

COVERT DEROGATIONS AND JUDICIAL DEFERENCE: REDEFINING LIBERTY AND DUE PROCESS RIGHTS IN COUNTERTERRORISM LAW AND BEYOND

*Helen Fenwick and Gavin Phillipson**

This article considers the use of control orders in the United Kingdom as an example of one of the most important legal aspects of the “war on terror”: the development, alongside the criminal justice approach, of a pre-emptive system. It argues that in relation to such orders the executive has in effect sought to redefine key human rights in a manner that, at its most extreme, amounts to covert derogation, and that both Parliament and the judiciary have been to an extent drawn into and made complicit in this process. It highlights key aspects of this story in order to illustrate some broader points about the role of judges, Parliament, and the rule of law in response to such exceptional measures. It argues that the attempted minimization of the ambit of rights, the spreading use of secret evidence, and the damaging constitutional impact of excessive judicial deference, are of great significance beyond UK counterterrorism law and can help illuminate both the opportunities and the dangers in constitutional dialogue.

Cet article étudie les ordres de contrôle au Royaume-Uni à titre d'exemple d'un des aspects les plus importants de la réponse juridique à la « guerre contre le terrorisme » : le virage d'une justice pénale réactive vers la création d'un système préemptif parallèle. Les auteurs soutiennent qu'en ce qui a trait à ces ordres, l'exécutif tente de redéfinir les droits fondamentaux de la personne, ce qui, dans les situations extrêmes, revient à y déroger secrètement. Ils ajoutent que tant le Parlement que l'appareil judiciaire ont d'une certaine manière été associés à ce processus et en sont devenus complices. L'essai souligne certains aspects de cet enjeu afin d'illustrer des questions plus larges sur le rôle des juges, du Parlement et de la primauté du droit face à de telles mesures exceptionnelles. Les auteurs soutiennent que cette tentative de réduire la portée des droits, l'utilisation croissante d'éléments secrets de preuve ainsi que les effets dommageables de la déférence judiciaire excessive sur la constitution ont une importance qui s'étend au-delà des lois anti-terroristes britanniques. Ces enjeux peuvent jeter de la lumière tant sur les bienfaits que sur les dangers du dialogue constitutionnel.

* Professors of Law, Human Rights Centre, Law School, University of Durham. Earlier versions of this paper have been given at the Max Planck Institut, Freiburg, Germany at an international conference entitled, “The Impact of Contemporary Security Agendas Against Terrorism on Criminal Law and Law Enforcement”, on 3-6 December 2009, and by Professor Phillipson at the Institute for Advanced Legal Studies, London, on 12 October 2010, and at a Constitutional Roundtable at the University of Toronto on 5 January 2011. Our thanks are due to the organizers and participants in those conferences, including Clive Walker, Tom Poole, and Kent Roach, for a number of helpful comments.

Introduction	865
I. Control Orders and the Legal Background	873
II. Redefining the Right to Liberty under Article 5 <i>ECHR</i>	879
<i>A. Imposing Article 5 ECHR Compliance in the Courts?</i>	879
<i>B. The Stance of the European Court of Human Rights on “Deprivation of Liberty”</i>	883
<i>C. Domestic Failure to Uphold Liberty?</i>	885
<i>D. Conclusions: The Wider Significance of Adopting a Narrow Conception of “Deprivation of Liberty”</i>	888
III. Due Process and Article 6 <i>ECHR</i>	890
<i>A. Introduction: The “Inherently One-Sided Procedure”</i>	890
<i>B. The Spread of Secret Evidence in Proceedings in the United Kingdom and Beyond</i>	892
<i>C. Risk Assessment, Intelligence, and Evidence</i>	894
<i>D. Control Orders, Due Process, and the Domestic Judicial Response: Division and Partial Accommodation</i>	896
<i>E. Intervention by the European Court of Human Rights: Principle Restored</i>	901
<i>F. Conclusions on the Pre-A v. United Kingdom Case Law on Article 6: Covert Derogations and the Wider Constitutional Picture</i>	904
IV. Possible Responses: Probing National Security Claims to Allow Greater Disclosure and Prosecution	910
Conclusion	915
Postscript	917

Introduction

In contrast to the approach of the Bush administration in the United States, which adopted a military, extra-legal approach to certain aspects of its counterterror policy—including imprisonment in legal “black holes” at Guantanamo and other “ghost” prisons¹—the United Kingdom has continued to ensure that even the extraordinary counterterror measures of detention without trial and subjection to control orders are clothed in legal authority and apparent human rights compliance.² The adoption of such exceptional measures in the United States and the United Kingdom represents a partial shift from a criminal justice response to the creation of a “pre-emptive”³ system operating alongside the criminal justice approach—measures are taken against individuals based upon an assessment of the risk they pose, in terms of their *likely future* conduct. These measures form part of what Lucia Zedner has termed “an emerging genre of preventive justice”⁴ driven by the fear of an extraordinarily heightened risk from terrorism and allowing for anticipatory action against perceived threats, with the aim of preventing terrorist activity before it occurs. We

¹ The US government took the stance that certain international law norms did not apply to the detainees in Guantanamo, since it classified them as “unlawful combatants”. In relation to other norms, such as torture, it sought to radically alter the definition so as to exclude techniques like water-boarding: see Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53:1 ICLQ 1; José E Alvarez, “Torturing the Law” (2006) 37:2-3 Case W Res J Int’l L 175 at 176-77. Thus its approach, in some respects, was extra-legal. However, in terms of US constitutional law, it sought to create a form of legal black hole through law—including the *Detainee Treatment Act of 2005* (42 USC § 2000dd (2005)). For a fierce critique of the US stance, see Conor Gearty, *Can Human Rights Survive?* (Cambridge, UK: Cambridge University Press, 2006) ch 4 at 99ff; Jordan J Paust, *Beyond the Law: The Bush Administration’s Unlawful Responses in the “War” on Terror* (New York: Cambridge University Press, 2007).

² The exception to this “legality” model is the United Kingdom’s complicity—the extent of which is still unknown—in the so-called “extraordinary rendition” carried out by the US government and in the torture of citizens by other countries. These are to be investigated in a judicial inquiry chaired by Sir Peter Gibson. The inquiry has not yet formally opened. For a recent report see Joshua Rozenberg, “Torture Inquiry Will Cover Rendition, Vows QC”, *The Guardian* (9 June 2011) online: Guardian Unlimited <<http://www.guardian.co.uk>>.

³ We prefer the term “pre-emptive” to the more commonly used term “preventive” for the reasons given by McCulloch and Pickering (Jude McCulloch & Sharon Pickering, “Counter-terrorism: The Law and Policing of Pre-emption” in Nicola McGarrity, Andrew Lynch & George Williams, eds, *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (London, UK: Routledge, 2010) 13 at 14-17). Essentially, “[t]he concept of pre-emption focuses attention on the *strategy* behind the legislation: targeting threats before they emerge. The term prevention, by way of contrast, asserts an *outcome* that is not supported empirically and is challenged by historical experience and a range of scholarship” (*ibid* at 17).

⁴ Lucia Zedner, “Preventive Justice or Pre-punishment? The Case of Control Orders” (2007) 60 *Curr Legal Probs* 174 at 174 [Zedner, “Preventive Justice”].

thus see a partial shift from a post-crime system, based on criminal offences, proof, and punishment, to a pre-crime society, based on risk assessment, suspicion, and pre-emption.⁵ Examples in the anti-terror context include: the establishment of the detention facility at Guantanamo Bay; the powers to detain foreign terrorist suspects indefinitely without conviction, introduced in the United Kingdom by part IV of the *Anti-terrorism Crime and Security Act 2001 (ACTSA)*;⁶ “Control Orders” under the *Prevention of Terrorism Act 2005 (PTA)*,⁷ also introduced in Australia into division 104 of their *Criminal Code*;⁸ powers of detention for investigatory⁹ and preventive purposes¹⁰ in Australia; the power to detain non-citizens in Canada on grounds of risk to national security,¹¹ which was recently declared unconstitutional by the Supreme Court of Canada;¹² and the use of racial profiling in stop-and-search under anti-terrorism powers in the United Kingdom and the United States.¹³ But of course the use of pre-emptive measures tends to create a greater likelihood that human rights, especially due process rights, will be violated, placing governments in the position of seeking to evade that possibility. Therefore they must either: (i) assert that human rights laws are inapplicable (draining law from the “war on terror”, the stance taken in some respects by the Bush administration);¹⁴ (ii) derogate from their human rights obligations; or (iii) find a way of diluting the standards upheld by the rights.

The detention without trial of foreign nationals under part IV of the *ACTSA* was the first manifestation of the pre-emptive approach in UK counterterrorism law—it used the second strategy of derogation: suspending the right to liberty under article 5 of the *European Convention on Hu-*

⁵ See Lucia Zedner, “Pre-crime and Post-criminology?” (2007) 11:2 *Theoretical Criminology* 261 at 261-62.

⁶ *Anti-terrorism Crime and Security Act 2001* (UK), c 24 [ACTSA].

⁷ (UK), c 2 [PTA].

⁸ *Criminal Code Act 1995* (Cth) [Criminal Code Australia].

⁹ See e.g. under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), the Australian security services are allowed to detain people for questioning about terrorism related activity.

¹⁰ Under division 105 of *Criminal Code Australia*, *supra* note 8.

¹¹ *Immigration and Refugee Protection Act*, RSC 2001, c 27, s 77 [IRPA].

¹² *Charakaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [Charakaoui].

¹³ See e.g. Daniel Moeckli, “Discriminatory Profiles: Law Enforcement After 9/11 and 7/7” (2005) 5 *Eur HRL Rev* 517.

¹⁴ See *supra* note 1 and accompanying text.

man Rights (ECHR).¹⁵ The derogation was challenged under the *Human Rights Act (HRA)*,¹⁶ the act giving domestic effect to the *ECHR*, and the derogation—and therefore part IV itself—was found to be incompatible with the *ECHR* by the House of Lords in the well-known *Belmarsh* decision.¹⁷ As a result, the British government abandoned part IV, and switched strategies. It withdrew its derogation from article 5 *ECHR*, and introduced “Control Orders” under the *PTA*.¹⁸

The withdrawal of the derogation from the right to liberty amounted to a public affirmation by the British government of its intention to protect British citizens from terrorism while remaining within the normal human rights standards laid down by the *ECHR*, as the Council of Europe had recommended.¹⁹ However, a key argument of this paper is that the Labour government’s policy since then (and now that of the current government) amounted to a switch to the third strategy outlined above: to use the threat of terrorism not as a reason for openly derogating from human rights standards, but instead to persuade Parliament and the judiciary into acquiescing in the creation of minimal interpretations of certain *ECHR* rights that stripped them of much of their content. This tactic had the effect of, at worst, seeking to create effective covert derogations and, at best, of redefining the rights so that they emerged only in a diluted form in practice. The government adopted two contrasting tactics to that end. Those parliamentarians without the requisite legal expertise were simply assured that the measures were compliant with the *ECHR* rights. In contrast, with respect to those Members of Parliament with greater awareness of the requirements of the *ECHR* and, of course, to the courts themselves, the tactic was to argue that this partial minimization

¹⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 226, Eur TS 5 [*ECHR*]. Art 5(1) *ECHR* provides as relevant: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.” It then provides for a number of exceptions in paras (a)-(f), including: (a) detention after conviction of an offence; (b) arrest or detention for non-compliance with an order of the court or to secure compliance with a legal obligation; (c) arrest on reasonable suspicion of having committed an offence; and (f) detention to prevent unauthorized entry into a country or with a view to deportation. Art 5(3) provides for those arrested under 1(c) to be brought “promptly” before a judicial officer and to trial “within a reasonable time”. Art 5(4) provides for habeas corpus.

¹⁶ *Human Rights Act 1998* (UK), c 42, s 19 [*HRA*]. For further details of the grounds of challenge, see text accompanying note 56.

¹⁷ *A v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh*].

¹⁸ *Supra* note 7.

¹⁹ Council of Europe, PA, Resolution 1271 (2002) and Council of Europe, Committee of Ministers, Recommendation 1534 (2001).

of liberty and due process rights was necessary given the exceptional threat posed by terrorism and the pressing need to protect public safety and national security. At times this was achieved simply by exploiting any ambiguities in the interpretation of *ECHR* rights so as to produce the most executive-friendly reading of them possible. In general, such tactics become possible due to the febrile atmosphere typically generated by government claims that we are in a semi-permanent state of emergency²⁰ in which the risk of terror attacks is discursively amplified by both government and media,²¹ and the human rights of suspects are easily portrayed, in Loader's vivid phrase, as a "gamble with people's safety".²² Hence, legislators may be pressured into passing anti-terrorism laws in haste with much too little scrutiny and amendment²³—as happened in the United Kingdom in relation to the introduction of the two key pre-emptive detention measures post-9/11.²⁴ In turn, this means that judicial review of the

²⁰ The United Kingdom Government has maintained that, because of the terrorist threat, there is an on-going actual or potential public emergency in the United Kingdom, now lasting some ten years, since 9/11. See critical comment by the Joint Committee on Human Rights (JCHR): UK, HL & HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (Sixteenth Report of Session 2009-10, HL 86, HC 111) (London, UK: Stationary Office, 2010) at paras 12, 13 [*JCHR Counter-Terrorism Policy Report 2009-10*]; UK, HL & HC, 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, HL 64, HC 395) (London, UK: Stationary Office, 2010) at paras 11-13. [*JCHR Control Orders Report 2009-10*].

²¹ See Victor V Ramraj, "Terrorism, Risk Perception and Judicial Review" in Victor V Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2005) 107 at 110.

²² Ian Loader, "The Cultural Lives of Security and Rights" in Benjamin J Goold & Liora Lazarus, eds, *Security and Human Rights* (Portland, OR: Hart Publishing, 2007) 27 at 39.

²³ Ramraj, *supra* note 21 at 119; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006) at 1-3.

²⁴ The 2001 UK *ACTSA* (*supra* note 6) was passed in the aftermath of the 9/11 attacks and rapidly passed in the Commons, but it contained measures that were not directly concerned with terrorism matters (see Helen Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?" (2002) 65:5 Mod L Rev 724 at 726-27). The *PTA* (*supra* note 7) legislated for derogating control orders, which have never yet been utilized, and it was also passed in great haste in under two weeks. Opposition Members of Parliament (MPs) were reported to be "absolutely incredulous" at the short time allowed to debate such a serious measure: Jenny Booth "Government Plans to Rush through New Terror Laws", *Times Online* (21 February 2005) online: Times Online <<http://www.timesonline.co.uk>>. The performance of the US Senate in relation to the US *Patriot Act* (Pub L No 107-56, 115 Stat. 272 (2001))—also passed in response to 9/11, and also provided for numerous controversial extensions of state power—followed a similar pattern with just one senator voting against the proposals. In the United Kingdom, later terrorism legislation has received greater scrutiny. See e.g. the defeat by the House of Commons (UK, HL & HC, *Commons Hansard Debates*, vol

exercise of such powers becomes, as Ramraj put it, “an institutional safeguard against policy-making motivated primarily by public fear.”²⁵

But precisely when it is most needed, the judicial safeguard also comes under intense pressure. As this paper shows, the UK government sought to persuade the judges to acquiesce in this process of diluting rights, partly by constant invocation of the need for particular judicial deference in the area of national security. At times, indeed, it has sought to reduce the judicial role to one of accepting the government’s assessment not only of the *extent of the threat* from terrorism, but of the proportionality of the measures needed to combat it. In *Belmarsh*, for example, a principal submission of the government was that:

As it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters ... calling for an exercise of political and not judicial judgment.²⁶

While this argument was clearly rejected in *Belmarsh*, and judges in the control order cases did not *overtly* accept it, we argue below that it has nevertheless had influence in some important decisions. In various judgments, a number of very senior judges have accepted that, in effect, due process rights such as those represented by articles 5(4)²⁷ and 6(1) of the *ECHR*²⁸, may be drained of much of their normal content—or, as the Canadian Supreme Court put it in a similar context, “not merely ... limited [but] ... effectively gutted.”²⁹ This can be seen most vividly in a kind of unholy trinity of decisions by the UK Court of Appeal: first, to accept the lawfulness of detention without trial in *Belmarsh (CA)*;³⁰ second, to find that the admissibility of torture evidence obtained by foreign agents did

439, No 62, col 310-col 312 (9 November 2005) (Dominic Grieve)) of the proposal for ninety day pre-charge detention after arrest in the *Terrorism Bill* (UK, HLB 38 in *Sessional Papers* (2005-06) 1) on 9 November 2005—the Commons did, however, accept a doubling of the detention period from fourteen to twenty-eight days.

²⁵ Ramraj, *supra* note 21 at 121.

²⁶ *Belmarsh*, *supra* note 17 at para 37.

²⁷ *Supra* note 15 at 226.

²⁸ “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (*ibid* at 228).

²⁹ *Charakaoui*, *supra* note 12 at para 64.

