlee?

Mr de la Mare: It does not address these matters at all save that it identifies that as the overall touchstone of fairness, so that if, for instance, in any particular case you can articulate a need to communicate with the controlee and to point out that absent such communication there will be a loss of fairness tested against that standard, then that logically demands a modification of the existing rules to ensure that that type of fairness is provided. The problems on the barrier to communication operate on two levels, first of all the practical level. It is often a great practical inconvenience or impediment to have to put what can be mundane or routine correspondence through a very cumbersome approval process. It often results in an extremely frustrating scenario where letters that you have drafted are substantially out of date and no longer fit for purpose by the time they come to be approved. You may be seeking to have some form of interaction in the procedural timetabling of the case and matters of that kind. By the time your letter is cleared by the security services or by the court that letter is behind the times. That is the first impediment and the cumulative effect of that can be such as to impact on the fairness of the hearing. The second impediment is one of your substantive ability to represent clients to the best of your ability by adopting the wisest tactical course by seeking, insofar as you can, to impart advice or strategy. There will be circumstances in which the closed material dictates that an ordinary competent lawyer should follow this strategy as opposed to that strategy and yet you cannot communicate that in any way to the open lawyers unless you disclose those very issues of strategy, or indeed legal privilege, to the very party that you are meant to be acting against, and one has to question whether that is compatible with their rights to effective representation and the protection of legal privilege.

Q53 Chairman: Can I put to you a question I put to the solicitors earlier on, just going back to the Carlile report and findings? I take it from what you were saying that you were surprised by his conclusions on your representations to him, and, putting it neutrally, as Baroness Falkner would like me to, do you think it has got to the stage where the independent reviewer has lost a degree of independence, bearing in mind how long that office has been held? You can be diplomatic if you like.

Mr McCullough: I will resist the temptation to answer that question, if I respectfully may, because I do not think as a special advocate I bring any particular insight or authority in answering that question and I would defer to open representatives and their views and answers in relation to that.

Q54 Earl of Onslow: Before I go on to the question which I am going to ask about Lord Hoffmann, on closed evidence, in your experience, could a lot more of it be released? Are they being over-prescriptive on what can be disclosed and what cannot be disclosed?

Mr McCullough: I think that is a difficult question to answer. We argue more should be and the courts form their view and perhaps inevitably the courts—

“deference” may be the wrong word—accord great weight to views on matters of national security expressed by the agencies who are particularly charged with protecting national security. So there are debates which go on as to whether more should be disclosed and the special advocates usually come out the wrong side of those debates.

Mr de la Mare: My answer to that question would be yes, there is more which could be disclosed but I would not want to exaggerate the extent to which that is the case. There are often clear categories of information which are necessarily sensitive as to which no special advocate worth their salt wastes time arguing about. At the edges, in my judgment and it is only an opinion, there is a substantial amount of information which could be disclosed. I do not expect for one minute anyone from the intelligence services would agree with that but that is my opinion. One has to again ask the question, what is the risk you are dealing with, and to a certain extent what is the opponent you are dealing with. Sometimes my impression is that the abilities, intelligence-gathering capabilities, interests, sophistication of the opponent you are putatively keeping the information from is exaggerated; one is modelling for a Cold War scenario rather than the type of intelligence problem we currently face. But that is simply an opinion and I am sure others would vehemently disagree.

Ms Mountfield: In one of the cases the security service evidence found its way into the judgment, the witness of the security service agreed that they are “institutionally cautious” and they take an extraordinarily precautionary approach to what needs to be kept private in the interests of national security. It was quite interesting that in *AF*, Baroness Hale I thought sounded surprised that a class approach was taken—“that ‘class’ of document or that ‘class’ of information cannot be disclosed because”—which is an approach that courts no longer take or no longer take as regularly in other forms of proceeding. I would agree that my opinion is sometimes more could be disclosed but that really is a judgment call in particular cases.

Q55 Fiona Mactaggart: On this issue of disclosure, I understand you operate as lawyers and I am a politician, but one of the things I am wondering is, do you ever have any conversations with people who make decisions that classes of documents, *et cetera*, should not be disclosed about the implications of that kind of thing? Is there any space in which special advocates and spies can sit down and talk about what can and cannot be disclosed? If not, why not?

