



# United Kingdom: Detention of Terrorism Suspects (Control Orders)

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**UNITED KINGDOM**  
**DETENTION OF TERRORISM SUSPECTS (CONTROL ORDERS)**

*Executive Summary*

*The operation of control orders has faced two legal challenges. The courts in both instances have ruled that the orders are tantamount to indefinite detention and unlawfully deprive the subjects of their liberty. The government continues to issue new orders while the case is being appealed to the House of Lords. The terms of control orders have been modified to comply with the judgments.*

## **I. Control Orders**

Control Orders were implemented through the Prevention of Terrorism Act 2005 (the “2005 Act”),<sup>1</sup> which received Royal Assent and came into force on March 11, 2005. The Act was in response to the repeal of the UK’s powers to indefinitely detain suspected international terrorists, which occurred as a result of a decision from the House of Lords.<sup>2</sup> One of the first impacts of the passing of the 2005 Act was the release of the detainees that had remained imprisoned for several months after the initial judgment of the House of Lords.<sup>3</sup>

The initial operation of control orders to the suspected international terrorists that had been detained under the provisions of the Anti-terrorism Crime and Security Act 2001(ATCSA) was criticized as patchy, and the orders were considered vague and unclear. A former detainee’s representatives stated that there was a “profound unease at the vagueness and lack of definition [in the control orders].”<sup>4</sup> Some of the detainees released were given accommodations with no money or food, and the Home Office help line established for individuals subject to the orders was not in operation. The Home Office stated that initial problems were to be expected with the new system and that it was working on improvements.

## **II. Definition of Control Orders**

Control orders are defined in section 1 of the 2005 Act as “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.” The orders are preventive in nature and are designed to disrupt the activity of individuals where intelligence shows them to be a threat by imposing “obligations on individuals suspected of being involved in terrorism-related activity<sup>5</sup> [whether domestic or international]... [to] restrict or prevent the further involvement by individuals in such activity.”<sup>6</sup> They are tailored to the particular risk imposed by

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<sup>1</sup> Prevention of Terrorism Act 2005 [PTA], c. 2.

<sup>2</sup> A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56.

<sup>3</sup> BBC News, *Eight Terror Detainees Released*, Mar. 11, 2005, <http://news.bbc.co.uk/1/hi/uk/4338849.stm>.

<sup>4</sup> BBC News, *Terror Control Orders in ‘Chaos,’* Mar. 14, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4346969.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4346969.stm).

<sup>5</sup> Section 1(9) of the 2005 Act defines terrorism-related activities as “one or more of the following: (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates [or gives encouragement to] the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.”

<sup>6</sup> PTA, c. 2, Explanatory Notes ¶ 3.

each individual, upon the advice of the Security Service and can be modified to adjust to the changing risks that the individual might pose.

The orders subject suspected terrorists to conditions similar to bail or probation, such as electronic tagging; curfews; a prohibition on the possession or use of certain items, conducting certain activities, and use of certain facilities; restrictions on communications; and association with other individuals.<sup>7</sup> The Secretary of State for the Home Department has stated that, in some instances, the control order could require that the individual reside in government-owned and -managed accommodation.<sup>8</sup> The obligations that can be imposed in the orders are not restricted solely to activities that initially caused suspicion that the person was or had been involved in terrorism-related activity, but can involve any obligation aimed to prevent the individual's involvement in any terrorism-related activity.<sup>9</sup> It has been reported that five individuals, previously detained under the former regime in the ATSCA but are now subject to control orders have been ordered to live at designated addresses and must remain indoors at those addresses for eighteen hours a day between the hours of 4 p.m. – 10 a.m.

