

JUSTICE/SWEET & MAXWELL Conference on
Counter-terrorism and Human Rights*

28 June 2005

CONTROL ORDERS AND RESTRICTIONS ON LIBERTY

Thomas de la Mare

Blackstone Chambers

"The consciousness of being at war, and therefore in danger, makes the handing-over of all power to a small caste seem the natural, unavoidable condition of survival." George Orwell, 1984

A. Introduction

1. This paper analyses the impact of Control Orders upon the liberty of those affected by them. The primary focus of this paper is upon the so-called "non-derogating" control order, since that is at present the current target. Parliament has also conferred (subject to conditions) *contingency* powers to grant what are referred to as derogating control orders, namely control orders that will lead to a deprivation (as opposed to a mere restriction) of liberty other than on one of grounds permitted by Article 5(1)(a) to (f) ECHR, and which therefore require a derogation on national emergency grounds from the Convention. But such powers have not been activated and absent some significant development it appears unlikely they will be in the short term, as their defence necessarily

* This paper is currently "work in progress" as it is hoped that it will mature into something worth publishing. Please contact Tom if you wish to cite the paper or material in it, as there may be a better or, at least, more recent version! All comments, typos, criticisms of contents or omissions would be gratefully received.

entails rearguing much of the grounds seemingly decisively cut away by the House of Lords in A v SSHD.¹

2. Instead, in creating the non-derogating control order, the Government has sought to reach out from its previous successes in the field of ASBOs, football banning orders. Both such regimes have led to court-sanctioned civil regimes leading to restrictions on liberty. The template of such models, namely (comparatively) focused action designed to preclude narrow forms of anti-social or violent misbehaviour, have largely been inverted, such that the powers that are conferred are so wide as to sanction banning or controlling nearly all forms of social behaviour, save for those specially approved. In short, non-derogating control orders seek to confer the power upon the Secretary of State to restrict (in fact take away) pretty well every significant civil or social liberty recognised, so long as the package of restrictions falls short of what might be defined as *de facto* deprivation of liberty. These far-reaching powers are intended to be exercised with the minimal judicial control or oversight of a judicial-review jurisdiction.
3. Moreover, the description of such orders as “control orders” is entirely apposite not least because, through the medium of conditions: (a) giving rise to general prohibitions on activities (e.g. pre-arranged meetings); but subject to (b) exceptions, *inter alia*, providing powers for the Secretary of State to approve particular instance of such activities, the Secretary of State (and/or the Security Services) is provided with a potentially constant stream of information about an individual’s activities together with a power to approve or veto them (subject to a largely theoretical power in the Applicant to go to Court). The control over what are ordinary or day to day facets of life thereby conferred is truly far-reaching. In short “Control Orders” pass the *Ronseal*TM test – “they do exactly what they say on the tin”.
4. This paper takes the following structure:

¹ A v SSHD [2004] UKHL 56; [2005] 2 WLR 87.

- (1) Section B analyses the forms of restriction permitted by PTA.
- (2) Section C then sets out the various types of fundamental and civil rights interfered with or even removed by such restrictions.
- (3) Section D analyses the limited judicial controls over the Secretary of State's power to make such orders.
- (4) Section E looks at potential legal arguments that might be addressed to attack the PTA regime.

B. What forms of civil "restriction" on liberty does PTA permit?

(i) What PTA authorises

5. §1(2) and §1(10) PTA explain the difference between derogating and non-derogating orders. As §1(2) makes clear the Secretary of State has power to make control orders imposing any of these obligations, save for "obligations that are incompatible with the individual's right to liberty under Article 5 [ECHR]", whilst the Court has (on application by the Secretary of State) the power to impose control orders containing "derogating obligations". "Derogating obligations" are defined by §1(10) PTA in the following terms:

In this Act –

"derogating obligation" means an obligation on an individual which –

- (a) is incompatible with his right to liberty under Article 5 of the Human Rights Convention; but*
- (b) is of a description of obligations which, for the purposes of the designation of a designated derogation, is set out in the designation order;*

"designated derogation" has the same meaning as in the Human Rights Act 1998 (c 42) (see section 14(1) of that Act);

“designation order”, in relation to a designated derogation, means the order under section 14(1) of the Human Rights Act 1998 by which the derogation is designated.