Mr McCullough: It happens at one remove, in that the standard procedure in relation to these discussions and debates is for the closed evidence firstly to be produced by the Government, the special advocates to produce a schedule of submissions as to that which we say should be made open, either because it can be made open without any risk to the public interest or because *AF* now requires it to be made open. The Secretary of State responds by way of a schedule, point by point, document by document, whatever, and then a

meeting takes place between the special advocates and counsel instructed on behalf of the Government. Those counsel then tend to go away and take instructions from those concerned and come back and tell us what we can and cannot have voluntarily and what we will have to argue before a judge because we are not going to get it from them voluntarily. That is the way the procedure works. There is no a direct discussion between the special advocates and members of the relevant agencies concerned.

Ms Mountfield: And special advocates have tried to argue whether the class approach is appropriate in individual cases and have not got very far.

Mr de la Mare: Your question is a very good one but the relevant party with whom to have discussions is not politicians.

Q56 Fiona Mactaggart: I know.

Mr de la Mare: Politicians have but extremely occasional involvement in decisions of this kind. The relevant interlocutors are the intelligence services, and the intelligence services in my experience have a view, and it is not a view from which they are easily moved and not necessarily one they are interested in debating.

Q57 Fiona Mactaggart: It is not a view which in many other contexts is in any way justiciable, which is accountable to the courts usually. One of our problems is that one can argue it is not as accountable as arguably it should be, but yours is one of the very few spaces in which there is that bit of accountability. I just wonder whether there is any possibility of creating a space which is not just about lawyer talk—and I am not “dissing” your profession in any way—but which brings the insight of the law and judges’ statements and the insights of people whose job is to go round spying and keeping us safe together in a space which is not, “Me being one side and you being the other side in a sort of court room war” but actually have a conversation about why something is dangerous, why something is just and unjust. It really strikes me that that conversation would potentially be a helpful conversation to serve the ends of justice.

Mr de la Mare: There are two things I would say in relation to that. Firstly, the type of process you are describing is to a certain extent a compromise base process, and it is not necessarily one that fits the type of discussion which is on-going, not least because ultimately the special advocates in this particular area have reasonably little leverage. The way the case law is structured is such that the courts recognise these issues are on the border line of justiciability and they recognise the very special acquired expertise of the intelligence services. It is only in a very exceptional case they will gainsay an intelligence assessment made by the intelligence services. First of all, there is little leverage. The second issue is that at the end of the day what underpins all of this is a risk assessment, and different and rational people can take a very different approach to risk assessment. As Helen points out, if you start off from an institutionally cautious basis—

and no one could rightly criticise the Secretary of State or the intelligence services from starting off from that perspective—if you start off with that caution in-built, you are always looking to maximise the extent to which you give effect to that in terms of restricting what is disclosed. So at the end of the day, if you are adopting that mentality, there is not much room for a debate about compromise in any event.

Q58 Chairman: Do you always act on one side? Have you ever acted on the security services side of the fence?

Mr de la Mare: I have acted for the security services but not in a control order case but I have acted in another national security case.

Mr McCullough: Likewise. I have often acted for the Home Office in other contexts and have also acted for the intelligence agencies in other contexts.

Ms Mountfield: Once but not in this context. I understand in these cases there is now a protocol to keep those who have been vetted as special advocates and those who have been vetted for the Home Office apart, so they do not “nick” each other’s lawyers.

Q59 Earl of Onslow: One of the things which seems to be coming out of this particular section of discussion is that there is no public light upon where the border should be set. It seems to be a closed conversation between everyone. Would it not somehow be better if there could be a level of public light on this which would, once it was found out what the level should be, have a greater legitimacy than it appears to have? I hope I am making myself clear.