³⁰ *A v Secretary of State for the Home Department*, [2002] EWCA Civ 1502, [2004] QB 335 [*Belmarsh (CA)*], *rev’d Belmarsh*, *supra* note 17.

not violate article 6;³¹ and third, to find that article 6 imposed no irreducible minimum of disclosure of the case against the suspect in control order cases.³² Lord Justice Brooke encapsulated this overly deferential approach in *Belmarsh* (CA) when he urged judges to trust the executive more, and (mis)characterized the insistence on upholding human rights standards as “a purist approach” that entailed “saying that it is better that this country should be destroyed ... than that a single suspected terrorist should be detained without due process.”³³

A more sophisticated route to achieving the same outcome, by introducing a novel species of proportionality argument into rights unqualified but for their specified exceptions, has been notably apparent in Lord Hoffmann’s approach—both to due process under article 6,³⁴ and to the concept of “deprivation of liberty” under article 5 in relation to control orders creating eighteen-hour house detention, combined with numerous other draconian restrictions. In one leading decision on article 5 of the *ECHR* he wrote:

The liberty of the subject and the right to habeas corpus are too precious to be sacrificed for any reason other than to safeguard the survival of the state. But one can only maintain this position if one confines the concept of deprivation of liberty to actual imprisonment or something which is for practical purposes little different from imprisonment. Otherwise the law would place too great a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens.³⁵

At its worst this approach amounts to a kind of dishonest dance in which all three arms of government have been complicit in seriously undermining basic rights, while preserving their outward form.³⁶ David Dyzenhaus

³¹ *A v Secretary of State for the Home Department (No 2)*, [2004] EWCA Civ 1123, [2005] 1 WLR 414, rev’d [2005] UKHL 71, [2006] 2 AC 221.

³² *Secretary of State for the Home Department v AF (No 3)*, [2008] EWCA Civ 1148, [2009] 2 WLR 423 [*AF (No 3)*(CA)], rev’d *AF (No 3)* (HL), *infra* note 72.

³³ *Supra* note 30 at para 87.

³⁴ See text accompanying notes 186-92.

³⁵ *Secretary of State for the Home Department v JJ*, [2007] UKHL 45 at para 44, [2008] 1 AC 385 [*JJ*]. See also text accompanying notes 75-85.

³⁶ There have been regular highly critical reports from the JCHR, warning that the *PTA* (*supra* note 7) almost certainly breaches the United Kingdom’s obligations under the *ECHR* and calling for urgent reform—see especially *JCHR Control Orders Report 2009-10*, *supra* note 20. However both Houses of Parliament have voted positively for its renewal on six occasions, most recently in March 2011. But see further text accompanying note 232.

has termed similar situations legal “grey holes”,³⁷ warning that such excessive judicial deference and a narrow concept of the rule of law in which only the *forms* of legality are required, can result in that concept being reduced to a “formal or empty” check.³⁸ In this way, “the compulsion of legality results in the subversion of constitutionalism ... Arbitrariness is covered by what an English judge referred to recently as a ‘thin veneer of legality.’”³⁹ The Eminent Jurists Panel recently spoke in strikingly redolent terms of the danger that the judicial role in pre-emptive schemes “may prove to be no more than a façade of justice to what is an inherently unfair procedure.”⁴⁰ Justice Kirby, in the Australian High Court decision of *Thomas v. Mowbray*, was even blunter, finding that the control order provisions under challenge in that case rendered the federal courts mere “rubber stamps for the assertions of officers of the Executive Government.”⁴¹

Such situations may be more dangerous than open derogations from human rights standards because the reality of the situation is not so starkly apparent—and may therefore generate less political opposition and activism. Meanwhile, judges, far from ameliorating the effects of draconian law and policy-making, are in danger of being co-opted into giving the whole repressive project an appearance of legitimacy—allowing governments to point to judicial oversight as proof of their respect for the rule of law and due process. In a form of negative or suppressive constitutional dialogue, this may then be used by the executive to resist calls for reform from Parliament⁴² and from oversight bodies, by arguing that the process has been given a clean bill of human rights health by the judiciary. As we will see throughout this article, the UK government has indeed repeatedly used House of Lords’ judgments—that have not gone so far as to de-

³⁷ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 3.

³⁸ David Dyzenhaus and Rayner Thwaites, “Legality and Emergency—The Judiciary in a Time of Terror” in Andrew Lynch, Edwina MacDonald & George Williams, eds, *Law and Liberty in the War on Terror* (Leichhardt, NSW: Federation Press, 2007) 9 at 10-11.

³⁹ *Ibid* at 11, citing Justice Sullivan in an early control order case (*Secretary of State for the Home Department v MB*, [2006] EWHC 1000 (Admin), (*sub nom Re MB*) [2006] HRLR 29 at para 103 [*MB* (HC)], *rev’d MB* (CA), *infra* note 191, *rev’d MB & AF*, *infra* note 72).

⁴⁰ International Commission of Jurists. *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Switzerland: International Commission of Jurists, 2009) at 99 [*EJP Report*].

⁴¹ [2007] HCA 33 at para 369, 233 CLR 307.

⁴² In the annual *PTA* renewal debates from 2006 to 2011: see e.g. UK, HC, *Commons Hansard Debates*, vol 506, No 47, col 725 (1 March 2010) (David Heath) [*Hansard* (1 March 2010)].

clare the whole control order scheme to be incompatible with the *ECHR*—as proof that it is fully compliant with the *ECHR*, thus resisting calls for wholesale reform of the system by Parliament’s Joint Committee on Human Rights (JCHR).⁴³ In this way, overly deferential judicial scrutiny is used to help avert rigorous parliamentary scrutiny, in a form of negative dialogue. Later in this article we suggest how, conversely, rigorous judicial scrutiny can be the friend rather than the enemy of the democratic process, and give rise to more positive forms of dialogue.

This article, then, seeks to highlight some crucial aspects of the control orders story, in order to illustrate some broader points about the role of judges, Parliament, and the rule of law in response to such exceptional measures. In particular, we analyze the way in which, in the face of the invocations of the need for judicial deference we have adverted to, the judges have still provided considerably more resistance to the executive than in the past. Nevertheless, we argue that one of the key lessons from the control orders story overall is the way that the overuse of judicial deference to the executive or Parliament can have wider, damaging constitutional implications, particularly in allowing the executive to run what are in effect covert derogations from fundamental rights. We highlight the way in which even the partial acceptance of such covert derogations by the judiciary has had distorting effects upon both the reasoning and outcome in some of the key control order cases. In particular, we draw out the way in which what we term “deference as distortion” has resulted, variously, in the minimization of the ambit of rights; the importation of a new proportionality analysis into unqualified rights; and on occasion, the way in which such a proportionality test, once judicially introduced, has then been flipped over, giving a qualification in favour of the state presumptive priority over the right itself in a kind of double rewriting of rights provisions. Finally, we connect the effects of both deferential and more assertive judicial judgments with the wider constitutional picture and the role of Parliament.

⁴³ See e.g. UK, HC, *Written Ministerial Statements in the Commons Hansard*, vol 469, No 22, col 38WS-39WS (12 December 2007) (Tony McNulty). As the JCHR recently noted with astonishment, one Home Office memorandum to a parliamentary committee stated that “various House of Lords judgments have confirmed the way in which the 2005 Act operates in a manner fully compliant with the ECHR” (*JCHR Control Orders Report 2009-10*, *supra* note 20 at para 81). The JCHR vigorously objected to this “mischaracterization” of important court judgments, which it said, was positively misleading (*ibid* at para 85). See UK, HL, *Lords Hansard*, vol 717, No 49, col 1521 (3 March 2010).

I. Control Orders and the Legal Background⁴⁴

Control orders represent an attempt to devise new methods of pre-emptive, quasi-criminal procedure in order to protect public safety while retaining a measure of procedural fairness and (purportedly) avoiding actual deprivations of liberty. The phenomenon is not confined to the United Kingdom as variants of such orders have also been used in Australia,⁴⁵ Canada, France, and the Netherlands, while the Danish government was reported in 2009 to be considering their introduction.⁴⁶

The introduction of control orders in the United Kingdom cannot be understood without a brief consideration of their status as a replacement for detention without trial under part IV of the 2001 *ACTSA*—itself introduced to deal with the dilemma faced by the government after 9/11. It was presented to Parliament and a number of parliamentary committees⁴⁷ in the following terms: certain foreign nationals were suspected of being international terrorists but could not be placed on trial due to the sensitivity of the evidence and the high standard of proof required. At the same time, they could not be extradited, or deported to their country of origin, because there were grounds to think that they would there be subject to torture or inhuman and degrading treatment in breach of article 3 of the *ECHR*⁴⁸—the anti-torture guarantee, as interpreted by the European Court of Human Rights (ECtHR) in *Chahal v. United Kingdom*.⁴⁹ As a matter of domestic law, it was clear that the power to detain persons prior to deportation⁵⁰ is limited to such time as is reasonable to allow the process of deportation to be carried out, and that deportation should follow

⁴⁴ For a very detailed account of the control orders regime see Clive Walker, “Keeping Control of Terrorists without Losing Control of Constitutionalism” (2007) 59:5 *Stan L Rev* 1395.

⁴⁵ See *infra* note 63.

⁴⁶ *EJP Report*, *supra* note 40 at 110-11. The system of security certificates in Canada has given rise to a form of de facto control orders, whereby those previously held under the certificates are released under conditions ranging from house arrest (*Jaballah v Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 379, 63 Imm LR (3d) 60) to milder forms of restriction such as weekly reporting in and bars on contacts with suspect groups (*Suresh v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 192, 229 NR 240)—many thanks to Kent Roach for this point.

⁴⁷ *The Anti-Terrorism, Crime and Security Bill* (UK), 2001-2002 sess, 2001, (Select Committee on Home Affairs, First Report, HC 351).

⁴⁸ Art 3 *ECHR* provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (*supra* note 15 at 224). No exceptions are provided.

⁴⁹ No 22414/93, [1996], ECHR 54, 23 EHRR 413 [*Chahal*].

⁵⁰ Under the *Immigration Act 1971* (UK), c 77, Schedule 3, s 2.

promptly after detention.⁵¹ Current powers of detention prior to deportation did not provide the government with a solution since the suspected terrorists in question could not be deported within a reasonable time, or in some instances, at all.

The last government's preferred solution to the dilemma was to introduce detention without trial for non-national terrorist suspects who could not be deported. But it considered that the new provisions would be incompatible with article 5(1) *ECHR*, which protects the right to liberty and security of the person. Although there is an exception under article 5(1)(f) allowing for detention of "a person against whom action is being taken with a view to deportation or extradition,"⁵² it was clear following *Chahal* that this would not cover the lengthy detentions envisaged, during which deportation proceedings would not be occurring.⁵³ Therefore, in order to introduce the new provisions it was necessary to derogate from article 5(1) under the provisions of article 15 *ECHR*, which provides that "[i]n time of war or other public emergency threatening the life of the nation," any of the contracting parties may take measures derogating from its obligations under the *ECHR* "to the extent strictly required by the exigencies of the situation."⁵⁴ However, as noted above, the relevant provisions under part IV *ACTSA* were declared unlawful by the House of Lords in *Belmarsh*.⁵⁵ The main basis of the finding was that the measures were arbitrary and therefore not strictly proportionate as required by article 15, because they irrationally applied only to foreign nationals—even though some British nationals posed the same threat as those detained. The measures were also found to be discriminatory and contrary to article 14 *ECHR* for the same reason.⁵⁶ The derogation did not therefore satisfy the requirements of article 15 *ECHR*, since the measures taken were disproportionate to

⁵¹ *R v Governor of Durham Prison ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704 (QB (Eng)).

⁵² *ECHR*, *supra* note 15 at 226.

⁵³ It was found in *Chahal* (*supra* note 49 at 113) that in order to allow detention under art 5(1)(f), deportation proceedings should be underway and it should be clear that they are being prosecuted with due diligence.

⁵⁴ *Supra* note 15 at 232. Measures taken must also not be "inconsistent with [the state's] other obligations under international law" (*ibid.*). Art 15 does not allow derogation from the anti-torture guarantee in art 3, as well as certain other very basic rights, such as the anti-slavery guarantee in art 4 *ECHR*.

⁵⁵ *Belmarsh*, *supra* note 17.

⁵⁶ Art 14 provides: "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (*ECHR*, *supra* note 15 at 232). The government had entered no derogation to art 14.

the demands of the emergency. The British government responded by withdrawing its derogation from article 5 and abandoning part IV. However, it maintained both that the emergency was still in place and that the difficulties of prosecuting terrorist suspects remained. The government therefore brought forward an alternative pre-emptive measure to deal with these suspects: “Control Orders”, under the *PTA*. It sought to answer the main criticism of the House of Lords by making such orders applicable both to British and non-national suspects, so that the measures could target persons due to the security threat they represented rather than their nationality.

Section 1(1) *PTA* defines a control order as: “[A]n order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.”⁵⁷ “Terrorism” is of course defined very broadly in UK law, in a way that goes far beyond the notion of serious politically-motivated violence to include serious damage to property or serious disruption of an electronic system.⁵⁸ The rationale of control orders is to deal with the risk of terrorism that certain suspects pose by placing restrictions on them—including curfews, limitations on their freedom of movement, their ability to access electronic communications, and their ability to associate with others—in order to disrupt their possible involvement in terrorism-related activity. The *PTA* provides for two types of orders: derogating and non-derogating. The former—which would allow house arrest and so would require derogation from article 5—have been placed on the statute book but not authorized for use by Parliament. Non-derogating orders are those that do not contain conditions thought to breach the suspect’s rights under article 5⁵⁹—a decision made in the first instance by the Home Secretary. The distinction between the two types of orders is not otherwise defined in the *PTA*, save in terms of the procedure for imposing them.

Non-derogating orders are imposed by the Secretary of State, subject to judicial review by a court, which will quash an order if it finds it to be

⁵⁷ *Supra* note 7.

⁵⁸ Under *Terrorism Act 2000* (UK), c 11, s 1 [*Terrorism Act 2000*], “terrorism” means the use or threat of action “for the purpose of advancing a political, religious, racial or ideological cause” that is “designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public,” and which involves serious violence against any person or serious damage to property, endangers the life of any person, or “creates a serious risk to the health or safety of the public or a section of the public, or ... is designed seriously to interfere with or seriously to disrupt an electronic system.”

⁵⁹ See *PTA*, *supra* note 7, s 1(10).

in breach of article 5.⁶⁰ It will also scrutinize the evidence led by the Home Secretary. However, the test for imposing an order asks only whether there are reasonable grounds for suspecting that an individual is or has been involved in “terrorism-related activity”.⁶¹ Additionally, the Secretary of State must consider each obligation imposed to be necessary for the purpose of protecting the public from a risk of terrorism. *Any* obligations that the Secretary of State considers necessary for such purposes may be imposed,⁶² except obligations that would breach article 5 of the *ECHR* (or article 3). It should be noted that the standard of proof for non-derogating orders is therefore below that of the civil standard of proof (the balance of probabilities, which is used for imposing control orders in Australia),⁶³ and akin to that required for arrest or stop-and-search. Thus very severe restrictions are placed upon the liberty, privacy, associational rights, and family life of suspects on mere suspicion of wrongdoing, relying partly upon a “prophetic” risk assessment of what they may do in the future.⁶⁴ Orders last for a year but they may be renewed, and many have been.⁶⁵ Breach of any condition imposed under a control order is a serious criminal offence, punishable by up to five years imprisonment.⁶⁶ The *PTA*, when introduced into Parliament, was accompanied by an assurance from the Home Secretary that the provisions were *ECHR*-compatible.⁶⁷

The control orders scheme appeared to be a more rational and proportionate response to the terrorism threat than the previous part IV provisions. As well as applying without regard to nationality, orders can impose a range of obligations on persons, allowing a closer “fit” between the risk posed by a given individual and the measures taken to deal with them, thus creating less of a blunt instrument than the previous regime of

⁶⁰ Under ss 3(10) and (11) the court, at the full hearing on the order, must decide whether the Secretary of State’s decision is “flawed”, applying judicial review principles, which include compliance with *ECHR* rights (*ibid*).

⁶¹ *Ibid*, s 2(1).

⁶² *Ibid*, ss 1(3) and 1(4) provide a non-exhaustive list of conditions.

⁶³ *Criminal Code Australia*, *supra* note 8, division 104, s 104(1), introduced by the *Anti-Terrorism Bill (No 2) 2005* (Cth).

⁶⁴ What the suspect has done in the past is plainly relevant to the assessment of what the suspect may do in the future, but the obligations imposed under the orders are based upon preventing future activities, not on punishing persons for past ones (*PTA*, *supra* note 7, s 1(3)).

⁶⁵ *Ibid*, s 2(4). UK, HL & HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* (Fifth Report of Session 2008-09, HL 37, HC 282) (London, UK: Stationary Office, 2009) at 10 [*JCHR Control Orders Report 2008-09*].