The 2005 Act provides for two types of orders: those that do not derogate from the United Kingdom's obligations under the European Convention on Human Rights (ECHR) (non-derogating orders) and those that do derogate from the ECHR by imposing obligations that are incompatible with an individual's right to liberty (derogating orders).<sup>10</sup> If an individual subject to an order contravenes any obligations it imposes, he can be arrested without a warrant and, if found guilty of an offence, may be imprisoned for up to five years and/or incur a fine upon conviction on indictment or, upon a summary conviction, be imprisoned for up to twelve months and/or incur a fine.<sup>11</sup> There are many instances in which the courts hear cases without the presence of the individual named in the order or his legal representative. The 2005 Act provides that Special Advocates, who are not responsible to the parties in the case, may be appointed to represent the interests of the individual named in the order.<sup>12</sup>

Individuals that are served with control orders cannot be prosecuted or deported for practical reasons. In issuing a control order, the Secretary of State must consult with the chief police officer for the area where an individual resides to consider whether there is a realistic prospect of prosecution for an offense relating to terrorism based upon the existing evidence. If the response to this consultation is negative, the chief constable is then required to keep under review the possibility of an investigation and criminal prosecution.<sup>13</sup> Upon examining letters provided by chief constables, an independent reviewer of the 2005 Act's operation recommended that the letter include clear reasoning as to why there is not sufficient evidence available that realistically could be used for the purposes of a terrorist prosecution rather than a general note.<sup>14</sup> The reviewer also recommended that the note should be presented to the person subject to the control order, with a closed version of the note, if necessary, disclosed to the court reviewing the order.<sup>15</sup>

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<sup>7</sup> PTA, c. 2, § 1(4).

<sup>8</sup> 431 PARL. DEB., H.C. (5th ser.) (2005) 151-155.

<sup>9</sup> PTA, c. 2, § 2(9).

<sup>10</sup> *Id.* § 1(2).

<sup>11</sup> *Id.* § 9.

<sup>12</sup> *Id.* sch. 1 ¶ 7.

<sup>13</sup> PTA, § 8; First Report of Independent Reviewer Pursuant To Section 14(3) Of The Prevention of Terrorism Act 2005, Feb. 2, 2006, <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/laws-against-terror.pdf?view=Binary> ¶ 56.

<sup>14</sup> First Report of Independent Reviewer Pursuant To Section 14(3) Of The Prevention of Terrorism Act 2005, *supra* note 13, ¶ 56.

<sup>15</sup> *Id.* ¶ 59.

To ensure that the requirements imposed by control orders are proportional to the threat posed by individuals, the reviewer of the Prevention of Terrorism Act has recommended that the Home Office establish procedures in which officials meet regularly to monitor each case where a control order has been issued to advise the Secretary of State on the necessity of the obligations imposed, with the aim of reducing them “to the minimum consistent with the safety of the Realm.”<sup>16</sup> The government accepted this recommendation and implemented a review group comprised of staff from law enforcement and the intelligence agencies to provide quarterly “audited” reviews.<sup>17</sup>

## II. Operation of Control Orders

The Secretary of State is required to report to Parliament on the exercise of control order powers. During his last report, which covered the period June 11 to September 10, 2006, the Secretary of State announced that nine non-derogating control orders had been made with a court’s permission, with one of these orders applying to a British citizen. As of September 10, 2006, there are fifteen control orders in force, with six of them applying to British citizens. Out of the eighteen control orders issued during the Prevention of Terrorism Act’s first five months of operation, nine of these were made simultaneously against individuals as a notice of the government’s intention to deport them.<sup>18</sup> These individuals then were detained prior to deportation, with four of the nine subsequently being released on bail by the Special Immigrations Appeal Commission with conditions very similar to those imposed by the control orders.<sup>19</sup> There still are problems involving the deportation these individuals due to the prohibition on *non-refoulement*, which prevents the deportation of anyone to a country where they may face inhumane treatment, torture, or death. The independent reviewer of the anti-terrorism legislation has noted that it would have been better to resolve the situation to enable deportation prior to detaining the individuals under immigration powers.<sup>20</sup>

The reviewer notes:

... I have not been told of any failing in the control orders ... In practical terms control orders have been an effective protection for national security ... I would have reached the same decision as the Secretary of State in each case in which a control order has been made. He asks questions and certainly does not act as a mere cipher when the papers are placed before him. The process is rigorous and structured in an appropriate way, so that the decisions are very definitely those of the Home Secretary himself, not his officials. In accordance with my obligations ... I report that the Secretary of State has acted appropriately in relation to his powers ... in relation to the use of the power to make urgent nonderogating orders.<sup>21</sup>

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<sup>16</sup> *Id.* ¶ 46.