Ms Mountfield: When evidence is served in open and closed form on special advocates, it comes with an open schedule of reasons why some of the evidence is closed, and a lot of that is in very general terms—“national security requires our intelligence-gathering techniques to be kept closed”, sometimes “people’s lives may be in danger”; it is in very generic terms. Sometimes a closed schedule gives more detailed reasons in a particular case about why things are closed. It is difficult to see, given that we do not have many weapons to gainsay what is actually in the end a judgment, as Tom said, how much further than that it can go. In the end, we have discussions with the advocates for the Secretary of State and the security services and if we do not agree we go to the court, but the court will also have a certain degree of deference to what they say; it is their judgment as to what measure you are meant to use to criticise their judgment. So it becomes quite difficult to adjudicate upon.

Q60 Earl of Onslow: I am not under-estimating the problem. Lord Hoffmann and Lord Hope have basically observed that as a result of the House of Lords decision the system of control orders is possibly unsustainable. Would you go along with that? Lord Hoffmann’s actual quote is, that the Lords decision “may well destroy the system of control orders which is a significant part of this

country’s defence against terrorism.” Lord Hope also observed that the result of the decision may be that “the system is unsustainable”. Comment please.

Mr McCullough: I think that remains to be seen. Certainly, as we have already indicated, a number of control orders have been recognised by the Government to be unsustainable and a number have been quashed by the courts since the judgment in *AF* and a further number are pending before the courts. So the overall sustainability of the system remains to be seen as to whether there is a significant number of control orders that can survive the decision in *AF*.

Mr de la Mare: Going back to my spectrum, it is going to be the mosaic cases which become harder to sustain. Proxy-criminal cases will be easier to sustain. The Secretary of State is to a degree caught between a bit of a Scylla and Charybdis because we have talked about the Scylla, which is the European Court of Human Rights, but there is also the Charybdis which is the European Court of Justice and the *Corriet* case law which is likely to be increasingly relevant in relation to the so-called control order lights. Internal exile actually concerns one of the protocols of the European Convention on Human Rights which is not incorporated in the Human Rights Act but is recognised to be a fundamental right in EC law even where no free movement within Community Member States is involved—there is a case called *Rutili*. I suspect we are going to see considerably more argument about that as the control orders get watered down.

Chairman: That sounds quite complicated, we are going to have to work on that one I think.

Q61 Earl of Onslow: If it does become unsustainable, what—and I am probably going to get a rocket from the Chairman for asking this question—can you put in its place or how would you do it?

Mr McCullough: For my part, that is a question that special advocates do not really have a particular expert view to offer this Committee and I would defer to reviews of open representatives generally.

Chairman: That is a fair point.

Earl of Onslow: Gareth Peirce did have a view.

Q62 Chairman: That is their position. The Home Office, in their memo to the Home Affairs Committee on control orders, says, “various House of Lords judgments have confirmed the way in which the 2005 Act operates in a manner fully compliant with the ECHR”. Do you think that fully characterises *MB* and *AF*?

Mr de la Mare: No.

Q63 Chairman: I thought you would say that!

Mr McCullough: It is a striking comment and it certainly struck all three of us because it does not seem to us to reflect our reading of the House of Lords decisions. They do not on our reading appear to be a confirmation of the way in which the 2005 Act operates in a manner which is fully compliant with the ECHR.

Dr Harris: The Home Office would say that it can operate if it is read compliantly with the rule. That is their get-out.

Chairman: That is a Humpty-Dumpty argument, is it not?

Mr de la Mare: I think a fairer way to put it is that the guidance contained in two House of Lords judgments and in a judgment of the European Court of Human Rights has indicated how it may be possible to operate control orders consistently with human rights legislation.

Q64 Chairman: I think that leads me to my next question and I can probably guess the answer to this one as well. If we are keeping control orders, do we need to change the legislative framework to reflect more accurately the way the courts require the system to be operated?

Ms Mountfield: That would be very helpful.

Mr McCullough: I think it would. Again probably not a particular special advocates specific question but there does seem to have been a gulf that has developed between what Parliament has set out should happen and the way in which the courts have said things are required to happen in order for the system to operate compatibly with ECHR requirements. When such a gulf has developed, it may well be sensible for the law to be brought into line; the legislation and rules to be brought into line.