⁶⁶ *PTA*, *supra* note 7, s 9(1), 9(4)(a).

⁶⁷ Under the *HRA*, *supra* note 16, s 19.

executive detention. The government thus doubtless calculated that, were derogating orders to be introduced, they would stand a better chance of surviving the rigorous test of proportionality under article 15 *ECHR*. Reliance instead on *non-derogating* orders alone has meant that the *overt* testing of such orders against article 15 proportionality demands has been avoided. But since non-derogating orders must in theory stop short of breaching article 5, their ability to fully answer security concerns was always in question, as was—more pertinently—their ability to achieve article 5 compliance if they *were* to be draconian enough to meet the stated demands of the security services for control over those placed under the orders.

When the non-derogating control orders were introduced they were aptly said to involve deprivation of most of normal life. They included an eighteen-hour curfew (virtual house detention); electronic tagging; house searches at any time; forced relocation (creating a form of internal exile); geographical restrictions on movements; bans on visits by all non-Home-Office-approved persons; and prohibitions on all electronic communication. Evidence provided by solicitors who represent controlled persons to the parliamentary JCHR, was to the effect that control orders “amount to virtual house arrest ... [with] the homes of controlled persons being turned into ‘domestic prisons.’”⁶⁸

We would concede that some kind of civil restriction order could, in principle be a justifiable approach to the government’s dilemma, if there was solid evidence against the suspects, which they were given an adequate opportunity to answer, and the restrictions were proportionate in averting a genuine threat. However, as we explain further below, it was the way in which control orders were used in practice that raised such grave concerns. First, we contend that the executive use of the discretion accorded under the core provisions of the *PTA* depended in effect on a covert derogation from the right to liberty under article 5 *ECHR*, since the regime imposed under a number of those early control orders could not be reconciled with the right to liberty guaranteed by that article, as the House of Lords subsequently found.⁶⁹ Indeed, when this regime was first tested in court, the judge, finding a breach of article 5, did not mince his words in saying that the restrictions went “far beyond” those permitted by the ECtHR case law. He concluded that “this is not a borderline case.”⁷⁰

⁶⁸ KD Ewing & Joo-Cheong Tham, “The Continuing Futility of the Human Rights Act” [2008] 4 PL 668 at 675.

⁶⁹ None of the exceptions in art 5 *ECHR* could apply to control orders (*supra* note 15 at 226).

⁷⁰ *Secretary of State for the Home Department v JJ*, [2006] EWHC 1623 (Admin) at para 73, [2006] ACD 97.

Consequently, in many cases the government was seeking to impose what were in effect derogating control orders, while purporting not to, thus not only running a covert derogation but also bypassing the significantly higher standards of judicial control provided in the legislation for derogating control orders.⁷¹

This meant, secondly, that the orders amounted effectively to a form of severe punishment without conviction. In fact, being under a typical control order for two or three years plainly amounted to a far more draconian punishment than many criminal sanctions, including fines, probation, community service, and suspended sentences. This served, thirdly, to highlight the very low burden of proof required (reasonable suspicion). At first sight, since controlled persons are not being convicted of an offence, the normal criminal standard of proof beyond reasonable doubt might not appear to be the appropriate one. Indeed, the reasonable suspicion standard is in general viewed as an acceptable one for interfering with liberty and property (to obtain a search warrant, for example). The problem is that this standard has been used to support the imposition of long periods of house arrest every day, in conjunction with other serious interferences with liberty, which have subsisted in certain cases for a period of years. Given, therefore, that control orders imposed burdens that were immeasurably graver in terms of the consequences to the suspect than mere arrest or search, such a low burden of proof started to appear plainly inadequate as grounds to impose them.

Finally, the gravity of the consequences of being placed on a control order also served to highlight the problematic nature of the very heavy reliance of the procedures on secret evidence, usually intelligence information. As explored further below, not only is such evidence often of poor quality that would never stand scrutiny in an ordinary trial, but in practice, even the gist of it was often withheld from the suspect. Persons were placed on control orders without ever knowing what they were suspected of doing, or what they could say to disprove the unknown allegations. Only a highly attenuated form of due process was provided for through the use of special advocates. This in turn meant that the government was essentially relying on a further unacknowledged derogation: from article 6 *ECHR*, the fair trial guarantee.

⁷¹ These include a higher standard of proof—namely the balance of probabilities at the full hearing (*PTA*, *supra* note 7, s 4(7))—and imposition of the order by the court, *not* the Home Secretary (*ibid*, s 1(2)(b)).

We turn next to consider the judicial response to this scheme, including a number of important decisions of the House of Lords,⁷² as well as the very significant recent judgment of the ECtHR in *A v. United Kingdom*,⁷³ and the 2010 judgment of the new UK Supreme Court in *Secretary of State for the Home Department v. AP*.⁷⁴

II. Redefining the Right to Liberty under Article 5 *ECHR*

A. *Imposing Article 5 ECHR Compliance in the Courts?*

Article 5 *ECHR* is only triggered if a “deprivation of liberty” occurs. This depends on a particularly serious interference with liberty as distinct from more minor interferences covered by *ECHR* protocol 4, article 2 on freedom of movement, which Britain has not ratified and is not therefore given domestic effect in the *HRA*. It is conceded that the interpretation of the “deprivation” concept by the ECtHR leaves room for some uncertainty as to the ambit of article 5.⁷⁵ But we will argue that the stance taken by the UK government and by the domestic courts towards the concept in the control orders context has exceeded the tolerance even of the somewhat relativistic approach accepted by the ECtHR.

The House of Lords and UK Supreme Court have considered the question of when a range of restrictions on liberty under a control order amounts to a “deprivation of liberty” under article 5 in four cases. In *Secretary of State for the Home Department v. JJ*, the appellants were under house detention for eighteen hours.⁷⁶ Their residences were subject to spot searches at any time and they were restricted to confined urban areas. Visitors had to be authorized by the Home Office. The Secretary of State argued that, due to the need to protect national security, the concept of deprivation of liberty in article 5 should be interpreted with especial nar-

⁷² *JJ*, *supra* note 35; *Secretary of State for the Home Department v E*, [2007] UKHL 47, [2008] 1 AC 499 [E]; *Secretary of State for the Home Department v MB and AF*, [2007] UKHL 46, [2008] 1 AC 440 [MB & AF]; *Secretary of State for the Home Department v AF (No 3)*, [2009] UKHL 28, [2010] 2 AC 269 [AF (No 3) (HL)].

⁷³ [GC], No 3455/05, [2009] ECHR 301, 49 EHRR 29 [A v UK]. This judgment found violations of the *ECHR* in relation to the detention powers under *ACTSA*, but is of direct relevance to control orders.

⁷⁴ [2010] UKSC 24, [2010] 3 WLR 51 [AP]. From October 2009 onwards, the new Supreme Court assumed the jurisdiction previously exercised by the Judicial Committee of the House of Lords, which no longer sits.

⁷⁵ See David Feldman, “Deprivation of Liberty in Anti-Terrorism Law” (2008) 67:1 Cambridge LJ 4 at 8 [Feldman, “Deprivation”].

⁷⁶ *JJ*, *supra* note 35.

rowness.⁷⁷ The majority in the Lords did not appear to accept this stance and, after applying the criteria set out in the leading ECtHR decision of *Guzzardi v. Italy*,⁷⁸ found a breach of article 5 and quashed the control order. Lord Bingham, with whom Baroness Hale broadly agreed, stated that the difference between deprivation of and restriction on liberty was one of degree, not of substance, and depended on an assessment of the impact of the restrictions on the life the controlee might otherwise have been living. On that basis Lord Bingham found that the orders created a deprivation of liberty. Lord Brown agreed, but added his view that a sixteen-hour curfew would have been acceptable.⁷⁹ The minority found no deprivation of liberty. Lord Hoffmann (with whom Lord Carswell agreed) argued that the concept should be seen as referring to “literal physical restraint”, as in prison,⁸⁰ in order to avoid imposing “too great a restriction on the powers of the state to deal with serious terrorist threats to the lives of its citizens.”⁸¹ The minority therefore acceded to the executive view that the national security context should overtly influence the ambit of article 5. Two further cases followed: *Secretary of State for the Home Department v. E*⁸² concerned a less onerous set of restrictions, including curfews of twelve hours, while *Secretary of State for the Home Department v. MB & AF*⁸³ concerned a fourteen-hour curfew together with electronic tagging, police searches of the premises, strict restrictions on visitors, and restriction to an area of about nine square miles. In both cases, the House of Lords found unanimously that there was no breach of article 5. The finding, particularly in *MB & AF*, coupled with the rejection of an eighteen-hour curfew in *JJ*, appeared to imply that the Lords were giving some—albeit, reluctant and qualified—support to the finding of Lord Brown in *JJ* that a sixteen-hour curfew might be the upper acceptable limit. The three decisions were interpreted by the government in various public statements to mean that the House of Lords had supported the control orders scheme and that the scheme was still relatively intact, but that orders would have

⁷⁷ See Ed Bates, “Anti-terrorism control orders: liberty and security still in the balance” (2009) 29:1 Legal Studies 99 at 106, n 59, citing JUSTICE, *Written Submission on behalf of Justice* (intervening in *MB & AF*, *supra* note 72 (Written intervention before the House of Lords) available at <<http://www.justice.org.uk>>.

⁷⁸ [1980] 39 ECHR (Ser A) 5, 3 EHRR 333 [*Guzzardi*]. See especially *ibid* at paras 92- 93. See also text accompanying note 95.

⁷⁹ *JJ*, *supra* note 35 at para 105. He considered that twelve or fourteen hour curfews were consistent with physical liberty.

⁸⁰ *Ibid* at para 36.

⁸¹ *Ibid* at para 44.

⁸² *E*, *supra* note 72.

⁸³ *MB & AF*, *supra* note 72.

to impose daily house detentions of sixteen hours or less.⁸⁴ Four or more control orders were indeed modified so that their curfew periods were *raised* to that point from twelve hours.⁸⁵

Since sixteen hours of house detention was on the cusp of acceptability according to Lord Brown in *JJ*, it might have been expected that where the controlee suffered the added factor of forced relocation away from family and friends in a form of internal exile,⁸⁶ this would have tipped the situation into creating a deprivation of liberty—particularly given the appalling impact of such exile on the controlees.⁸⁷ However, when the Court of Appeal had to consider such a control order in *AP v. Secretary of State for the Home Department*,⁸⁸ it refused to find a violation of article 5, arguing first that the isolation was mitigated because the controlee’s family could visit occasionally and second, that the issue of interference with family life was an article 8 *ECHR* issue only.⁸⁹ However, the UK Supreme Court overruled this decision and quashed the control order.⁹⁰ Lord Brown, with whom the other judges agreed, approved the finding of Lord Bingham in *E* to the effect that the element of physical confinement is the dominant one in relation to the deprivation of liberty question. But he then reaffirmed his finding in *JJ* to the effect that sixteen-hour house detention did not in itself create a deprivation of liberty under article 5, stating:

[F]or a control order with a 16-hour curfew (a fortiori one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living.⁹¹

⁸⁴ See UK, HL, “Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008; Government Reply to the Tenth Report from the Joint Committee on Human Rights”, Cm 7368 in *Sessional Papers* vol 13 (2007-08) HL Paper 57, HC 356 at 4.

⁸⁵ See UK, HC & HL, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (Tenth Report of Session 2007-08, HL Paper 57, HC 356) (London, UK: Stationary Office, 2008) at 14 [*JCHR, Counter-Terrorism Report 2007-08*].

⁸⁶ Creating some parallels with the case of *Guzzardi*, *supra* note 78, in which the applicant was exiled on a small island for sixteen months.

⁸⁷ See *JCHR Control Orders Report 2009-10*, *supra* note 20 at para 41.

⁸⁸ [2009] EWCA Civ 731 (available on BAILII) [*AP* (CA)], rev’d *AP*, *supra* note 74.

⁸⁹ Art 8 provides for respect for private and family life, subject to lawful and proportionate restrictions, where there is a pressing social need to safeguard one or more of a broad range of specified social interests including national security and public safety (*supra* note 15 at 230).

⁹⁰ *AP*, *supra* note 74.

⁹¹ *Ibid* at para 4.

He went on to find that the forced relocation of AP met the “unusually destructive” of normal life test: it had led to an especially high degree of isolation in his case due to the particular difficulties his family had in visiting him, which had had a profound impact on him. Such isolation could be considered under article 8, and might be found under that article to amount to a proportionate restriction on AP’s private and family life, but Lord Brown found that this did not preclude consideration of it in relation to article 5. AP had been placed, it was found, under a particularly stringent restriction, which, combined with physical confinement and other restraints, created a deprivation of liberty. Thus, this decision evinced a more holistic approach towards the adverse impacts of control orders, taking account in particular of their destructive effect upon family life and friendship. But the decision made it clear that sixteen-hour periods of home confinement, repeated over a long period of time would *not* create such a deprivation—and neither would forced relocation combined with a similar period of confinement—*unless* the particular circumstances of the relocation led to quite extreme social isolation. In a narrowly focused decision, then, the UK Supreme Court gave support to most of the core aspects of the control order scheme as implemented by the government, while making it clear that if sixteen-hour house detentions are to be imposed, the Home Secretary would have to take full account of the impact of *other* significant restrictions on the controlees since they might tip the balance to a finding of a breach of article 5.

Thus the net result of the above decisions was to interpret article 5 as meaning that sixteen but not eighteen hours of house detention can be imposed and will not generally breach article 5—even when combined with other restrictions on liberty and movement—so long as such restrictions do not have a particularly stringent effect on the controlee, as described in *AP*. As a result, while the majority of their Lordships in *JJ* and the UK Supreme Court in *AP*⁹² rejected the *explicit* executive argument that the ambit of article 5(1) should be narrowed by reference to the needs of national security, the combined effect of these decisions was, we argue, to redefine and minimize that ambit by implication, in the domestic context. The obligations imposed could only be viewed as not amounting to a “deprivation of liberty” by relying implicitly on a narrow interpretation of that concept, which is *not* fully supported by the jurisprudence of the ECtHR. It is to that jurisprudence that we now turn.

⁹² *AP*, *supra* note 74. The Home Secretary in that case relied on the use of the “purpose” of restrictions on liberty to narrow the ambit of art 5—an argument that had been accepted by the House of Lords in a different context, namely, the public protest case of *Austin v Commissioner of Police of the Metropolis*, [2009] UKHL 5, [2009] 1 AC 564 [*Austin*]. For further on this case see *infra* note 123.

B. The Stance of the European Court of Human Rights on “Deprivation of Liberty”

The case law of the ECtHR supports the proposition that there are a number of paradigm instances of deprivation of liberty—most obviously, imprisonment. It is *also* reasonably clear that house arrest for twenty-four hours—complete confinement, albeit in the home rather than a state-run place of detention—falls within the paradigm cases and amounts to a deprivation of liberty.⁹³ This will be the situation even where the house arrest is not directly enforced.⁹⁴ It is in the *non*-paradigm cases of interference with liberty, where an issue related to the existence, brevity, or intensity of the confinement arises, that the situation becomes more difficult. The ECtHR found in *Guzzardi* that in such circumstances four factors have especial pertinence: the type, duration, effects, and manner of implementation of the measure in question.⁹⁵ The overall result then depends on an assessment of the cumulative impact of the restrictions on the life the person might otherwise have been living. The control order cases, bearing in mind the varying restrictions imposed, clearly fall into the non-paradigm category since none of them concern—or could concern—complete imprisonment or full house arrest, as such orders would necessitate a derogation under article 5.

The ECtHR has employed the *Guzzardi* approach in a number of cases concerning supervisory measures reasonably analogous to control orders. In *Ciancimino v. Italy*,⁹⁶ the applicant was obliged not to leave the district without first obtaining authorization, to report to the police daily, and was subject to an eleven-hour (8:00 p.m. to 7:00 a.m.) curfew. This measure was viewed as falling short of creating a deprivation of liberty. An eleven-hour curfew from 9:00 p.m. to 7:00 a.m. was imposed in *Raimondo v. Italy* as a supervisory measure.⁹⁷ The applicant could leave the house with permission if he had valid reasons for doing so. The restrictions were not found to prevent him from living a normal life and so did not deprive him of his liberty. In *Trijonis v. Lithuania*, the applicant was subjected to a similar curfew and house detention for the whole weekend, meaning that he could spend time at work.⁹⁸ Again, no deprivation of liberty was found.

⁹³ *Ciancetta and Mancini v Italy*, No 52970/99, [2002] IV ECHR 42; *Nikolova v Bulgaria (No 2)*, No 40896/98, [2004] I ECHR 462. See also *Vachev v Bulgaria*, No 42987/98, [2004] VIII ECHR 325; *NC v Italy* [GC], No 24952/94, [2002] X ECHR 824.

⁹⁴ *Pekov v Bulgaria*, No 50358/99, [2006] 43 ECHR 299.