6. The obligations, whether derogating or otherwise, that may be imposed by any form of control order are those that the Secretary of State or Court (as the case may be) considers *“necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity”*: see §1(3) PTA. Then §1(4) PTA proceeds to define the types of obligation that may be imposed, which *“may include, in particular”*:

- (a) *a prohibition or restriction on his possession or use of specified articles or substances;*
- (b) *a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;*
- (c) *a restriction in respect of his work or other occupation, or in respect of his business;*
- (d) *a restriction on his association or communications with specified persons or with other persons generally;*
- (e) *a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;*
- (f) *a prohibition on his being at specified places or within a specified area at specified times or on specified days;*
- (g) *a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;*
- (h) *a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;*
- (i) *a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;*
- (j) *a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;*

- (k) *a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;*
 - (l) *a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;*
 - (m) *a requirement on him to allow himself to be photographed;*
 - (n) *a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;*
 - (o) *a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;*
 - (p) *a requirement on him to report to a specified person at specified times and places.*
- (5) *Power by or under a control order to prohibit or restrict the controlled person's movements includes, in particular, power to impose a requirement on him to remain at or within a particular place or area (whether for a particular period or at particular times or generally).*
- (6) *The reference in subsection (4)(n) to co-operating with specified arrangements for monitoring includes a reference to each of the following –*
- (a) *submitting to procedures required by the arrangements;*
 - (b) *wearing or otherwise using apparatus approved by or in accordance with the arrangements;*
 - (c) *maintaining such apparatus in the specified manner;*
 - (d) *complying with directions given by persons carrying out functions for the purposes of those arrangements.*
- (7) *The information that the controlled person may be required to provide under a control order includes, in particular, advance information about his proposed movements or other activities.*
- (8) *A control order may provide for a prohibition, restriction or requirement imposed by or under the order to apply only where a specified person has not given his consent or approval to what would otherwise contravene the prohibition, restriction or requirement.*

7. At the risk of stating the obvious, these provisions are of staggering potential width. The forms of combined prohibition authorised by this section range from straightforward custody, through to house arrest, and then on to pretty well every conceivable lesser form of restriction on liberty. More importantly, this provision ducks the obvious question – “where is the cut off between Article 5 detention, and mere restrictions on liberty?”. No attempt is made to answer this question, with the result that whether the package of prohibitions and/or restrictions proposed for any individual case infringes Article 5 will be a central issue in many cases.² The significance of paragraph 1(8) PTA is easy to miss at first, but the sample Control Order in Appendix A makes it plain.³ By means of this provision general or swinging restrictions can be imposed that effectively ban all forms of activity of a certain type unless previously approved by the “specified person”. A controlled person therefore has a choice, for example, of either (a) reporting who he meets, when, where, how, for what purpose; or (b) not meeting them; or (c) breaching the order. By this means, the detail of the Order is taken “off balance sheet”, the primary burden is placed on the restricted person to report their every move (this could be called “self-surveillance”), and the possibility of judicial control/review of these operational decisions becomes so remote in many instances as to be negligible.⁴

(ii) The generic PTA non-derogating control order

8. The Secretary of State has currently made derogating control orders against eleven former detainees under ATCSA, using the transitional provisions in

² There is no discernible underlying rationale in section 1(4)(a) to (p) in the linguistic distinction drawn between “prohibitions” or “restrictions”.

³ I am extremely grateful to the Treasury Solicitor’s department for having supplied such “generic” control order.

⁴ Given the delays in getting even the main substantive hearings to Court, is a party really going to start a collateral challenge to such an operational decision?