Q65 Chairman: Rather peculiarly, it was not a certificate of incompatibility case I think.

Mr de la Mare: I think it is also fair to say that Parliament did not necessarily have it fully explained to it that the system as previously operated was a substantial departure from the way that public interest immunity works at common law. At common law there is a three-stage balancing test for public interest immunity, the final stage of which is to balance the unfairness against the damage to public interest. If there is an intolerable unfairness, then the material must be disclosed.

Q66 Chairman: Or the case dropped?

Mr de la Mare: That stage in the common law public interest immunity stage was effectively abolished by the legislation and the gradual effect of the decisions in *MB* and *AF* was to replace it so that the legislative test effectively again looked like the common law test. I think before Parliament is asked to do something of that kind again, the reasons for any abolition of the common law test replicated in Strasbourg should be closely articulated. Now the House of Lords has said that that test should be re-introduced and it should appear consistently.

Chairman: I suppose the inference is that if we re-legislate to try and put things right and get it wrong, it would be an incompatibility a second time around; speculative, I suppose.

Q67 Earl of Onslow: I see that Lord Carlile says that he has considered the effects of the Court decisions on disclosure, and in his view it should be possible in most cases to provide sufficient disclosure to comply with legal requirements without damaging the public interest. Do you agree?

Mr McCullough: I think that is probably a case-specific question but I rather doubt it. For reasons Tom has explained, in most of the existing control order cases that were in existence before the House of Lords decision in *AF*, a conclusion had been reached that the closed material could not be disclosed without there being harm to the public interest. As a result of *AF*, that material has to be revisited. Insofar as allegations which are currently closed are required to be made open in order to comply with Article 6 and the principles expounded in *AF*, then a decision has to be made by the Government as to whether to disclose on the one hand, and thereby incur harm (as the Government assesses it and courts have accepted) to the public interest, set against the harm that the Government assesses there would be through not having a control order at all. So there is a judgment for the Government to make in each case where they have been told that disclosure is required in order to comply with *AF*. I think those are case-specific and, even within cases, elements of evidence specific judgments which fall to be made, and it is probably not possible to generalise across the system. At least I would be reluctant to do so.

Q68 Chairman: Talking about generalisations, I just want to move on to other types of secret evidence cases briefly and implications for *AF* for them. You have identified with the assistance of the Home Office some 21 different types of cases which involve secret evidence and special advocates to some degree or another, do you think *AF* has implications for use of secret evidence and your role in other types of cases?

Mr McCullough: Yes.

Ms Mountfield: Yes. The big category of case where *AF* has been said so far is in passing not to apply is SIAC proceedings because they are deportation proceedings—

Q69 Chairman: That was the next question.

Ms Mountfield: — and Article 6 does not apply, but there is a case which is going to the Court of Appeal in June called *Z and Others*, where that is being challenged at least in relation to the assessments about national security. It is a common law fairness argument and the argument that has been advanced is that Article 6 may not require disclosure this but there are lots of dicta that fairness is fairness or a “core irreducible minimum” of fairness is the same in all types of proceedings whether that is backed by European law principles or common law principles.

Q70 Chairman: We had better not go into that too much because of the *sub judice* rule which binds us.

Ms Mountfield: I am just telling you what the argument is.

Mr McCullough: There is a range of other contexts in which it remains to be determined, at least remains to be determined by the Court of Appeal, as to the applicability of *AF*. Those include the so-called “light touch” control orders which at first instance it has been held *AF* principles do apply but that is subject to appeal due to be heard by the Court of

Appeal in the next few months I think. Similarly in the context of employment tribunal proceedings, that is due to be considered by the Court of Appeal. So the scope of the applicability of *AF* principles remains to be determined by the courts.

Ms Mountfield: And curiously SIAC bail. Whether or not you can get bail in SIAC does engage *AF* principles; whether or not you can be actually sent back is *sub judice*.

Mr de la Mare: Particularly contentious is likely to be the classic civil proceedings, and the most obvious instance of that is the civil proceedings being brought consequent upon extraordinary rendition and such acts. There will be real questions raised there about to what extent *AF* applies to a classic tort claim.