⁹⁵ *Guzzardi*, *supra* note 78. This approach was confirmed in *Storck v Germany*, No 61603/00, [2005] V ECHR 406 at para 74, 43 EHRR 96.

⁹⁶ No 12541/86, [ECHR] 74.

⁹⁷ (1994), ECHR 3, 18 EHRR 237.

⁹⁸ No 2333/02, [2005] ECHR 875.

One of the problems in applying these decisions in the United Kingdom was that Italy and Lithuania at the time had ratified *ECHR* protocol 2, article 4, and therefore protection was available under *ECHR* protocol 2 against restrictions on movement falling short of deprivation of liberty. It is possible that this led the ECtHR to take a more state-friendly approach to article 5, since protection under the *ECHR* was still available to the applicants if article 5 was found not to apply. In all of those cases there also appeared to be a stronger prospect than in the control order instances of successfully challenging the regime imposed—therefore the element of potentially indefinite restriction was a lesser factor.

Ashingdane v. United Kingdom re-emphasizes the point that, contrary to Lord Hoffmann's contention in *JJ*, the issue of physical confinement is *not* necessarily the determining factor in non-paradigm instances of invasion of liberty.⁹⁹ Here, the applicant was confined in a closed psychiatric hospital with high security,¹⁰⁰ but then moved to an open hospital, was free to go home four days a week, and free to leave the hospital provided he returned at night. The court found that he had undergone a deprivation of liberty during his stay in *both* institutions. In *Guzzardi* itself, great emphasis was placed on the *cumulative* impact of the range of restrictions in relation to the life the applicant would otherwise have been living.¹⁰¹ *Guzzardi* was confined on a small island for sixteen months. He was ordered to remain in an area of two-and-a-half square kilometres, he had to remain in his home for nine hours daily, and had to seek permission to make phone calls or have visitors. The overall impact of the restraints rather than the fact of house detention alone formed the basis for the finding of the court that, in some respects, the restraints to which he was subjected resembled detention in an open prison and amounted to a deprivation of liberty.¹⁰²

These facts quite strongly resemble those in *MB & AF*, in which the House of Lords found no breach of article 5. *AF*'s house detention was for fourteen hours, so it was significantly longer than *Guzzardi*'s—although he was restricted to a significantly larger geographical area of nine square miles. He was subject to similar, perhaps more far-reaching, restrictions on association and communication. *AF* was also subject to repeated house detentions for a longer period than *Guzzardi*—more than sixteen months. It should also be noted that when *Guzzardi* was decided, Italy had *not*

⁹⁹ (1985), ECHR 8, 7 EHRR 528.

¹⁰⁰ The restraints included barred windows and a high perimeter fence; he was only able to visit his family twice in seven years.

¹⁰¹ See also *Engel v The Netherlands* (1976), 22 ECHR 8 (Ser A).

¹⁰² *Guzzardi*, *supra*, note 78 at para 95.

ratified protocol 2. The facts of *AP* also bear some resemblance to those of *Guzzardi*; the controlee was subject to house detention for sixteen hours daily, which prevented him from living the life he otherwise would have been living, and the factor of internal exile created further parallels with *Guzzardi*'s situation. The exile factor led the UK Supreme Court to conclude that article 5 had been breached but, as discussed above, on fairly narrow grounds.

C. *Domestic Failure to Uphold Liberty?*

In the light of these findings from the ECtHR jurisprudence, strong doubt is raised as to the correctness of the Lords' decisions in *JJ*, in *MB & AF*, and that of the UK Supreme Court in *AP* in terms of the acceptability of fourteen- and sixteen-hour house detentions. Firstly, too much emphasis has been placed on the idea of restriction of physical liberty analogous to arrest. *MB & AF* in particular appears to represent a drift away from the *Guzzardi* principles, evincing a failure to focus clearly on the overall impact of the restrictions—the key issue in *Guzzardi*. The factor of internal exile due to forced relocation, which was decisive in the UK Supreme Court's finding in *AP*, is of especial significance and—in relation to the controlee's day-to-day experience—no doubt has a much greater adverse impact than the difference between fourteen or sixteen hours of house detention. But it is unclear that the same result would have been reached in *AP* had the house detention been for fourteen hours, or had the suspect's family been able to visit more frequently. The JCHR has highlighted the impact of forced relocation—especially on the families of controlled individuals who sometimes had to be uprooted from their communities and their schools—and has pointed out that its impact on both the suspect and the suspect's family has been described as “extraordinary”.¹⁰³ In general, while correctly reiterating that the issue was one of degree, not of kind, the Lords in *MB & AF* and *E*, and the UK Supreme Court in *AP* nevertheless focused too strongly on particular periods of house detention, thus undermining the more holistic notion of *degrees* of restriction on normal life.

Secondly, we would agree with the JCHR that house detention for sixteen hours *is* a deprivation of liberty—even if it is the only restriction.¹⁰⁴ If combined with other significant restrictions, including internal exile, obviously this argument is strengthened. The ECtHR's decisions mentioned above, support the assertion that twelve hours of house detention is acceptable, but do *not* support house detention for *longer* periods. Twelve

¹⁰³ JCHR *Control Orders Report 2009-10*, *supra* note 20 at para 41.

¹⁰⁴ JCHR *Counter-Terrorism Report 2007-08*, *supra* note 85 at paras 47-49.

hours is thus the period of time that the JCHR has suggested as the maximum permitted under article 5.¹⁰⁵

Third, the judges in the control order cases have not focused on the total *duration* of the interference with liberty. Duration was one of the four factors expressly identified in *Guzzardi* and can refer to the period of time over which house detentions based on a daily curfew were repeated. In the above decisions, insufficient emphasis was placed, not only on the cumulative effect of the restrictions in terms of the concrete day-to-day situation, but also on the cumulative effect of imposing such restrictions on an individual over a long and indefinite period of time. As of February 2008, two controlled individuals had been subjected to orders for almost three years and a further five had been subjected to them for more than two years. In the case of a number of the controlees this followed detention for over three years in Belmarsh prison.¹⁰⁶

Fourth, the element of coercion in relation to the control order obligations is one of the strongest indicators that they may tend to cause a deprivation of liberty. As noted above, breach of any condition imposed under a control order is a criminal offence, punishable by up to five years imprisonment,¹⁰⁷ and a number of the controlees have spent periods of time in prison for breach of the obligations imposed.¹⁰⁸ The imposition of such sanctions is an indicative factor in finding a breach of article 5, as the ECtHR has found in a different context in *Gillan v. United Kingdom*.¹⁰⁹

Our conclusion is that, while the non-derogating orders scheme—as originally envisaged by the executive—relied on presupposing a heavily attenuated version of article 5 that the judges did not accept, the judges *have* nevertheless been partially drawn into the redefining process by accepting an overly restrained concept of deprivation of liberty. If the *ECHR* authorities give little support to finding that the control orders discussed above do not create a deprivation of liberty, what explanation can be offered for this? It is suggested that the instincts of the judges to defer to the executive on national security matters led to an unacknowledged focus on the *purpose* of the orders—to combat terrorism. This in turn meant that they effectively wrote in an extra exception to article 5: that the use of such control orders was “necessary in a democratic society in the inter-

¹⁰⁵ *Ibid.*

¹⁰⁶ *JCHR Control Orders Report 2008-09*, *supra* note 65 at para 31.

¹⁰⁷ *PTA*, *supra* note 7, s 9(1)(4)(a).

¹⁰⁸ *JCHR Control Orders Report 2008-09*, *supra* note 65, App 2 Q6 at 40.

¹⁰⁹ No 4158/05, [2010] ECHR 28 at para 57, 50 EHRR 45 [*Gillan*]: “[The] element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1.” See also text accompanying note 125.

ests of national security,”¹¹⁰ or was “strictly required by the exigencies”¹¹¹ of the emergency. In other words, the ambit of article 5 was in effect redefined by a type of proportionality argument, although article 5 is, apart from its exceptions, absolute. As seen above, this argument was afforded a degree of articulation by Lord Hoffmann in *JJ*,¹¹² and acquiesced to by Lord Carswell—although without using the term “proportionality”—but given no *overt* acceptance by the other judges in these decisions.¹¹³ Nevertheless, we contend that the *outcome* of the domestic decisions discussed above shows that they are best understood through the notion of redefining article 5 by implying extra exceptions into it based on the need to combat terrorism, thus shifting the balance it strikes between the needs of society and the rights of the individual.

The British government’s preference for widening the exceptions to article 5 via a proportionality-type argument was more fully articulated in the ECtHR case of *A v. UK*,¹¹⁴ which concerned the *Belmarsh* scheme:

The Government relied upon the principle of fair balance, which underlies the whole Convention, and reasoned that sub-paragraph (f) of Article 5 § 1 had to be interpreted so as to strike a balance between the interests of the individual and the interests of the State in protecting its population from malevolent aliens. Detention struck that balance by advancing the legitimate aim of the State to secure the protection of the population.¹¹⁵

The Grand Chamber, in one of the clearest statements from the ECtHR on this issue, strongly rejected the notion of introducing a proportionality-type argument into article 5, stating:

This argument is inconsistent with ... the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions [to the right to liberty in Article 5] and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.¹¹⁶

¹¹⁰ See *ECHR*, *supra* note 15 at 230-32; the phrase appears in each of arts 8-11(2).

¹¹¹ See *ibid* at 232; the phrase appears in art 15.

¹¹² *JJ*, *supra* note 35.

¹¹³ See text accompanying note 89.

¹¹⁴ *A v UK*, *supra* note 73 at para 148.

¹¹⁵ *Ibid*. It will be recalled that para 5(1)(f) (*ECHR*, *supra* note 15 at 226) provides for an exception to the right to liberty in relation to “a person against whom action is being taken with a view to deportation or extradition.”

¹¹⁶ *A v UK*, *supra* note 73 at para 171.

By contrast, in the domestic control order decisions we have discussed, we contend that unacknowledged deference allowed just such a dilution of article 5 to creep in.

D. Conclusions: The Wider Significance of Adopting a Narrow Conception of “Deprivation of Liberty”

The bold move for the House of Lords in *JJ*, supported by the JCHR,¹¹⁷ would have been to find that a scheme allowing the executive to impose restrictions of the nature of those under discussion, was incompatible with article 5, and formally declare the incompatibility under section 4 of the *HRA*—despite the fact that the precise restrictions that may be imposed are not spelled out on the face of the *PTA*. This could have accompanied the quashing of the individual control order in that case. Since such declarations do not affect the validity or enforceability of the legislation in respect of which they are made,¹¹⁸ the government could in theory have ignored a declaration, at least for a time. But the declaration would have made it clear that the Lords rejected the whole scheme and placed the responsibility for dealing with the watered-down version of article 5 that it appeared to accept, with the executive. If the government had been adamant that it needed to retain the scheme, it could have openly sought to derogate from article 5. If not, the government would have been forced to accept a robust version of article 5. In relation to control orders, it might have accepted a recommendation that the JCHR made in 2008, and put forward an amendment to the *PTA* to Parliament stating, on the face of the statute, that under a non-derogating control order house detention can only be for twelve hours.¹¹⁹ The government could have made greater efforts to use normal criminal processes against some controlees (and the constant surveillance might have uncovered further evidence against some of them). However, the government would still have claimed that prosecutions were impossible due to the sensitivity of the evidence. The possibility of prosecuting more suspects, and the obstacles in the way, are discussed in Part IV below.

¹¹⁷ UK, HL & HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (Twelfth Report of Session 2005-06, HL 122, HC 915) (London, UK: Stationary Office, 2006) at para 38.

¹¹⁸ *HRA*, *supra* note 16, s 4(6). This is reinforced by s 6(2) (*ibid*), which specifically provides that the continued enforcement of incompatible legislation by public authorities shall not be unlawful under the *HRA*.

¹¹⁹ UK, HL & HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill* (Thirtieth Report of Session 2007-08, HL 172, HC 1077) (London, UK: Stationary Office, 2008) at para 130.

There is a wider message to be drawn from the narrow approach to the right to liberty taken by the domestic judges. In an age of Anti-Social Behaviour Orders,¹²⁰ Serious Crime Prevention Orders,¹²¹ and of growing police powers that interfere with liberty in the contexts of both counter-terrorism¹²² and public protest,¹²³ the question whether a “deprivation of liberty” refers to literal physical restraint as in prison, or to something much more amorphous, is of especial importance, and resonates far beyond the terrorism context—just as the use of secret evidence and special advocates has spread far beyond their use for special counterterrorism measures.¹²⁴ The varied ways of interfering with liberty now available to the state, render the traditional idea of focusing on physical restraint outdated. Tying the deprivation of liberty concept to that notion marginalizes it in relation to new measures, which may appear less draconian but can have a profound impact on the lives that those subject to them might otherwise be living.¹²⁵ If the concept of deprivation of liberty receives a restrained interpretation in the control orders context, as it evidently has, that ungenerous interpretation tends to leach into other areas, and also encourages the executive to consider new outgrowths from the control order concept for use well beyond the terrorism context. This contaminating effect that the special powers and extraordinary concepts found in terrorism law have on the whole legal system is discussed further below.

Such acceptance of an executive-friendly approach to the concept of liberty in a different context has already led to a strong reproof—albeit not a full rebuff—from the ECtHR to the House of Lords in *Gillan*.¹²⁶ In a challenge to the lawfulness of powers of stop-and-search for items connected with terrorism without reasonable suspicion,¹²⁷ the Lords had found that those stopped had merely been detained in the sense of being “kept from

¹²⁰ Imposed under the *Crime and Disorder Act 1998* (UK), c 37.

¹²¹ See *Serious Crime Act 2007* (UK), c 27, ss 1-41, Schedules 1-2.

¹²² The reference is not confined to s 44 of the *Terrorism Act 2000* (*supra* note 58), but that power most readily comes to mind, bearing in mind the response to its use in *Gillan*, *supra* note 109.

¹²³ See *Austin*, *supra* note 92. The House of Lords decided that “kettling” thousands of protesters—trapping them in a police cordon for around 7 hours—did not amount to a deprivation of liberty for the purposes of art 5(1) *ECHR*, thereby encouraging the practice as a standard response to mass protest such as the London student protests in November and December 2010. For comment see Helen Fenwick, “Marginalising Human Rights: Breach of the Peace, ‘Kettling’, the Human Rights Act and Public Protest” [2009] 4 PL 737 at 746-48.

¹²⁴ See text accompanying notes 150-65.

¹²⁵ The key issue in *Guzzardi*, *supra* note 78.

¹²⁶ *Supra* note 109.

¹²⁷ *Terrorism Act 2000*, *supra* note 59, s 44.

proceeding or kept waiting”,¹²⁸ and so were outside the ambit of article 5. The ECtHR found that stop-and-search under section 44 of the *Terrorism Act 2000*¹²⁹ had all the hallmarks of a deprivation of liberty. In other words, the court refused to be seduced—impliedly or expressly—by executive arguments as to redefinition of article 5 in the terrorist context, and upheld a higher standard as to the liberty of the citizen than the House of Lords had done.

If the article 5 concept of deprivation of liberty is becoming inapt or irrelevant in relation to modern measures allowing state interference with liberty, including control orders, it may also be argued that the exceptions are too. Feldman argues, in the control order context, that a new protocol to the *ECHR*, further specifying circumstances in which liberty can justifiably be infringed may be needed.¹³⁰ That may well be the case as a concomitant to adopting a clearer and expanded notion of deprivation of liberty. Until such a new protocol emerges—if it ever does—we would argue that the courts should resist being drawn into a process in which the state takes more than full advantage of uncertainty as to the nature of the deprivation of liberty concept and as to the point at which it converges with interference with movement under article 2 of protocol 4 *ECHR*.¹³¹ As we will see, a similar pattern emerges in relation to the other key human rights issue raised by the control order scheme—namely, due process, the issue to which we now turn.

III. Due Process and Article 6 *ECHR*

A. Introduction: The “Inherently One-Sided Procedure”¹³²

Article 6 *ECHR* provides for the presumption of innocence,¹³³ and gives specific minimum rights for those charged with criminal offences.¹³⁴

¹²⁸ *R (Gillan) v Commissioner of Police of the Metropolis*, [2006] UKHL 12 at para 25, [2006] 2 AC 307; *Terrorism Act 2000*, *supra* note 58, s 44.

¹²⁹ *Ibid*; *Gillan*, *supra* note 109. See e.g. *ibid* at para 55: the court did not finally decide whether art 5 *ECHR* applied, since it resolved the case by finding a clear breach of art 8 *ECHR*.

¹³⁰ Feldman, “Deprivation”, *supra* note 75 at 8.

¹³¹ See Ed Bates, “Anti-terrorism control orders: liberty and security still in the balance” (2009) 29:1 LS 99 at 121-25 [Bates, “Anti-terrorism”].

¹³² As described by the European Commissioner on Human Rights, in his 2004 Report on his visit to the United Kingdom. Council of Europe, Officer of the Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom*, (2004) at para 21.

¹³³ *ECHR*, *supra* note 15 at 228.