§3(1)(c) PTA.⁵ A sample Control Order is exhibited as Appendix A to this paper. The Orders made contain provisions that require the subject:

- (1) to wear an electronic tag;
- (2) to reside and remain at a specified address, save between the hours of 7 a.m. and 7 p.m. ("the daytime period");
- (3) not during the daytime period to (a) meet anyone by prior arrangement or (b) to attend a pre-arranged meeting (not including attendance at a mosque, so long as not preaching), save with the prior consent of the Secretary of State;
- (4) to report to a monitoring company on entering and leaving his house;
- (5) to permit entry to various types of authorities to his home without notice so that they can ensure compliance with the order. Those individuals have the power to search the premises, inspect items found on the premises, and to remove items, as well as modify equipment on the premises (this provision appears to be wide enough to enable the Secretary of State to place listening devices throughout the home, subject *perhaps* to authorisation under under legislation such as RIPA);
- (6) not to permit anyone into the home, save for: (a) his wife or children (b) members of the legal team on the record; (c) emergency services in an emergency; and (d) anyone else with the Secretar of State's prior approval;
- (7) not to permit to be brought into the residence any communication equipment, save for one fixed telephone, one internet disabled computer. It is not a breach to allow legal representatives to bring in a mobile phone,

⁵ See Charles Clarke's response to a Parliamentary Question, dated 16 June 2005.

provided it is switched off. There is a general ban on the possession of mobile telephones by the subject;

- (8) to notify the Secretary of State of any proposed departure from the UK and proposed port of departure, as well as the proposed duration of any trip; the subject is required to report on return;
- (9) not to hold more than one bank account, and to provide monthly statements; and
- (10) not to transfer (directly or indirectly) any money, goods or documents outside the UK.

C. What is “Liberty”? What rights are of relevance?

9. Rather than succumb to the temptation of accepting, without question, the false counter-point PTA seeks to draw between Article 5 ECHR (derogating orders) and the balance of relevance rights (non-derogating orders), and thus starting analysis with Article 5 ECHR, I believe that it is instructive to consider the other recognised civil rights affected by control orders in an incremental fashion, before turning to a consideration of Article 5 ECHR itself.
10. This review of relevant rights includes those drawn from two EC sources:
 - (1) First, recognised EC fundamental rights and freedoms derived from the “common constitutional tradition” of Member States. Such rights are relevant in any case falling within the ambit of the Treaty, which includes any case in which: (a) the appellant is an EC national working in or lawfully integrated in the UK; or (b) the appellant is a UK national who has previously exercised free movement rights or who is wishing to leave the UK to exercise relevant Community rights; and
 - (2) Secondly, those specifically enunciated in the EC Charter on Fundamental Rights of the European Union (“the Charter”), a ‘soft-law’ document of

increasing relevance: (a) as a source for the ECJ in identifying that “common constitutional tradition”; and (b) as a source for the ECHR when charting the development of the Convention, as a “living instrument”.

(i) Article 8 ECHR

11. There can be little doubt that “non-derogating orders” can give rise to far-reaching interferences with the right to respect for:

- (1) The home, as is evident from the rolling power of access and search, without judicial warrant (contrast the position in *Funke v France* (1993) 16 EHRR 297;
- (2) Correspondence, as is evident from the wide powers available to preclude, intercept and even censor correspondence;
- (3) Family life, given the obvious impact of a regime of controlled/monitored home life upon the other family members affected; and
- (4) Private/personal life, given the potential for near or complete inability to further personal development in the “private sphere” in which individuals form personal relationships (whether at work, or relationships of friendship, sexual intimacy, marriage etc) and/or to find personal fulfilment through work: see e.g. the well-known dictum in *Niemitz v Germany* (1992) 16 EHRR 97, at paras 29-30. The right to engage in work (of some form) is also given further protection by Article 15.1 of the Charter; Article 16 of the Charter provides a like right to run a business.

12. Indeed, after *Pretty v UK* (2002) 35 EHRR 1 it might be said that the common thread running through Article 8 is that of personal autonomy. Obvious, non-derogating control orders have the potential to go or cut at this very essence of the Article 8 right.