Q71 Chairman: So damages cases?

Mr de la Mare: Damages cases, yes.

Q72 Chairman: Interesting. I think we have finished our questions, is there anything you think we have missed or would like to add?

Mr de la Mare: One point, which is law reporting. In the *Binyam Mohamed* case, quite extraordinarily the ICLR, that is the charity responsible for law reporting, intervened to point out how much their job was being impeded by closed hearings and closed arguments including closed arguments on law, and they invited some attention to be given to how these cases could be effectively and procedurally efficiently reported. That is a subject which I would suggest is allied to this whole topic so that the public can inform themselves as to what is happening from a legal perspective.

Q73 Chairman: That goes beyond control orders, that is generally in these cases?

Mr de la Mare: That is also linked to the problem of closed judgments and there is an increasing corpus of closed judgments with which special advocates have to familiarise themselves. So there are a number of practical issues connected with that, not least whether or not an advocate in one case can get access to a closed judgment in another case because of the specification of not only the law but of the facts.

Q74 Chairman: How do the courts get access to them then?

Mr de la Mare: A very good question.

Q75 Chairman: You have a closed judgment in one case, if you are a special advocate in that case and you have a subsequent case you obviously have access to it—

Mr de la Mare: You say “obviously” but if it is in relation to facts that are themselves sensitive and summarised and you do not have a need to know those facts, the security services may object to you reading that judgment.

Q76 Chairman: So you have a judge who has to decide one of these cases—

Mr de la Mare: The judge can read it.

Q77 Chairman: How does the judge know it exists?

Mr de la Mare: That is the problem.

Mr McCullough: Before you even get to the issue of access you have to be aware that a judgment which may be relevant exists.

Q78 Chairman: So what happens? Is that word of mouth amongst the special advocate community, as you call it?

Mr de la Mare: Yes.

Mr McCullough: Which is not an ideal or satisfactory way for this body of closed case law to have been made available to those who need to operate it.

Q79 Chairman: If we are looking at the development of the common law in this area or statutory interpretation, you could have mutually contradictory judgments—

Mr de la Mare: To give you a practical example, in the *AF* case, the special advocates got together and summarised the effect of all the closed judgments dealing with disclosure and distilled the disclosure principles which had been applied in the various closed disclosure application hearings, and persuaded the Secretary of State to make that document open. It was then incorporated in the judgments in the House of Lords. That was the first time the precedent was made known what the criteria were by reference to which—

Q80 Chairman: So you wrote your own precedent?

Mr McCullough: We summarised the precedents.

Mr de la Mare: We wrote the head note I think is more accurate.

Q81 Dr Harris: If you are doing a discrete case, there are certain legal arguments where you are arguing about disclosure but you are not able to make them efficiently, for all you know, because you may not be able to draw on previous judgments and previous arguments because those include facts that you are not entitled to know because they are to do with a different case unrelated to the one you are working on?

Mr McCullough: Yes.

Mr de la Mare: Yes.

Ms Mountfield: Yes, and it is problematic.

Q82 Lord Dubs: Suppose you as an individual had been involved with both cases?

Mr de la Mare: Then you would know and you would be—

Ms Mountfield: But that is *ad hoc*.

Q83 Lord Dubs: That would be pure luck?

Mr de la Mare: Yes.

Q84 Dr Harris: Have you raised this as an issue? What has been said when this has been raised?

Mr de la Mare: “Under consideration”.

Q85 Lord Dubs: If you have been involved in another case, say Case A, can you in Case B, if you happen to be individually on both of them, quote Case A?

Mr de la Mare: Not without prior approval.

Q86 Chairman: So they can restrict you relying on previous precedent?

Mr de la Mare: That is possible, yes.

Q87 Chairman: Has it ever happened to you?

Mr de la Mare: It has actually, yes.

Q88 Dr Harris: How do they know you are using an argument from a closed judgment if you do not cite the closed judgment and just come up with the argument?

Mr de la Mare: I cannot really go into specifics.

Chairman: You cannot argue the basis of the case if you do not cite the case.

Dr Harris: No, but you can make the argument.