More pertinently for our purposes, it also provides a general guarantee of a fair hearing, in terms virtually identical to those of article 14 of the *International Covenant on Civil and Political Rights*.¹³⁵ Article 6(1) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹³⁶

Control orders were found not to amount to the imposition of a criminal charge so that the specific rights guaranteed in criminal proceedings did not apply.¹³⁷ However, since control orders plainly limited a person's "civil rights", the judicial hearings provided for by the *PTA*, in which the lawfulness of the imposition of control orders are tested,¹³⁸ were found to be subject to the basic guarantee set out in article 6(1). A key point should be noted at the very outset: article 6 contains no stated exceptions to the basic right to a fair hearing set out above.¹³⁹ It has neither the specific exceptions found under article 5, nor general public interest qualifications of the kind found in articles 8 to 11 *ECHR* and in section 1 of the *Canadian Charter of Rights and Freedoms*.¹⁴⁰ As Lord Hope has observed: "Art 6(1) [is] a fundamental right which [does] not admit of any balancing exercise ... the public interest could never be invoked to deny that right to anybody in any circumstances."¹⁴¹ However, the ECtHR has found that limited departures from some of the component aspects of a fair hearing—for example, full disclosure, equality of arms, and so forth—may be permissible, provided that these are *strictly necessary* to protect other vital interests such as the safety of witnesses or national security, and that the proceedings are fair overall.¹⁴² In other words, the narrow departures from the

¹³⁴ *Ibid.*, art 6(3)(a)-(e).

¹³⁵ Art 14 of the *International Covenant on Civil and Political Rights* (19 December 1966, 999 UNTS 171, Can TS 1976 No 47) provides: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

¹³⁶ *ECHR*, *supra* note 15, art 6(1) at 228.

¹³⁷ *MB & AF*, *supra* note 72.

¹³⁸ *Supra* note 60. See also text accompanying note 60.

¹³⁹ In certain circumstances, art 6(1) allows the public to be excluded from otherwise public hearings when necessary (*ECHR*, *supra* note 15 at 228).

¹⁴⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁴¹ *DS v Her Majesty's Advocate*, [2007] UKPC D1 at para 17, 2007 SC (PC) 1 (Scot).

¹⁴² *Rowe v United Kingdom* [GC], No 28901/95, [2000] ECHR 91 at para 61, 30 EHRR 1 [Rowe]; *Botmeh v United Kingdom* (2007), No 15187/03, [2008] 46 EHRR 31 at para 37

ordinary canons of due process that the court has allowed for *already* amount to a compromise with the face-value text of article 6. As we will see below, the control orders legislation itself, and certain senior judges, have sought to take much more radical inroads into the standards set by article 6.

The key due process issues arising under the control orders scheme concern the use of secret, or “closed”, evidence, and special advocates to deal with this evidence. These represent further major departures from the standards of criminal procedure in addition to the very low standard of proof required to impose control orders.¹⁴³ Any of the evidence against the suspect that the government considers sensitive can be classified as “closed material” that is not disclosed to the suspect.¹⁴⁴ In order to adduce some level of protection for the suspect, this closed case may be challenged, but only by special security-cleared counsel (termed “special advocates”).¹⁴⁵ The inherent weakness of the scheme is that the advocates cannot take any instructions from the suspect after they have seen the closed material and so cannot challenge the material on the basis of those instructions.¹⁴⁶ It was plain from the outset that this procedural feature raised sharp questions of compatibility with the fair trial guarantee in article 6(1) in terms of the normal requirement to “disclose to the defence all material evidence ... against the accused,”¹⁴⁷ and the principle of equality of arms.¹⁴⁸ We have recently had clear findings by the ECtHR on this issue in the seminal 2009 decision of *A v. UK*,¹⁴⁹ which is discussed below.

B. The Spread of Secret Evidence in Proceedings in the United Kingdom and Beyond

We address the issue of secret evidence primarily in the context of control orders in the United Kingdom, but it has far wider significance

[*Botmeh*]; *Van Mechelen v Netherlands* (1997), No 21363/93, 36 ECHR (Ser A) 694 at para 58, 25 EHRR 647 [*Van Mechelen*].

¹⁴³ See text accompanying note 61.

¹⁴⁴ See Part III.D below.

¹⁴⁵ *Civil Procedure Rules* (UK), r 76.23, 76.24 [*CPR*].

¹⁴⁶ *Ibid.*, rs 76.25, 76.28(2).

¹⁴⁷ *Rowe*, *supra* note 142 at para 60. The use of special advocates had been accorded a degree of approval by the ECtHR but in a very different context in *Chahal*, *supra* note 49.

¹⁴⁸ The equality-of-arms principle “requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent” (*Kress v France* [GC], No 39594/98, [2001] VI ECHR at para 72).

¹⁴⁹ *Supra* note 73.

than this. First, it is but one example of a general problem: how can information that the executive considers sensitive be used in criminal or quasi-criminal proceedings? This issue arises in a huge number of areas concerned with anti-terrorism, including inquiries such as the 9/11 Commission, decisions as to deportation,¹⁵⁰ the use of intercept evidence (which still may not be used in the United Kingdom in criminal proceedings), bail proceedings,¹⁵¹ and hearings to determine extensions to pre-charge detention. Second, the use of special advocates as a means of dealing with the disclosure of secret evidence also takes place in other countries.¹⁵² The special advocate scheme originated in Canada, and is again being used for the new procedure for challenges to deportation and detention decisions in Canada,¹⁵³ following the suspended strike-down by the Canadian Supreme Court of the old procedure in *Charakaoui*.¹⁵⁴ It has been used in Hong Kong and New Zealand also.¹⁵⁵ As a result, the significance of this issue is apparent in many contexts and jurisdictions. Finally, as in so many other areas of criminal procedure, what was trialled as an exceptional measure to deal with specific situations raising acute national security concerns in “a mere handful of deportation cases a year,” has spread very quickly to a large number of other areas in the United Kingdom, including asset-freezing cases, parole hearings, and some employment and immigration cases.¹⁵⁶ The chair of the JCHR recently noted that in the United Kingdom “[t]here are no fewer than 22 different types of court hearing in which special advocates can be used.”¹⁵⁷ This phenomenon of creep and contamination—the corruption of the ordinary criminal justice system by anti-terrorism laws—was also discussed above in the context of

¹⁵⁰ See *RB (Algeria) v Secretary of State for the Home Department*, [2009] UKHL 10, [2010] 2 AC 110.

¹⁵¹ See *R (Cart) v Upper Tribunal*, [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 (the use of closed evidence in bail proceedings in relation to a deportee breaches art 5(4) ECHR).

¹⁵² See generally John Ip, “The Rise and Spread of the Special Advocate” [2008] 4 PL 717.

¹⁵³ Bill C-3, *An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to Make a Consequential Amendment to Another Act*, 2nd Sess, 39th Parl, 2008. See Kent Roach, “*Charakaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures” (2008) 42 Sup Ct L Rev (2d) 281 [Roach, “*Charakaoui* and Bill C-3”].

¹⁵⁴ *Charakaoui*, *supra* note 12 at para 64. See the *EJP Report*, *supra* note 40 at 99-100.

¹⁵⁵ See JUSTICE, *Secret Evidence: A JUSTICE report* (2009), online: JUSTICE <<http://www.justice.org.uk>> at paras 363-66 [*JUSTICE Report*]; Ip, *supra* note 152 at 728-31.

¹⁵⁶ Eric Metcalfe, “Representative But Not Responsible’: The Use of Special Advocates in English Law” (2004) 1:2 JUSTICE Journal 11 at 33.

¹⁵⁷ *Hansard* (1 March 2010), *supra* note 42, col 739 (Andrew Dismore).

deprivation of liberty. It is now well-known in the United Kingdom¹⁵⁸ and a similar tendency has been reported in Canada.¹⁵⁹ British examples include the erosion of the right to silence,¹⁶⁰ the police power to stop-and-search within a designated area without reasonable suspicion,¹⁶¹ and powers of extended detention before charge.¹⁶² As Zedner puts it: “The less demanding procedural protections attached to exceptional measures infiltrate and transform the mainstream criminal process with alarming speed.”¹⁶³ The other very evident tendency is for special counterterrorism powers to be misused against ordinary suspects and protestors. For example, the notorious section 44 *Terrorism Act 2000*¹⁶⁴ power to stop-and-search without reasonable suspicion was widely used against protestors, including one episode in which 995 such searches were carried out on anti-war protestors at a military base over a two-month period.¹⁶⁵

C. *Risk Assessment, Intelligence, and Evidence*

We noted above the fear-driven nature of many of these pre-emptive measures and the particular importance of the courts’ ability to act as a check in this context. But courts have particular difficulties in carrying out this role when scrutinizing measures such as control orders, due to the nature of the evidence used. Assessing intelligence and risk is seen par excellence as the prerogative of the executive, in which the courts lack institutional competence to engage. The government thus deploys this further argument for acceptance of a low burden of proof and strong judicial deference to executive determinations.

But there are good reasons for the judges to resist such pressure and to insist upon rigorously reviewing the evidence when confirming control orders. Firstly, this is a normal judicial function, involving the determination of something closely akin to the guilt of an individual through the in-

¹⁵⁸ See also *EJP Report*, *supra* note 40 at 118.

¹⁵⁹ Rodney C Austin, “The New Constitutionalism, Terrorism, and Torture” (2007) 60 *Curr Legal Probs* 79 at 97.

¹⁶⁰ Originally found in Northern Ireland anti-terrorism laws, but later transplanted into the *Criminal Justice and Public Order Act 1994* (UK), c 33, ss 34-37.

¹⁶¹ *Ibid*, s 60.

¹⁶² First found in *Prevention of Terrorism (Temporary Provisions) Act 1974* ((UK), c 56, s 7(2)), and then adopted into the *Police and Criminal Evidence Act 1984* ((UK), c 60, Part IV).

¹⁶³ Zedner, “Preventive Justice”, *supra* note 4 at 201. See also the *EJP Report*, *supra* note 40 at 11.

¹⁶⁴ *Supra* note 58.

¹⁶⁵ *EJP Report*, *supra* note 40 at 126.

dividual's involvement with wrongdoing. As Justice Sullivan writes in *MB* (HC):

[The] ground of appeal against the control order is, in summary, "I was not involved in terrorism-related activity." Save for the standard of proof, there is no difference between determining that ground of appeal in proceedings under the Act and resolving a very similar ... allegation in criminal proceedings.¹⁶⁶

Second, the person who has made the decision to impose the control order is the Home Secretary—who is institutionally biased in favour of a risk-averse policy. As the JCHR has remarked:

Both the Home Secretary and the Prime Minister have been very candid in saying that they are proposing legislation of this exceptional kind because they do not want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding. ... A person who is determined to avoid being accused of failing to do more to protect the public is extremely unlikely to be the best person to conduct a rigorous scrutiny of the strict necessity of a particular order.¹⁶⁷

That rigorous review *must* therefore be carried out by the judges.

Third, as JUSTICE asserted in its report on the subject, "[O]ne of the central problems with secret evidence, besides its obvious unfairness, is its dramatically poor quality."¹⁶⁸ JUSTICE went on to explain that

much of the secret evidence used in closed proceedings is not the product of a criminal investigation ... [but of] security and intelligence services who, despite their expertise in intelligence, have no background in evidence-gathering and for whom the *prosecution* of suspected terrorists is much less of a priority than the *disruption* of their activities. Accordingly, intelligence material may contain second- or third-hand hearsay, information from unidentified informants, ... [or] information received from foreign intelligence liaisons, ... not to mention the hypotheses, predictions and conjecture of the intelligence services themselves.¹⁶⁹

In other words, this is unreliable material, much of which would be inadmissible in ordinary court proceedings. JUSTICE concludes that "the government's resort to secret evidence has been motivated by its desire to close the gap between suspicion and proof."¹⁷⁰ Hence it is all the more im-

¹⁶⁶ *Supra* note 39 at para 50.

¹⁶⁷ UK, HL & HC, Joint Committee on Human Rights, *Prevention of Terrorism Bill* (Tenth Report of Session 2004-05, HL 68, HC 334) (London, UK: Stationary Office, 2005) at para 16.

¹⁶⁸ *JUSTICE Report*, *supra* note 155 at para 455.

¹⁶⁹ *Ibid* at para 413 [emphasis added]. See also *EJP Report*, *supra* note 40 at 161.

¹⁷⁰ *JUSTICE Report*, *supra* note 155 at para 454.

portant that it can be challenged rigorously. But precisely *because* it is intelligence information, the government insists that it cannot be disclosed to suspects at all—thus it cannot be properly challenged. The problem then may be seen to have four aspects: (i) the use of *unreliable* evidence of risk; which, however (ii) readily crosses the *low level of suspicion* required by the legislation; which, (iii) is then subject to *highly attenuated* judicial review; but (iv) is used to place people under semi-house arrest for several years. We consider that it is the very urgency of the need for rigorous judicial challenge, combined with the difficulty of doing so in practice, and the government’s persistent arguments for particular judicial restraint in this area, that has led to the ambivalent judicial response apparent from the case law discussed below.¹⁷¹

D. Control Orders, Due Process, and the Domestic Judicial Response: Division and Partial Accommodation

We noted above the basic limitations inherent in any closed-evidence special advocates system. The scheme in the *PTA*, however, aggravates these in four particular ways. First, the statutory rules themselves provide that the court *must not* allow disclosure of material to the suspect (even redacted summaries) that it considers would be contrary to the public interest.¹⁷² Thus, as Baroness Hale put it, “[T]he [court] is *precluded* from ordering disclosure even where [it] considers that this is *essential* in order to give the controlled person a fair hearing.”¹⁷³ The rules themselves thus provide for no irreducible minimum of disclosure, and subordinate fair trial rights to the public interest. As the JCHR has stated:

[W]hen the court ... is considering whether or not closed material should be open, there is no balancing of the interests of justice to the individual on the one hand against the public interest in non-disclosure on the other. If there can be shown to be *any* public interest against disclosure, that is the end of the matter.¹⁷⁴

This problem is then exacerbated by the second factor; in many situations including those of *AF* and *MB*, and as one judge put it:

The basis for the Security Service’s confidence is wholly contained within the closed material. Without access to that material it is diffi-

¹⁷¹ See also Thomas Poole, “Courts and Conditions of Uncertainty in ‘Times of Crisis’” [2008] 2 PL 234 at 253.

¹⁷² *PTA*, *supra* note 7, Schedule, para 4(3)(d)-(f); *CPR*, *supra* note 145, rs 76.2(2), 76.29(8).

¹⁷³ *MB & AF*, *supra* note 72 at para 69 [emphasis added].

¹⁷⁴ UK, HL & HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (Nineteenth Report of Session 2006-07, HL 157, HC 394) (London, UK: Stationary Office, 2007) at para 196 [*JCHR 28 days Report 2006-07*] [emphasis added, footnotes omitted].

cult to see how, in reality, the [suspect] could make any effective challenge to what is, on the open case before him, no more than a bare assertion.¹⁷⁵

In the same case, Lord Bingham of the House of Lords agreed that in such cases the suspect “was confronted by a bare, unsubstantiated assertion which he could do no more than deny.”¹⁷⁶ In other words, the special advocates were often left to tackle, not simply a few particularly sensitive pieces of evidence, but the whole substantive case against the suspect. This situation arose because of the approach adopted by successive Home Secretaries—a “precautionary” approach of refusing to disclose evidence if there is even “the slightest possibility” that it might damage national security.¹⁷⁷ There is thus a heavy bias in the system against disclosure to the suspect.

Given the very low level of disclosure to suspects, the role of the special advocates becomes absolutely critical, which brings us to our third point. The function of the special advocates is first to argue for greater disclosure to the suspect and second, to seek to challenge the evidence that remains closed—searching for any inconsistencies and weaknesses. In both instances, however, their abilities are severely limited.¹⁷⁸ As to the first function, they are unable to ensure that full disclosure has been made even in the closed case.¹⁷⁹ In relation to the second, the special advocates have a particular handicap under the *PTA*. Unlike the position under some other similar schemes, not only are the special advocates prohibited from communicating the closed evidence to the suspects—the special advocate scheme logically requires this—but they are unable to communicate at all with the suspects after they have seen that evidence.¹⁸⁰ They are thus unable to ask the suspect any questions that might exculpate the suspect by, for example, providing an alibi. This point in particu-

¹⁷⁵ *MB* (HC), *supra* note 39 at para 67, Sullivan LJ.

¹⁷⁶ *MB & AF*, *supra* note 72 at para 41.

¹⁷⁷ *JCHR 28 days Report 2006-07*, *supra* note 174 at para 196.

¹⁷⁸ *JCHR Control Orders Report 2009-10*, *supra* note 20, at paras 60-65. See also the summary of the evidence considered in *A v UK*, *supra* note 73; reference is made there to written evidence submitted by “A number of Special Advocates” to the House of Commons Constitutional Affairs Committee, and annexed to its report: UK, HC, House of Commons Constitutional Affairs Committee, “Oral and written evidence” in *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, vol 2 (Seventeenth Report of Session 2004-05, HC 323-II (London, UK: Stationary Office, 2005) at Ev 53.