13. Indeed, the width of the cumulative powers granted in this respect (see e.g. §1(4)(n) read with §1(6) PTA) appear to be truly all encompassing, extending to, say, a requirement to carry at all times a transmitting microphone.⁶ The generic control orders currently drafted appear to leave little scope for meaningful private life, as:

- (1) Private life at home seems to be strictly monitored, as well as circumscribed. The ‘home’ has been reduced largely, it seems, to somewhere where the family lives, but with no potential for ordinary engagement with the outside world;
- (2) Collateral restraints are placed upon family members; and
- (3) Private life outside the home has little sensible prospect of flourishing, given the bans on pre-arranged meetings. One may think that private life without spontaneity is little like private life at all. Little data is available on how the “pre-approval” systems actually work.

(ii) Articles 9, 10, 11 ECHR

14. For similar reasons, it is also obvious that control orders may heavily circumscribe, indeed often preclude the exercise of:

- (1) The right to *receive* and *impart* information (by telephone, by the internet, by correspondence, by literature), guaranteed by Article 10 ECHR. Potential obligations will apparently bite on political, religious, journalistic and/or artistic free speech, as well as commercial free speech.

⁶ See e.g. §1(4)(n) PTA read with §1(6). Such powers bring to mind another Orwell quote:

“Even the Catholic Church of the Middle Ages was tolerant by modern standards. Part of the reason for this was that in the past no government had the power to keep its citizens under constant surveillance. The invention of print, however, made it easier to manipulate public opinion, and the film and the radio carried the process further. With the development of television, and the technical advance which made it possible to receive and transmit simultaneously on the same instrument, private life came to an end.”

PTA authorises fundamental restrictions on free speech, on a par with, if not going *further* than that typically applied to convicted prisoners. The restrictions currently imposed do not appear to go that far, but are profound nevertheless.

- (2) The freedom to associate with others of one's choosing. It seems likely at the more extreme end that the orders will be framed not in terms of those you are actively precluded from associating with (consider by contrast e.g. named or convicted football hooligans, other gang members responsible for anti-social behaviour), but in terms of preventing you from associating with *anyone* but certain permitted individuals. Again, paradoxically (family aside) many individuals in prison would appear potentially to have better rights of association. The current generic order seeks to ban pre-arranged meetings (if not approved) but does not regulate accidental/unplanned encounters. This is a far-reaching restriction, cutting to the very quick of the right to associate, the essence of which is to combine in order to share ideas, or in order to pursue political or private life.
- (3) Religious freedom, in the sense of the ability to practice religious belief (e.g. by attendance at a mosque, a place of prayer or religious discussion or instruction). The community angle of religious freedom has been given added impetus by Article 10 of the Charter, which provides for a (qualified) right of "*freedom, either alone or in community with others and in public or in private, to manifest religion or belief*".⁷ The generic non-derogating order will have a very substantial impact upon those who are religiously active (e.g. a religious figure or leader).

(iii) Free movement

⁷ The control order in respect of all of the present control orders prevent them from preaching at a mosque.

15. Whilst Article 2 of Protocol 4 ECHR may not have been ratified by the UK (largely out of apparent concern as to how such ratification might impact upon the various different types of British national), and thus does not constitute a “Convention Right” under the HRA, such provision is by no means a dead-letter. Instead, it has been relied upon by the ECJ in the development of its case-law in relation to the free movement of workers and freedom of establishment under the EC Treaty. In Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219 the ECJ relied upon Article 2 of Protocol 4 as part of the underpinning of and evidence of the importance of the rights conferred by (what was) Article 48 EC (see §32), holding that an interference with free movement can only be justified by “*a genuine and sufficiently serious threat to public policy necessary for the protection of those interests in a democratic society*”. The potential potency of this provision is well-illustrated by the *Labita* case, considered below.