<sup>17</sup> Home Office, *Home Secretary's response to Lord Carlile of Berriew's first review of the Prevention of Terrorism Act 2005*, Apr. 2006, [http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/hs-annual\\_review.pdf?view=Binary](http://security.homeoffice.gov.uk/news-and-publications1/publication-search/legislation-publications/hs-annual_review.pdf?view=Binary).

<sup>18</sup> First Report of Independent Reviewer Pursuant To Section 14(3) Of The Prevention of Terrorism Act 2005, *supra* note 13, ¶ 18.

<sup>19</sup> *Id.* ¶ 18;A and Others v. Secretary of State For The Home Department, Oct. 2005, [http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc33\\_392005.htm](http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc33_392005.htm) ¶ 62.

<sup>20</sup> First Report of Independent Reviewer Pursuant To Section 14(3) Of The Prevention of Terrorism Act 2005, *supra* note 13, ¶ 18.

<sup>21</sup> *Id.* ¶ 29.

### III. Effect of Control Orders on Subjects

Medical reports state that individuals subject to control orders have suffered from mental illnesses ranging from Major Depressive Disorder to Post Traumatic Stress Disorder that, in some cases, have had a physiological affect upon those affected.<sup>22</sup>

### IV. Legal Challenges to Control Orders

There have been successful challenges to the operation of control orders. In June 2006, in response to a challenge brought by individuals subject to six control orders whom must remain inside for eighteen hours a day, the High Court ruled that the conditions imposed by the control orders were tantamount to house arrest and, as the orders could be renewed virtually indefinitely, they amounted to a deprivation of liberty incompatible with the European Convention on Human Rights. The Judge's statement was critical of the control orders, noting that the "difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance."<sup>23</sup> The judge ruled that the "Secretary of State has no power to make the orders and they must therefore all be quashed."<sup>24</sup> The government immediately challenged this judgment and, in August 2006, the Court of Appeal rejected the government's arguments and agreed with the High Court, ruling that the control orders should be quashed. Despite the quashing of the orders, the Court of Appeal refused to modify or direct the Secretary of State to modify them, noting that the Secretary of State has authority under the Prevention of Terrorism Act to issue orders, which "is an exercise that the Secretary of State is very much better placed to perform than the court."<sup>25</sup>

### V. Concluding Remarks

The government's response to the court of appeal's judgment has been to prepare an appeal to the House of Lords. In order to comply with the judgment in the meantime, the control orders were modified and the hours that the individuals must remain indoors were reduced to fourteen hours a day.

Overall, the reviewer of the Prevention of Terrorism Act noted that the use of non-derogating control orders is a "justifiable and proportional safety valve for the proper protection of civil society as a last resort (only)."<sup>26</sup>

While the reviewer notes that the orders as justifiable as a last resort, after considering all the information upon which the Secretary of State makes his decisions, he concluded:

The nature of the activities of which I have seen information is sufficiently alarming for me to re-emphasise ... the real and present danger of shocking terrorism acts involving suicide bombers. Further suicide bombings in the UK must be expected, and the targets are unpredictable.<sup>27</sup>

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<sup>22</sup> A and Others v. Secretary of State For The Home Department, Oct. 2005, [http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc33\\_392005.htm](http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc33_392005.htm) ¶ 62.

<sup>23</sup> Secretary of State for the Home Department v JJ et al, [2006] EWHC 1623 (Admin) ¶ 99.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ¶ 27.

<sup>26</sup> First Report of Independent Reviewer Pursuant To Section 14(3) Of The Prevention of Terrorism Act 2005, *supra* note 13, ¶ 46.

<sup>27</sup> *Id.* ¶ 60.

There is a possibility that the Prevention of Terrorism Act will be amended in 2007, as the government has announced its intention to introduce an additional piece of anti-terrorism legislation that year, which would provide an opportunity for further changes to control orders.

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