¹⁷⁹ It was noted before the Special Immigration Appeals Commission in *Ajouaou v Secretary of State for the Home Department* ([2003] UKSIAC (BAILII)) that the special advocates do not receive closed material that the Home Secretary decides not to use.

¹⁸⁰ *CPR*, *supra* note 145, rs 76.25, 76.28(2).

lar weakens the protection provided by the special advocates substantially, as compared with the Canadian scheme that was the inspiration.¹⁸¹

Finally and equally importantly, the notion of harm to the “public interest” in the *PTA*, as the test for when evidence must be withheld from the suspect, goes far beyond guarding against real danger to national security or public safety.¹⁸² Avoiding disclosure merely requires demonstration that the disclosure is “likely to harm” the “public interest”, which is defined extremely broadly to include damage to the international relations of the United Kingdom, the detection or prevention of crime, or “in any other circumstances where disclosure is likely to harm the public interest.”¹⁸³ Thus the rules do not even *purport* to confine infringement of due process rights only to circumstances in which national security or the safety of others requires it, unlike the tests set out in the recent Canadian legislation dealing with detention of non-national terror suspects.¹⁸⁴ The United Kingdom scheme therefore appears overbroad and disproportionate on its face as tested against the case law of the ECtHR, which allows departures from full disclosure of evidence *only where this is strictly necessary*.¹⁸⁵

At least by the time it emerged that most evidence was being treated as “closed”, it seemed fairly likely that this scheme was likely to fall foul of the principle declared at Strasbourg (ECtHR)—that where material is relied on in coming to a decision that the person at risk of an adverse ruling has had no adequate opportunity to challenge or rebut, the proceedings will be unfair.¹⁸⁶ Nevertheless, in *MB (CA)* the Court of Appeal held that the special advocate procedure as it stood afforded sufficient safeguards

¹⁸¹ See the study quoted in *JUSTICE Report*, *supra* note 155 at para 329: Canadian Centre for Intelligence and Security Studies, “Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates” in *National Security Proceedings*, by Craig Forcese & Lorne Waldman (August 2007) at 9. A rule change in 2007 allows a special advocate to seek the court’s permission to consult with the suspect. However, the Home Office has to be given notice of such an application and invariably objects—thus the change has “had no effect in practice”: Martin Chamberlain, “Special Advocates and Procedural Fairness in Closed Proceedings” (2009) 28:3 *CJQ* 314. See also *JCHR Control Orders Report 2009-10*, *supra* note 20 at paras 62-73.

¹⁸² *Supra* note 7.

¹⁸³ *CPR*, *supra* note 145, r 76.1(4).

¹⁸⁴ Roach, “*Charakaoui* and Bill C-3”, *supra* note 153 at 314.

¹⁸⁵ See *Botmeh*, *supra* note 142 at para 37; *Van Mechelen*, *supra* note 142 at para 58; *Rowe*, *supra* note 142.

¹⁸⁶ See e.g. *Edwards v United Kingdom* [GC], No 39647/98, [2004] X ECHR 65, 40 EHRR 593; *Doorson v Netherlands* (1996), 6 ECHR (Ser A) 447, 22 EHRR 330 (see e.g. *ibid* at para 75).

for a controlee in order to satisfy article 6(1).¹⁸⁷ In *MB & AF*, by four to one, the House of Lords overturned the Court of Appeal's judgment on this point.¹⁸⁸ Using section 3(1) *HRA*,¹⁸⁹ it read into the procedural rules a proviso that overall the procedures must be such as to ensure a fair trial under article 6. But this apparently straightforward outcome obscured the fact that within the decision there were really three different approaches, which together fatally blurred the clarity and force of this main finding. Lord Hoffmann in dissent fully accepted the government position and therefore took what may be characterized as a fully accommodationist approach,¹⁹⁰ as he had in relation to article 5. Procedural fairness meant only doing as much as could be done without compromising the wider public interest. The special advocate system was the best that could be contrived in the circumstances and, because it was the best that could be achieved, it should be deemed fair. Lord Hoffman's judgment is a paradigm example of the point at which deference becomes distortion. By assuming that the risk of damage to the public interest should automatically override the right to due process¹⁹¹—even in cases where the essential core of that right was being invaded—article 6 was turned on its head. This is all the more striking given that, as noted above, article 6 is not a generally qualified right—the (effective) qualification in favour of national security has to be read in, as the ECtHR has done.¹⁹² Then, to give that qualification presumptive priority over the right itself is to engage in a double rewriting of the provision—first reading in, and then reversing the proportionality test. As noted above, this is of course the position under the relevant legislative provisions, but the point is that Lord Hoffmann saw no case for using the *HRA* to produce any change in that stance, which manifestly reverses the position of the ECtHR—that departures from normal standards of due process may only be permitted when absolutely necessary.

At the opposite end of the spectrum was Lord Bingham, who viewed the system as fundamentally unfair in providing for no irreducible core of disclosure, and would evidently have liked to declare the whole scheme

¹⁸⁷ *Secretary of State for the Home Department v MB*, [2006] EWCA Civ 1140, [2007] QB 415 [*MB* (CA)], aff'd *MB & AF*, *supra* note 72.

¹⁸⁸ *Supra* note 72.

¹⁸⁹ S 3 of the *HRA* (*supra* note 16) provides: "So far as it is possible to do so, primary legislation and subordinate legislation [whenever enacted] must be read and given effect in a way which is compatible with the Convention rights."

¹⁹⁰ Poole terms it a "straightforward" example of accommodation (*supra* note 171 at 242). We contend it goes much further than this in amounting to "reverse proportionality".

¹⁹¹ *MB & AF*, *supra* note 72 at paras 50-54; see especially *ibid* at para 54.

¹⁹² See text accompanying note 142.

incompatible with article 6.¹⁹³ In between—seeking to find a perhaps untenable middle ground between these two positions—lay Baroness Hale, Lord Brown, and Lord Carswell. Their view was that procedural fairness was fact-specific and did not always depend on minimum disclosure. The government therefore should not be forced to disclose truly sensitive information, but more of what was being withheld at present could and should be disclosed, and the special advocates could do more to challenge whatever *was* disclosed.¹⁹⁴ But these judgments were also heavily freighted with distorting deference. Lord Carswell remarked that “there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight.”¹⁹⁵ By laying the burden on the suspect to explain why their right should prevail over the public interest rather than the other way round, this reasoning also appeared to turn article 6 on its head. Dangerously, Lord Brown also indicated that there might be cases in which disclosure would not have made a difference in any event, since simply by seeing the evidence the court could find it so compelling that, regardless of what the suspect said, they would not have been able to rebut it.¹⁹⁶ As a result, the overall conclusion of these three was that in most cases the system could and would operate with a sufficient degree of fairness so that there was no need to declare it incompatible with article 6.

We return to the broader constitutional significance of this judgment below. The next event in the doctrinal story was that the lower courts could not agree on what *MB & AF* had decided, resulting in conflicting decisions.¹⁹⁷ In particular, as Bates has pointed out, High Court judges could not agree on whether the House of Lords had concluded that there was “an irreducible core minimum of disclosure” that must be accorded in or-

¹⁹³ *MB & AF*, *supra* note 72, at paras 34-35.

¹⁹⁴ Baroness Hale placed particular emphasis on the ability for greater disclosure to be achieved under the current system: *MB & AF*, *supra* note 72 at para 66; something she later conceded she had been “far too sanguine” about (*AF (No 3)* (HL), *supra* note 72 at para 101).

¹⁹⁵ *MB & AF*, *supra* note 72 at para 72.

¹⁹⁶ *Ibid* at para 90.

¹⁹⁷ See *Secretary of State for the Home Department v AE*, [2008] EWHC 132 (Admin) (available on BAILII); *Secretary of State for the Home Department v AN*, [2008] EWHC 372 (Admin) (available on BAILII); *Secretary of State for the Home Department v AF*, [2008] EWHC 453 (Admin) (available on BAILII); *Secretary of State for the Home Department v AE*, [2008] EWHC 585 (Admin) (available on WL Can); *Secretary of State for the Home Department v AF*, [2008] EWHC 689 (Admin), [2008] 4 All ER 340; *Secretary of State for the Home Department v AH*, [2008] EWHC 1018 (Admin) (available on BAILII).

der to ensure procedural fairness or not¹⁹⁸—this is perhaps unsurprising, given what JUSTICE described as the “wildly divergent opinions” within the majority in *MB & AF* on this point.¹⁹⁹ When these cases were appealed, a divided Court of Appeal²⁰⁰ concluded that *MB & AF* had *not* held there to be any irreducible minimum, taking the view that the special advocates in closed hearings would be able to challenge the secret evidence effectively enough, even without any disclosure to the suspect and particularly where the evidence seemed so strong that it was not clear how the suspect could have refuted it anyway—the “makes no difference” exception put forward by Lord Brown. In a powerful dissent, however, Lord Justice Sedley criticized this exception as “dangerous and wrong”,²⁰¹ and the Court of Appeal gave leave to appeal.

E. Intervention by the European Court of Human Rights: Principle Restored

Before the appeal came back to the House of Lords, the ECtHR intervened in its seminal decision in *A v. UK* on the ACTSA system of executive detention.²⁰² The court’s findings as to the fairness of the procedure in such cases, which was substantially identical to that used under the PTA, were clearly therefore of direct relevance to the control order cases.²⁰³ In striking contrast to the House of Lords, the Grand Chamber was clear and unanimous. If the case against a suspect was based mainly on the open evidence, or even where it was not, if the allegations in the open material were sufficiently specific—for example, that the controlee had visited a specific training camp during particular dates—it was found that the proceedings could be fair. In either case, suspects would have a reasonable opportunity to challenge the case against them.²⁰⁴ However, the court, in a decisive passage, went on to state that procedural fairness could *not* be achieved when “the open material consisted purely of general assertions and [the court’s] decision ... was based solely or to a decisive degree on closed material.”²⁰⁵ In such instances the role of the special advocates, unable to take instructions on the secret evidence, was rendered

¹⁹⁸ Bates, “Anti-terrorism”, *supra* note 131 at 114.

¹⁹⁹ JUSTICE Report, *supra* note 155 at para 154.

²⁰⁰ *AF (No 3) (CA)*, *supra* note 32.

²⁰¹ *Ibid* at para 117.

²⁰² *A v UK*, *supra* note 73.

²⁰³ As the House of Lords subsequently found, see text accompanying notes 207-208.

²⁰⁴ *A v UK*, *supra* note 73 at para 220.

²⁰⁵ *Ibid*.

nugatory as they “could not perform [their] function in any useful way” and thus could not render the system *ECHR*-compliant.²⁰⁶

When the government stated its position in relation to this judgment to Parliament, it sought—extraordinarily—to argue that this finding applied only to cases concerning deprivation of liberty under article 5, and not to the article 6 rights of controlees.²⁰⁷ This untenable position was decisively refuted when the House of Lords gave its unanimous judgment in the appeal *AF (No 3) (HL)*,²⁰⁸ now with the benefit of a clear steer from the ECtHR. Their Lordships accepted this guidance in full and found that it was now apparent that article 6(1) required that suspects have knowledge of at least the essence of the case against them, so as to be able to give effective instructions to the special advocates. Lord Phillips carefully followed the ECtHR in finding that:

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.²⁰⁹

Article 6 thus provided for an irreducible minimum disclosure of the case against a suspect; as Lord Hope said, this was “the bottom line”.²¹⁰ While some of their Lordships reluctantly accepted the decision of the ECtHR or even accepted it under protest,²¹¹ others seemed to find their courage. Thus Lord Hope quoted stirringly from the previous *Belmarsh* decision, “[A] denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour.”²¹² Meanwhile Lord Scott stated firmly that while the government had the power to derogate from the *ECHR* if it thought this really necessary to ensure public safety, it had not currently done so. In such circumstances it was not for the court to “water down” the guarantees of

²⁰⁶ *Ibid.*

²⁰⁷ See UK, HC, *Commons Hansard Debates*, vol 488, No 37, col 734ff (3 March 2009). See also the comment by the Chair of the JCHR, Andrew Dismore, in a recent renewal debate: *Hansard* (1 March 2010), *supra* note 43, col 737 (Andrew Dismore).

²⁰⁸ *Supra* note 72.

²⁰⁹ *Ibid* at para 59.

²¹⁰ *Ibid* at para 81.

²¹¹ See e.g. Lord Hoffman predicted that acceptance of the judgment would lead to the collapse of the control orders scheme, which he thought would damage the United Kingdom’s national security (*ibid* at para 70).

²¹² *Ibid* at para 83. See also *Belmarsh*, *supra* note 17 at 155.

the *ECHR*, but simply to apply the law—a clear rejection of the kind of judicial complicity in covert derogations that this article has discussed.²¹³

The House of Lords did not, however, issue a declaration of incompatibility in relation to the closed evidence provisions and article 6 *ECHR*. Instead, the House used section 3(1) *HRA* to read into the procedural rules a requirement that, in order to enable the procedure to be fair, enough of the gist of the allegations must be disclosed to the suspect. It is here that we encounter the difference between what might be termed the *rhetorical* aspect of a declaration and its strictly legal impact. In terms of law and remedy, section 3(1) *HRA* of course represents the desired outcome. It gets something done—immediately. It changes the law and thus upholds citizens' rights. But, as the control orders saga has clearly revealed, it allows the government to say to Parliament, media, and the public that the scheme is compliant with human rights principles—hoping the important detail that *it was not so but for the section 3 HRA reinterpretation*, will be lost in the gulf between lawyer and layperson. Conversely, while a section 4 *HRA* declaration leaves the claimant languishing in their prison cell,²¹⁴ it has tremendous rhetorical force as a speech-act—perhaps virtually equivalent to a strike-down—in presenting a simple and compelling narrative for the media and for public discourse. The distinction was illustrated in the House of Lords' debate on renewal of the *PTA* in 2010, in which the substantial rewriting of the legislation engineered by the House of Lords in *AF (No 3)* (HL) was air-brushed out of reality. Lord West, for the government, and to the astonishment of the more well-informed parliamentary members of the JCHR, said:

The judgment [in *AF (No 3)* (HL)] should also finally put to bed the argument ... that control orders are in some way an affront to human rights. That is clearly not the case. ... We remain firmly of the view that the legislation and the order before us today are fully compliant with the European Convention.²¹⁵

Such a statement, to human rights lawyers, is simply disingenuous. But it can be made. And perhaps it gave the government—and some parliamentarians—enough of a fig leaf to procure the renewal of control orders for yet another year in March 2010.

²¹³ *AF (No 3)* (HL), *supra* note 72 at para 97.

²¹⁴ As in *Belmarsh*, *supra* note 17.

²¹⁵ *Lords Hansard*, *supra* note 43.

F. Conclusions on the Pre-A v. United Kingdom Case Law on Article 6 ECHR: Covert Derogations and the Wider Constitutional Picture

In *Hamdi v. Rumsfeld* the US Supreme Court, citing previous case law, made the following ringing pronouncement:

For more than a century the central meaning of procedural due process has been clear: “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” ... *These essential constitutional promises may not be eroded.*²¹⁶

It is a sobering fact that it took the international ECtHR to show the United Kingdom’s highest court the truth of this simple but powerful proposition. It may seem unduly negative to dwell on the reasoning in *MB & AF*, given that the House of Lords redeemed itself in *AF (No 3)*, but the critical point is that this redemption seemingly required the intervention of the ECtHR. Their Lordships anchored themselves to that court’s clear findings in *A v. UK* as a way of escaping from the muddle they had created in *MB & AF*. But it was purely fortuitous that the judgment of the ECtHR happened to intervene between the consideration given to the case by the Court of Appeal and House of Lords. Had that not happened, it is by no means clear that the Lords would have produced the same clear judgment, which of course binds all lower courts, while decisions of the ECtHR do not.²¹⁷ Lord Hoffmann’s reasoning was, in reality, an argument for derogation—an ironic point, since he was the only Law Lord who found that there was no public emergency in the *Belmarsh* case. The basic thrust of his position in *MB & AF* was that, due to the nature of the threat and the sensitivity of the evidence, it was *necessary* to resile from normal, core standards of due process. That is precisely what derogation does. But to introduce a covert derogation through redefinition—to argue that, through necessity, the standard of protection afforded by a right can be decisively lowered—is an extraordinarily dangerous strategy as it opens the door to a major, undeclared retreat from human rights standards. Further, as noted above, this retreat is then promptly given effect in numerous other situations, as witnessed in the House of Lord’s redefinition of the ambit of article 5 in *Austin*.²¹⁸ The majority did not go as far as Lord Hoffmann, and indeed overtly rejected his stance. But while Lord

²¹⁶ 542 US 507 at 533, 124 S Ct 2633 (2004) [emphasis added], citing *Fuentes v Shevin*, 407 US 67 at 80, 32 L Ed 2d 556 (1972) [footnotes omitted], citing *Baldwin v Hale*, 68 US (1 Wall) 223 at 233, 17 Law Ed 531 (1864).