Q89 Baroness Falkner of Margravine: You get together as a community, so you speak to each other, do judges have that sort of relationship where they also find out by speaking to each other?

Mr de la Mare: The Special Advocates Support Office convenes regular meetings in which we discuss so far as we can these points of principle which emerge, so we inform each other as to what is happening in relevant cases. That may work reasonably well amongst the special advocates at the moment, but as the pool grows bigger that becomes more problematic. There is a wider problem, which is that some of these principles are principles of law and they should be known by the open lawyers so that the open lawyers can fix appropriate strategies or take informed decisions as to what to do to best represent their clients as against knowing how the special advocates will act, may act or be inhibited from acting in consequence.

Q90 Chairman: It also affects academic research on all this and the work we do.

Mr de la Mare: Yes.

Earl of Onslow: How much of the stuff for the courts is a matter of public record or is it all closed?

Q91 Chairman: That is the whole point.

Mr de la Mare: That is precisely the objection of the law reporters, which is that it all should be a matter of record and decisions on points of principle should so far as possible be contained in open. The courts, to be fair to them, strive as far as they can to put points of principle into the open judgments.

Q92 Earl of Onslow: The question I am asking, and again I am seeking knowledge, can I as a member of the public just walk into the court and hear you arguing your case?

Mr de la Mare: The closed case, no, the public are excluded.

Q93 Earl of Onslow: Are all of these cases closed?

Mr de la Mare: The public are fully excluded from the portion that deals with the closed evidence and arguments in relation to the closed evidence, closed witnesses.

Mr McCullough: In every case there will be an open stage and then a closed stage, and the public are excluded from the closed stage and that is when the special advocates ply their trade behind closed doors.

Q94 Chairman: One specific question which I must put to you, has any minister met with or asked to meet with the special advocates to discuss your concerns about the process?

Ms Mountfield: No, not as far as I know.

Mr McCullough: Not in recent times, I think.

Mr de la Mare: I remember a meeting with Lord Goldsmith but that was before the House of Lords decision in *MB*. It was some time ago.

Mr McCullough: I have an idea quite a number of years ago a Home Office minister did meet with a small number.

Chairman: I remember Tony McNulty promising us he would do so and I was reminded of the promise.

Q95 Dr Harris: You would remember him if you had met him!

Mr McCullough: It was not me but I think a meeting did take place, and it sounds as if it was on this Committee's prompting. I think that did occur some years ago.

Ms Mountfield: Another special advocate and I corresponded when the new rules were being drafted for SVAP, the Security Vetting Appeal Panel. We had real concerns about the proposed role for special advocates in that context and we wrote and expressed those concerns and copied it to the Attorney General who did then intervene and she supported us.

Q96 Chairman: Did you have an extra point you wanted to raise?

Ms Mountfield: A lot of what we have talked about is rule changes and there is one, I think endemic, problem in closed proceedings which deserves to be made open, which is about the very late disclosure of documents by the Secretary of State to special advocates. I have taken soundings from other special advocates about whether that is a fair word to use and it is a fair word. In almost every case a very substantial volume of disclosure, sometimes very important disclosure, arrives on the Friday before a Monday hearing or a couple of days before. I think it is fair also to say that the special advocates share a serious concern that this prevents them from performing the function they are intended to perform.

Q97 Chairman: This is closed material?

Ms Mountfield: The system is that the closed material is served, we ask for some of it to be made open, we meet with the advocate for the Secretary of State to try to agree that, if we cannot agree it we go to court and get a decision about what ought to be

disclosed. What often happens is that very, very shortly before the substantive hearing another wodge of new material arrives. Sometimes that is additional material which comes as a result of late review but not always. We are often aware of documents disclosed late, which we know were available many weeks or months before. It is very disruptive.

Q98 Chairman: When you say it arrives, it arrives at your chambers?

Ms Mountfield: Yes. You get a note that it has been delivered to your safe. It may be that (indicating) much, it may be three lever arch files, you do not know how much it is going to be, you have no guide to what is in it.

Q99 Chairman: Are there rules about where you can take it? Can you take it home to work on it over the weekend?