²¹⁷ Under s 2 of the *HRA* (*supra* note 16), decisions of the ECtHR organs must only be “taken into account”.

²¹⁸ This was the public protest case concerning the confinement of protestors by police “kettling” (*supra* note 92).

Hoffman argued for an effective derogation from article 6 standards, Lords Brown, Carswell, and Baroness Hale purported to uphold them, but then fatally blurred the force and clarity of their stance through the equivocation and ambiguity induced by their deferential attitude.²¹⁹

Undoubtedly, the claims to democratic legitimacy by Parliament (which passed the legislation), and by the Home Secretary (who enforced it), weighed heavily on the judges' minds. It has only been a few brief years since the United Kingdom saw the invocation by the House of Lords, in *Secretary of State for the Home Department v. Rehman*,²²⁰ of the particular need for democratic decision making in the area of national security, and of the consequent need for judicial deference to it. When put forward by authoritarian-type Home Secretaries,²²¹ this argument may be seen as manifestly self-serving. But arguments for a limited judicial role and for the primacy of democratic decision-making about human rights are also strongly advanced by the "political constitutionalism school".²²² In a recent dialogic article with Fiona de Londras, Fergal Davis specifically argued that judges should *not* seek to engage in rigorous review of the compatibility of anti-terrorism legislation with human rights norms, since the primary responsibility lies with Parliament.²²³

We would respectfully disagree and contend that, in this instance at least, the argument from political constitutionalism does not point to judi-

²¹⁹ Lord Phillips found in *AF (No 3)* (HL) (*supra* note 72 at paras 32-38) that the House of Lords' judgment in *MB & AF* (*supra* note 72) had failed to establish a right to an irreducible minimum of disclosure. He also found that in *AF (No 3)* (HL) (*supra* note 72 at para 17) that a critical part of Baroness Hale's speech was "ambiguous". He noted also that later judges had found dicta of both herself and Lord Brown "enigmatic" (*ibid* at para 18).

²²⁰ [2001] UKHL 47, [2003] 1 AC 153 [*Rehman*].

²²¹ Former Home Secretary David Blunkett was perhaps the most notable recent example. See e.g. "Blunkett to Fight Asylum Ruling", BBC News (20 February 2003) online BBC News <<http://news.bbc.co.uk>>.

²²² The literature is extensive, see e.g. JAG Griffiths, "The Political Constitution" (1979) 42 Mod L Rev 1 at 16; Joo-Cheong Tham, "Parliamentary Deliberation and the National Security Executive: The Case of Control Orders" [2010] 1 PL 79; Gearty, *supra* note 1; Danny Nicol, "The Human Rights Act and the Politicians" (2004) 24:3 LS 451; Ewing & Tham, *supra* note 66. For a full length treatment, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Adam Tomkins, *Our Republican Constitution* (Portland, OR: Hart, 2005). For a critical survey and rejoinder, see Gavin Phillipson, "Deference, Discretion, and Democracy in the Human Rights Act Era" (2007) 60 Curr Legal Probs 40; Aileen Kavanagh, "Constitutional Review, the Courts, and Democratic Scepticism" (2009) 62 Curr Legal Probs 102.

²²³ Fiona De Londras and Fergal F Davis, "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms" (2010) 30:1 Oxford J Legal Stud 19; see especially *ibid* at 26.

cial deference, but to its opposite. That is because here the argument between the government “securitocracy”²²⁴ and the courts, is *not* in reality premised on an opposition between liberty and security—leading to the conclusion that where there is a clash of incommensurable societal values, only the democratically-elected branches of government represent a fair means of making a choice. Rather, the argument is between open and covert derogation. If the British government seriously believes that it cannot protect the public while respecting its human rights obligations, then it can derogate from articles 5 and 6 *ECHR*, imposing full house arrest on terror suspects with minimal due process, or, as one commentator has recently suggested, it can use the emergency powers set out in the *Civil Contingencies Act 2004*.²²⁵ But to do so—and this is the key point—it must persuade the public, Parliament and, finally, the courts that the risk from terrorism is so overwhelmingly serious that this step is absolutely necessary. Parliament must approve a derogation from the *ECHR* after debate for the purposes of the *HRA*.²²⁶ But, as matters currently stand, Parliament has *not* approved a departure from *ECHR* standards. It has given the government *discretionary* powers, whose compatibility with human rights standards depends upon how they are exercised. Furthermore, it has been assured that the individual exercises of these powers—on which Parliament *cannot* itself vote—will be rigorously scrutinized by the courts in order to ensure compliance with *ECHR* standards, using the powers granted to them by Parliament in the *HRA*.²²⁷ It has indeed been pointed out that the main efforts of both the United Kingdom and Australian Parliaments, in seeking to amend and improve the control orders legislation passed through them, were directed at enhancing the degree and effectiveness of judicial scrutiny of the imposition of particular control orders.²²⁸ If the courts, swayed by the siren song of deference, then fail to engage in such searching scrutiny and accept arguments that may only properly be directed towards justifying a derogation, they are not defer-

²²⁴ The phrase is Clive Walker’s (“The Threat of Terrorism and the Fate of Control Orders” [2010] 4 PL 4 at 5 [Walker, “Threat”]).

²²⁵ (UK), c 36. See David Campbell, “The Threat of Terror and the Plausibility of Positivism” [2009] 3 PL 501 at 514-15; see also Shami Chakrabarti, “So Much for Habeas Corpus” *The Guardian* (24 January 2008) online: guardian.co.uk <<http://www.guardian.co.uk>>.

²²⁶ A derogation order under the *HRA* giving a derogation effect in domestic law under s 1(2) and s 14 has effect once it is made by the Secretary of State, but ceases to have effect after forty days unless approved by both Houses of Parliament (*HRA*, *supra* note 16, ss 16(3), 16(5)).

²²⁷ David Feldman, “Human Rights, Terrorism and Risk: The Roles of Politicians and Judges” [2006] 2 PL 364 at 383.

²²⁸ “[T]he key issue in the Australian and British Parliaments concerned the extent of judicial involvement in the issuing of control orders” (Tham, *supra* note 222 at 92).

ring to Parliament but betraying its trust, and they are allowing the executive to escape rigorous scrutiny by *both* arms of government²²⁹—the greater scrutiny that would have to come with a derogation.

It is of course true that in relation to the executive's first pre-emptive strategy, executive detention under *ACTSA*, Parliament passed the derogation order readily enough. But that was in the aftermath of 9/11 when shock and fear abounded, and when all the human rights disasters of the West's "war on terror" had yet to unfold. In contrast, in the aftermath of the Iraq war, which was sold to Parliament on a similar basis of risk assessment and the need for deference to the executive's superior knowledge, of the Chilcot Inquiry into that war,²³⁰ and of the cases revealing British acquiescence in torture,²³¹ there is reason at least to hope that Parliament would not be so easily persuaded a second time. Moreover, the passage of key elements of the Wright Committee reforms may signify, finally, a serious attempt by the House of Commons to wrest back at least some control from government of its own timetable and business.²³² The day a week that is to be timetabled not by the government, but by a committee of backbench Members of Parliament (MPs), could be used to debate control orders—even to pass backbench bills reforming the system.

That this would be a welcome development is particularly evident in light of Parliament's marginalization in this area of counterterrorism law and policy since the *PTA* was passed. The role given to Parliament under the *PTA* in some way echoes that which the government evidently hoped to give the judiciary: the appearance of rigorous control without the reality of it. The word "control" is carefully chosen—there is certainly scrutiny of the regime by the JCHR, whose work has been enormously valuable in informing opposition to the government's more draconian anti-terrorism

²²⁹ For further on this point see Phillipson, *supra* note 222 at 75.

²³⁰ See The Iraq Inquiry, online: <<http://www.iraqinquiry.org.uk>>.

²³¹ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, [2010] EWCA Civ 65, [2011] QB 218. See also *JCHR Counter-Terrorism Report 2009-10* (*supra* note 20 at para 53), which concluded that an independent inquiry into the extent of UK complicity was now urgently needed.

²³² Standing Order 14 of the House of Commons previously gave priority to government business in every session, effectively allowing almost total control by government of the scheduling of business in the Commons (see UK, HC, *Public Business* (Standing Orders) (London, UK: Stationary Office, 2011) [*Standing Order 14*]). But key aspects of the Wright Committee reforms, including a back bench committee to schedule non-government business, have now been implemented by the Coalition Government: UK, HC, House of Commons Reform Committee, *Rebuilding the House* (First Report of Session 2008-09, HC 1117) (London, UK: Stationary Office, 2009). For discussion of the reforms, see Helen Fenwick and Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights*, 3d ed (Abingdon, UK: Routledge, 2011) at 419-24.

laws. This scrutiny calls forth from the government what may be termed “explanatory accountability”—that is, the need to answer criticisms and to explain and justify government policy.²³³ But parliamentary control over policy requires not just scrutiny, but the practical opportunity for legislative decision making. And therein lies the rub. While “a sunset clause” for the control order provisions was insisted upon by the House of Lords during the bill’s passage—against the protests of the government—it amounts in practice to the *appearance* of political control without the reality of it. The positive resolution procedure laid down by the *PTA*, by which the Home Secretary’s order renewing the legislation expires after forty days unless approved by votes in both Houses of Parliament,²³⁴ in practice means an annual ninety minute debate in each House before the vote to renew. Thus, renewal does require parliamentary assent, but only to an executive order. The fact that the government grants Parliament a mere 180 minutes a year to debate this issue compares staggeringly poorly to the hundreds of hours that have been spent in legal argument in the scores of control order cases that have come before the courts in the last four years. It also bespeaks a thorough contempt for democratic oversight and input. Most importantly, the renewal procedure does not allow Parliament to *amend* the legislation. Therefore, each House has only the theoretical “nuclear” option of rejecting the legislation altogether,²³⁵ or the do-nothing option of acquiescing in its renewal. But it cannot be *improved*. At least until the above-mentioned Wright reforms were brought in, a backbench bill to reform the scheme could have been introduced but would almost certainly have failed without government support, due to the government’s control over the parliamentary timetable. Hence, Parliament witnessed the disturbing phenomenon—acidly remarked upon by an opposition MP in the annual renewal debate in 2010²³⁶—of Labour MPs queuing up to denounce the scheme in debate, and then obediently trooping through the lobbies to support its renewal in the division. The explanation is found in the fact that this is the only choice that the government has given Parliament. Without the ability to amend the legislation, Parliament must either renew it or take the risk of letting the controlees go free. What parliamentarians *want* is the chance to debate, and consider

²³³ See e.g. Diana Woodhouse, “The Reconstruction of Constitutional Accountability” [2002] 1 PL 73.

²³⁴ *PTA*, *supra* note 7, s 13(6)(b).

²³⁵ The House of Lords rejects statutory instruments extremely rarely, although Parliament has declared that there is no convention preventing it from doing so: UK, HL & HC, Joint Committee on Conventions, *Conventions of the United Kingdom Parliament* (First Report of Session 2005-06, vol 1, HL 265-I and HC 1212-I) (London, UK: Stationary Office, 2006) at 54-63.

²³⁶ *Hansard* (1 March 2010), *supra* note 42, col 729 (Crispin Blunt).

enacting *replacements* or substantial reforms to the scheme—hence the recent recommendation by the JCHR that sunset clauses should require renewal of extraordinary anti-terrorism powers by primary legislation.²³⁷

We have made the argument above that rigorous scrutiny by the courts in no way undermines the democratic role of Parliament in this area, rather, it seeks to preserve and enhance it. This preservation and enhancement occurs at two levels. First, as pointed out above, since Parliament cannot itself foresee and supervise the actual use to which discretionary powers (such as stop-and-search and the imposition of control orders) will be put, it relies on the courts to do so—indeed, it devotes much of its legislative effort to beefing up the role of courts in this regard. In turn, this calls for a muscular rather than a deferential posture from the courts in order to *ensure* Parliament’s trust and enhance the constitutional cooperation between these two branches of government. But there is a broader effect that follows from an assertive posture by the courts: robust judicial findings that breaches of *ECHR* rights do not in this instance “impose silence in the name of a truth that falsely claims to be above politics.”²³⁸ The *effect* of some of the judgments examined above, particularly *AF (No 3)* (HL), has been to bring the sustainability and utility of the control orders scheme into doubt, which has resulted in a fierce political debate about possible alternative measures.²³⁹ In other words, these findings appear to have kick-started a lively political debate both within government and between government and Parliament—with the media and public opinion intervening—as to exactly what powers the government needs and whether a derogation is necessary to grant them. Thus, the assertive decisions we have examined do not illegitimately constrain the government through contestable judicial interpretations of rights.²⁴⁰ Instead, they do what John Griffith memorably said the political constitution must do: “[F]orce governments out of secrecy and into the open,”²⁴¹ where the government must make the argument to the *demos* that the terrorist threat fully justifies the severe restrictions on liberties that it seeks to

²³⁷ JCHR *Control Orders Report 2009-10*, *supra* note 20 at para 14.

²³⁸ Gearty, *supra* note 1 at 98.

²³⁹ After this article was completed it became clear in 2011 that a “light-touch” version of control orders would be retained as a result of the government’s review of counterterrorism law. See UK, Secretary of State for the Home Department, *Review of Counterterrorism and Security Powers: Review Findings and Recommendations*, Cm 8004 by The Right Honourable Theresa May (London, UK: Stationary Office, 2011); see also Postscript below.

²⁴⁰ As, for example, Nicol (*supra* note 222) has characterized rights review.

²⁴¹ JAG Griffith, “The Political Constitution” (1979) 42:1 Mod L Rev 1 at 16.

impose.²⁴² In contrast, when judicial deference becomes distortion, allowing for undeclared and covert derogations, Parliament's trust is betrayed and our liberties are left hanging on the single, now-frayed thread of trust in the executive.

IV. Possible Responses: Probing National Security Claims to Allow Greater Disclosure and Prosecution

The outcome in *AF (No 3)* (HL) left the then Labour government with a seemingly stark choice, on its own account of the situation: to disclose more evidence in control order proceedings and thereby (as it insisted) put national security at risk, or to revoke control orders and thereby put the public at risk. Insofar as the government took the first course in some cases, it engaged in considerable passive resistance, revealing as little new closed material as possible²⁴³ and refusing to take account of the *AF (No 3)* (HL) findings in relation to the numerous other areas in which secret evidence and special advocates were being used.²⁴⁴ In general, the government preferred the second course, meaning that a very small number of control orders were abandoned.²⁴⁵ But the government also sought to avoid having to make further disclosure in certain cases, not by withdrawing control orders, but by imposing "lighter-touch" orders and subsequently arguing that such orders did not interfere with the suspect's "civil rights" under article 6—meaning that article 6 did not apply to them. So far this argument has been rejected by the courts.²⁴⁶

We conclude this article, therefore, by questioning whether the UK government was genuinely on the horns of an agonizing dilemma post-*AF (No 3)* (HL), as it claimed, or whether it was in reality exaggerating the difficulty posed by further disclosure in many of these cases, and could either disclose more material in control order proceedings or charge terrorist suspects as potential controlees with preparatory terrorist offences—the latter being by far the better option. So far, control orders have continued to be used under the new government, suggesting that the

²⁴² On this point see Roach for the Canadian context: Roach, "Charakaoui and Bill C-3", *supra* note 153 at 329. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

²⁴³ *JCHR Control Orders Report 2009-10*, *supra* note 20 at paras 49-53.

²⁴⁴ *JCHR Counter-Terrorism Report 2009-10*, *supra* note 20 at paras 55-62.

²⁴⁵ David Hanson reported in the 2010 renewal debate that "only two control orders have been revoked on article 6 grounds without being replaced by new orders." He also reported that the High Court had upheld four orders post-*AF (No 3)* (HL) (*Hansard* (1 March 2010), *supra* note 42, col 728).

²⁴⁶ See *Secretary of State for the Home Department v BC*, [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542.

perceived need for them, based largely on reluctance to disclose the evidence needed for prosecution of terrorism offences, continues. We would argue that there are three reasons pointing to the conclusion that more evidence may be disclosed than at present, either in control order hearings, criminal trials, or both.