Ms Mountfield: No, you cannot take it home. If it arrives on a Friday before a Monday hearing, that is extremely problematic. There is a real lack of discipline about that and there is a lack of sanction. You stand up and say, "This was terribly unfair, we have done our best but we are sure we have done it in too hurried a way". What can the court do? In private proceedings they might say, "We will not allow that late evidence to be used", but they cannot do that here because it is evidence about national security. You cannot say, "We will decide a national security case based on only half the evidence." There is no cost sanction, it is money moving from one part of the Treasury Solicitors to another. If you really need an adjournment, I guess you would seek it, but the controlee does not really want this to go on for still longer than it already has, given the delays which are inherent in the system. What we do, and I know that whether Angus has done it, is to register our concern and we try to make that open if we can and the courts share our concern, and on we go. This is not something about the rules but it is a very, very serious problem about the operation of the special advocates system. I think sometimes, when the higher courts express views on the role special advocates can perform, that is based on lucky ignorance of quite how difficult it is in practice to do the job which the rules say we do. That is a difficult position for a lawyer to be in, if you care about the rule of law, and this is a system for filling a justice gap.

Mr de la Mare: Helen's point is extremely well made. Every single special advocate has experienced this problem. There are two inevitable consequences about making disclosure. The first is that this material is incredibly dense, it is incredibly difficult to parse, and parse it you have to do word by word often, unpicking the various synonyms or codes used in this documentation. It takes a long time to read and you read it without the benefit of someone to help you with it because you do not have a client, you do not have an intelligence expert to tell you what this document means or does not mean or what its implications are for other documents. You do not read it in isolation, you have to read it with the

documents it has to be read with or refers back to. To do that job properly takes time and you cannot do it if you are dumped with the material the day before court. The second point is that late disclosure inevitably means that the thing which is lost is the disclosure process, and it is the disclosure process which is one of the two most important jobs that a special advocate does, namely ensuring that insofar as it can be the material in question is put in open, or a gist is provided for it or some form of follow-up occurs. That process always goes out the window when you get late disclosure.

Q100 Chairman: That begs the questions, is this a conspiracy cock-up or a cocked-up conspiracy? Is it a deliberate tactic?

Mr McCullough: I echo the experiences of both Tom and Helen. I would not suggest that it is a conspiracy. I think the Government forces, as it were, are overstretched, but they realise, or at least have at the back of their mind, that there is no effective sanction that the court can impose for these serial and routine breaches.

Q101 Chairman: So you would not say it is a deliberate tactic?

Mr McCullough: I would not say it is a deliberate tactic but I think the special advocates' ability to discharge their role effectively falls quite a long way down the order of priorities that the Secretary of State and his team have in the way they conduct the litigation. This leads to these endemic problems. As Helen has said, my recent practice at least, so that open advocates are aware of the position at least, is to produce a note setting out the chronology of what has occurred and getting the court's permission with the Secretary of State's approval for that note to be disclosed to the open advocates. It does not remedy the position but at least the open representatives are aware of what is going on. It may be possible, if the Committee were interested, for me to give just one example by way of such a note which has been approved for open disclosure as illustrative of this widespread problem.

Q102 Chairman: That would be helpful.

Ms Mountfield: On cock-up or conspiracy, frankly it does not matter.

Q103 Chairman: It matters to the extent that if it is a deliberate strategy then that is a rather more serious thing than simply a lack of resources or lack of competence.

Ms Mountfield: But the effect—

Q104 Chairman: The effect on the individual is the same but the remedy is very different; the political remedy from our point of view.

Ms Mountfield: The problem is different agendas. The security service is taking an institutionally cautious approach to do whatever it takes to protect national security as they perceive it in a particular case. Overstretched government departments are going through their documents to do the things they have said they will do, but it does not much matter

to them if it is late because at the end of the day there is not a sanction. It is a real concern if you think the rule of law matters. The other real problem is that it

is all closed and one wonders whether it would happen quite so frequently if this was a process which was open to public scrutiny.

Chairman: I think we are going to have to draw a line there. Thank you very much, it has been a fascinating session.