First, as noted above, the governing procedural rules allow evidence to be withheld on grounds that have nothing to do with protecting national security.²⁴⁷ These rules could be dramatically narrowed without causing any damage to security or putting lives at risk. That would, in turn, allow more evidence to be included in the open cases without posing that danger. Second, there is clear international evidence to support a simple reform that would at a stroke create much stronger opportunities for suspects to challenge the evidence against them, without risking truly dangerous disclosures. The JUSTICE report considered above noted that in the previous Canadian system, unlike in the UK scheme, the special advocates *were* able to communicate with the suspects after hearing the closed evidence and ascertain, through careful questioning, whether the suspects had evidence that could rebut the secret case against them (such as an alibi).²⁴⁸ Moreover, this experience provided evidence that the special advocates could question detainees, at least in some cases, with sufficient skill to uncover exculpatory evidence without revealing the secret evidence to them. The JUSTICE study found indeed that no complaint had been received from the Canadian government that such contact with suspects had resulted in a disclosure injurious to national security.²⁴⁹ This shows that the ban on special advocates communicating with suspects could be lifted and the special advocates trusted to use their professional judgment to do as their Canadian counterparts have done. This amendment of procedural rules would go a long way towards restoring essential fairness to the process.²⁵⁰ A recent report from Lord Carlile recommends allowing the special advocates to apply for permission to question sus-

²⁴⁷ See text accompanying note 183.

²⁴⁸ See the study (Forcese & Waldman, *supra* note 181) quoted in *JUSTICE Report*, *supra* note 155 at para 329. The special advocates were under an obligation not to disclose the closed evidence to the suspects.

²⁴⁹ *Ibid.*

²⁵⁰ Under Bill C-3, (*supra* note 153) no provision is made for such consultation (Roach, “*Charkaoui* and Bill C-3”, *supra* note 153 at 284). But it has been suggested that it could be authorized by a court under a general provision that allows a special advocate with judicial authorization to exercise “any other powers that are necessary to protect the interests” of the detainee (*IRPA*, *supra* note 11, s 85.2(c); Roach, “*Charkaoui* and Bill C-3”, *supra* note 153 at 314-22). See also David Dunbar & Scott Nesbitt, “Parliament’s Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA” (2008) 42 Sup Ct L Rev 415.

pects without notifying the Home Office,²⁵¹ which would also represent a move in the direction of greater procedural justice.

Finally, there is strong international evidence that governments generally overclaim the need to protect sensitive evidence, suggesting that prosecuting at least some of these suspects may not be as hard as the government claims. It is reported that 9/11 Commission Chairman Thomas Kean observed that “roughly three-quarters of the classified material he reviewed during the Commission’s investigation should not have been classified in the first place.”²⁵² Kent Roach has also highlighted “the recently documented tendency of the Government of Canada to make overbroad claims of secrecy,” in the terrorism context, notably during the Arar inquiry.²⁵³ A major study by New York University in 2005 concluded that “over-classification [of information as sensitive] is a constant pitfall,”²⁵⁴ and that “[f]ar from being frequent and foreseeable, the terrorism case that cannot be prosecuted without exposing sensitive intelligence is and likely will continue to be exceedingly rare.”²⁵⁵ It is now known that the UK government has at times needlessly withheld evidence from suspects or deportees. For example, JUSTICE found that in deportation hearings after 7/7,²⁵⁶ the government started putting into the closed material not only the evidence of the risk posed by the deportee to national security, but also the government’s evidence for thinking that return to the country in question would be safe—a practice that seemed to be as much about pandering to the sensitivities of countries such as Libya and Algeria as it was about anything else.²⁵⁷ In Canada, government reasons for claiming secrecy have included the desire to avoid embarrassing the US authorities and to prevent the revelation of Canada’s possible complicity in torture.²⁵⁸

The tendency of Parliament and the judiciary to acquiesce too far in favour of the Security Service’s view of national security needs is particu-

²⁵¹ UK, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* by Lord Carlile of Berriew QC (1 February 2010) (London, UK: Stationary Office, 2010) at para 139. Until recently, Lord Carlile was the government’s independent reviewer of terrorist legislation.

²⁵² Serrin Turner & Stephen J Schulhofer, *The Secrecy Problem in Terrorism Trials* (New York: Brennan Centre for Justice, 2005) at 3.

²⁵³ Roach, “Charkaoui and Bill C-3”, *supra* note 153 at 336. Roach also considers the evidence at *ibid* at 337-44.

²⁵⁴ Serrin & Schulhofer, *supra* note 252 at 3.

²⁵⁵ *Ibid* at 7.

²⁵⁶ On 7 July 2005, a significant terrorist attack was carried out on the subway system of London, United Kingdom.

²⁵⁷ JUSTICE Report, *supra* note 155 at paras 118-33.

²⁵⁸ Roach, “Charkaoui and Bill C-3”, *supra* note 153 at 340-41.

larly evident in the United Kingdom. A glaring example is provided by the blanket ban on the use of intercept evidence in criminal proceedings²⁵⁹—a ban shared by no other Western state. It is also apparent in the way that claims for nondisclosure in control order cases are put forward, a point that was made by Baroness Hale in *AF (No 3)* (HL).²⁶⁰ As the JCHR has stated:

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 damaging to the public interest.²⁶¹

It appears that similar “class decisions” with respect to information held by the intelligence services have been made in Canada.²⁶² The overdominance of the Security Service in this process is evident in these rules of nondisclosure. It is readily apparent, therefore, that if this blanket rule against the admission of evidence were lifted, much greater disclosure could take place—resulting in higher levels of procedural fairness, and a concomitant reduction in the risk of miscarriages of justice and needless violations of the rights of suspects. As this story indicates, overclaiming the needs of national security tends, paradoxically, to undermine them. Further criminal prosecutions—even a derogation from article 5 protecting heavy-touch control orders or full imprisonment—if warranted by the security situation, would be much more likely to protect national security than the current light-touch orders, but would, unless a derogation from article 6 was also sought, require further disclosure of Security Service material or the transformation of such material into evidence for use in a criminal trial.

The future focus, in terms of protecting national security, should therefore be on critically examining the closed system of the Security Service, a system that, in claiming exclusive expertise as to the demands of national security, often goes largely unchallenged. There are now good grounds to believe that much greater disclosure in control order cases can safely be managed. More fundamentally, however, ways must be found of turning more Security Service material, including intercept material, into evidence that can be used in criminal trials. A wide range of extremely broad terrorism offences currently exists, including offences specifically

²⁵⁹ *Regulation of Investigatory Powers Act 2000* (UK), c 23, s 17.

²⁶⁰ *AF (No 3)* (HL), *supra* note 72 at para 105.

²⁶¹ *JCHR Control Orders Report 2009-10*, *supra* note 20 at para 62. See also Baroness Hale in *AF (No 3)* (HL), *supra* note 72 at para 104.

²⁶² Roach, “*Charkaoui* and Bill C-3”, *supra* note 153 at 341.

designed to allow intervention at a very early stage in terrorist plots.²⁶³ But of course, prosecuting these offences requires the state to use evidence that can currently be withheld. Admitting this evidence into criminal trials would require, first of all, ending the absurd pretence that the United Kingdom, uniquely, cannot use intercept evidence in criminal trials without doing serious damage to its national security or public safety.²⁶⁴ It is noteworthy that the current Director of Public Prosecutions, Keir Starmer, argued before he took office that the real reason for the government's reliance on pre-emptive measures like detention without trial and control orders is not a pressing need for security, but rather the unreasonable resistance of the Security Service to preparing phone-tap evidence that could be used as evidence in criminal trials.²⁶⁵ As stated by the former Law Lord, Lord Lloyd, when he reviewed the United Kingdom's counterterrorism powers back in 1996, "We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so."²⁶⁶ The continuing failure to lift the ban on intercept evidence has fatally undermined the British government's previously stated priority of prosecuting terrorist suspects wherever possible—a priority that finds expression in the *PTA*. Before making a control order "the Secretary of State must consult the chief officer of the police force about whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism."²⁶⁷ The chief officer must also ensure that investigation of the individual's conduct, with a

²⁶³ The broadest is s 5 of the *Terrorism Act 2006* (*supra* note 58), which provides that:

- (1) A person commits an offence if, with the intention of —
 - (a) committing acts of terrorism, or
 - (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention ((UK), c 11, s 5 [emphasis added]).

There are also possession and encouragement offences and a large number of proscription-related offences. See David McKeever, who notes that forty-six new terrorism offences were created between 2000 and 2008 ("The Human Rights Act and Anti-terrorism in the United Kingdom: One Great Leap Forward by Parliament, but are the Courts Able to Slow the Steady Retreat that has Followed" [2010] PL 110 at 116-17). For full details see Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 2d ed (New York: Oxford University Press, 2009).

²⁶⁴ UK, "Privy Council Review of Intercept as Evidence: Report to the Prime Minister and the Home Secretary", Cm 7324 in *Sessional Papers* (30 January 2008) at 4. See e.g. *JUSTICE Report*, *supra* note 155 at 94.

²⁶⁵ Keir Starmer, "Setting the Record Straight: Human Rights in an Era of International Terrorism" (2007) 2 *Eur HRL Rev* 123 at 128-32.

²⁶⁶ *Ibid* at 129-30.

²⁶⁷ *PTA*, *supra* note 7, s 8(2).

view to his prosecution for a terrorism-related offence, is kept under review during the period that an individual is subject to a control order.²⁶⁸ But, despite the *PTA* provisions giving priority to prosecuting terrorism-related offences, no one subject to a control order has yet been prosecuted for such an offence, save for breach of their control order. The suspicion remains that—as McGarrity, Lynch, and Williams have put it—when the state can choose between a range of legal measures to deploy against suspect individuals, it “may deliberately select measures which demand less of it—in terms of due process and respect for individual liberties—than other means of achieving substantially the same end.”²⁶⁹

Conclusion

Doctrines of judicial deference, restraint, and even non-justiciability are commonly found in the constitutional and administrative law of Western democracies. But in the United Kingdom in particular, judges have long had very strong constitutional doctrines of deference to both executive and Parliament, as represented by highly restrained grounds of review such as *Wednesbury* unreasonableness²⁷⁰ and the constitutional doctrine of parliamentary sovereignty, which is at least partly a judge-made norm.²⁷¹ It is also well-known that the general record of judges in common law countries standing up for the rule of law in the face of executive claims of national security has been decidedly patchy. Dyzenhaus describes the record as “at worst dismal, at best ambiguous.”²⁷² Thus, it is in the anti-terrorism context that we would expect to find judicial deference not only at its strongest but also with the most dangerous potential since it is in this area of government policy—unlike others in which deference has traditionally been strongest such as in the area of resource allocation²⁷³—that threats to fundamental rights have been most intense. This article has not found, however, excessive deference to have been displayed

²⁶⁸ *Ibid.*, s 8(4).

²⁶⁹ Andrew Lynch, Nicola McGarrity & George Williams, “The Emergence of a ‘Culture of Control’” in McGarrity, Lynch & Williams, *supra* note 3, 3 at 6.

²⁷⁰ Deriving originally from *Associated Provincial Picture Houses, Limited v Wednesbury Corp* ((1947), [1948] 1 KB 223, [1947] 2 All ER 680 (CA)), and renamed in *Council of Civil Service Unions v Minister for the Civil Service* ((1984), [1985] 1 AC 374 at 410, [1984] 3 WLR 1174 (HL (Eng)) [*Civil Service Unions*]) as the “irrationality” head of review.

²⁷¹ It was referred to recently as “a construct of the common law” by Lord Steyn in the leading decision of *R (Jackson) v AG*, [2005] UKHL 56 at para 102, [2006] 1 AC 262.

²⁷² *Supra* note 37 at 17.

²⁷³ See e.g. *R v Criminal Injuries Compensation Board ex parte P* (1994), [1995] 1 WLR 845 at 857, [1995] 1 All ER 870 (CA (Eng)), Neill LJ, dissenting.

by *all* courts. Indeed, the contrast between the deference and equivocation often displayed by senior British judges and the unanimity and confidence of the European Court of Human Rights has been striking—and an effective rejoinder, we suggest, to Lord Hoffmann’s recent condescending dismissal of the jurisprudence of that court.²⁷⁴ Moreover, while we have been critical of the distorting effects of deference upon many of the judgments of British courts we have examined, we should also recognize that overall the courts have displayed a relative boldness that contrasts strongly with the approach taken in much earlier decisions—such as *Liversidge v. Anderson*²⁷⁵ *Hosenball*,²⁷⁶ *Civil Service Unions*,²⁷⁷ and *Rehman*²⁷⁸—in which matters of national security were treated as either simply non-justiciable, or as requiring such a high degree of judicial deference as to render judicial review an almost empty check.²⁷⁹ The result has been that the judiciary has achieved significant reform of the control orders scheme, albeit with considerable assistance from the European Court of Human Rights.

We noted earlier in this article the way in which undue judicial deference can set up a kind of negative or suppressive constitutional dialogue where the executive uses the results of overly deferential judgments to silence criticism from Parliament, particularly the JCHR. We have also noted the converse: that more assertive judgments actually vindicate Parliament’s legislative efforts to check the executive by giving judges a more effective oversight role, in a positive form of constitutional co-operation. Two further connections between judicial deference and constitutional dialogue emerge from this story. The first connection is that excessive judicial deference, in addition to setting up the possibility of a negative constitutional dialogue, also negates the chance for a positive one. If judges take restraint so far that they actually defer the whole substance of the question they have to decide by simply adopting the executive view, then the possibility of an argumentative dialogue between courts, the execu-

²⁷⁴ Lord Hoffmann, “The Universality of Human Rights” (Lecture delivered at the Judicial Studies Board Annual Lecture, 19 March 2009), (2009) 125 Law Q Rev 416.

²⁷⁵ (1941), [1942] AC 206, [1941] 3 All ER 338 (HL (Eng)).

²⁷⁶ *R v Secretary of State for Home Affairs, ex parte Hosenball*, [1977] 1 WLR 766, (*sub nom R v Secretary of State for the Home Department ex parte Hosenball*) [1977] 3 All ER 452 (CA (Eng)).

²⁷⁷ *Supra* note 270.

²⁷⁸ *Supra* note 220.

²⁷⁹ See Walker, “Threat”, *supra* note 224 at 6. *C.f.* Adam Tomkins, who sees the record of the appellate courts since *Belmarsh* (*supra* note 17) as a disappointing retreat from that decision, but praises the rigorous standard of review recently imposed on the executive in the anti-terrorism context in the lower courts and certain specialist tribunals (“National Security and the Role of the Court: A Changed Landscape?” (2010) 126 Law Q Rev 543).

tive, and the legislature as to the necessary and reasonable restraints on rights in order to preserve public safety in the face of the threat from terrorism, simply disappears. Instead, only one voice is heard—that of the executive, accompanied by a muted chorus of approval or at least acquiescence by the judiciary, and largely ineffective parliamentary complaints in the background.

The second connection, in contrast, emerges where the more assertive judgments discussed above may be seen to represent a more positive form of constitutional conversation—a series of structured exchanges between judiciary and executive both as to the point at which restraints on liberty imposed by control orders tip over into effective deprivations of liberty, and as to the extent to which the normal due-process principles of evidential disclosure can be upheld in control order proceedings. Some commentators have been critical of this particular episode of “dialogue”, regarding it as covering neither side with glory and amounting to a kind of extended and unsavoury haggling session between executive and judiciary over how far the former can go in limiting rights.²⁸⁰ But the fact is that the strongly deferential approach taken at times by various members of the judiciary—what in this paper we have termed “deference as distortion”—results in effectively no dialogue at all, but simply an executive monologue that allows covert derogations from fundamental rights to go largely unchallenged, and even unrecognized. It is to be hoped that, in whatever battles on terrorism and human rights lie ahead, both the courts and Parliament will absorb the lessons of the control orders story that we have sought to tell in this article, opening the possibility for more positive and fruitful forms of constitutional dialogue to arise in the future.

Postscript

The current government has placed before Parliament the *Terrorism Prevention and Investigation Measures Bill 2010-11*,²⁸¹ which will abolish control orders, but replace them with “terrorism prevention and investigation measures” (TPIMs). The new measures, also operating outside the criminal justice system, are in a number of respects very similar to control orders: curfews will be replaced by “overnight residence requirements”, travel restriction orders, or both; other surveillance measures will also be retained; breach of a TPIM will also result in criminal sanctions with the

²⁸⁰ See e.g. Campbell, *supra* note 225.

²⁸¹ Bill 193, 2010-2011 sess, 2011. See also the House of Commons briefing paper for TPIMs: UK, House of Commons Library, *Terrorism Prevention and Investigation Measures Bill: Bill 193 of 2010-11* (Research Paper 11/46) by Alexander Horne & Gavin Berman (1 June 2011) online: House of Commons Library Briefing Papers <<http://www.parliament.uk>>.

same maximum penalty of imprisonment for five years. The imposition of forced relocation will not, however, be included—the orders will initially be for two years only (but can be extended) and the standard of suspicion will be slightly higher, at “reasonable belief”. The procedures for imposing or reaffirming TPIMs replicate the current process with respect to control orders, including the use of special advocates, save that courts will be able to refuse reliance on secret material, the gist of which has not been disclosed to the suspect. Thus TPIMs, as introduced, demonstrate the continuing governmental insistence on pre-emptive “control” measures; they also amount, dialogically, to minimal acceptance of the human rights principles insisted upon by courts in the decisions discussed above. It is probable that efforts will be made in Parliament to amend the TPIMs legislation so as to reflect those principles more generously.