16. In EC law the right to free movement is also:

- (1) guaranteed by Articles 39 (free movement of workers) and Articles 43 EC (free establishment) for those exercising it in order to take or (to a more limited degree) seek work or self-employment in another EC state;
- (2) in Article 18 EC, in the context of citizenship of the EC;
- (3) reiterated in Article 45 of the Charter.

In particular, Article 18 EC is giving birth to a burgeoning case-law of increasing complexity, that seems to be moving towards a free-standing notion of EC citizen’s rights.

17. Thus free movement rights are relevant in three key respects:

- (1) So far as the target of a control order is an EC national, any order that purports to restrict their movement within the host state or impede their exit from it (e.g. an order requiring passport surrender, or prohibiting exit from the UK) would instantly engage EC law and/or the Charter,

together with Article 2 of Protocol 4 which underpins/inspires those provisions.

- (2) Secondly, insofar as a UK national subject of a control order can establish that he or she wishes to move abroad within the EC (e.g. to work abroad, to reside their on own means), any attempt to prevent such movement would also engage EC rights.
- (3) Thirdly, any UK national returning to the UK from having worked in another EC state could assert that theirs is not a “purely internal situation”.

(iv) Article 6 ECHR

18. I do not wish to repeat in this paper in depth the well-rehearsed lines of battle between whether or not non-derogating control orders give rise to a dispute calling for the application of Article 6 civil (broadly, the UK Government line) or Article 6 criminal (the applicants line). What is certainly clear is that:

- (1) On any view, one or other of these guarantees is engaged by the proceedings relating to a control order. Even on the strictest Strasbourg approach to what constitutes a “civil right”, one which does not treat other ECHR rights as “civil rights” (an approach I would predict municipal courts would, in any event, not necessarily follow), the generic control orders interfere with civil rights (e.g. the ability to contract freely, to join and participate in a trade union or society, civil rights acknowledged by the common law).
- (2) There are (ASBO and football precedents aside)⁸ strong arguments of principle to suggest that the non-derogating control order, particularly

⁸ See *R(McCann) v Crown Court at Manchester* [2002] UKHL 39; [2003] 1 AC 787 (ASBOs not criminal in nature); *Gough v Chief Constable of Derbyshire* [2002] QB 1213. There are strong arguments that such cases are to be distinguished on their facts; Control Orders differ in fact and in degree in many ways.

those at the “higher end” involving cumulative, stringent conditions, call for criminal guarantees under the *Engel* test, not least because of the condition precedent of “terrorist-related” activity, the swinging types of relief capable of being imposed, and the strong sanctions for breach.

- (3) Even if it is wrong to see non-derogating civil control orders as “criminal” under the *Engel* test, it is strongly arguable that it is equally wrong to view civil v criminal guarantees as two distinct boxes. They are in reality a spectrum, and on any view the nature and impact of civil control orders may call for civil guarantees all but equivalent to criminal guarantees under Article 6.2 and 6.3 ECHR.
- (4) The extensive use made of Special Advocates, even as improved by the reforms resulting from or recommended by the CASC report, constitutes a far-reaching and highly contestable departure from ordinary fair trial guarantees.

(v) *The right to an effective remedy*

19. Nor should it be thought that the right to an effective remedy as guaranteed by Article 13 ECHR is a dead-letter due to its non-incorporation as a Convention Right. Again, provided that nationals can bring themselves within the scope of EC law, and for EC nationals whose EC rights (particularly of free movement for work etc) are being curtailed, such right is directly in play as the right to an effective remedy has been an essential core of EC fundamental rights since *Johnston v RUC* [1986] ECR 1651; Article 47.1 of the Charter also guarantees the right to an effective remedy.

(vi) Article 14

20. For all the talk of there being 200 active trained supporters of Al Qaida at large in the UK,⁹ it is noticeable that at present, some three months after the passage of PTA, not one UK national has been subjected to even a non-derogating control order. Such is notwithstanding the fact that Parliament was told that such powers were critically required to address the threat from UK nationals.

21. Article 14 seems to me to be potentially relevant in a number of ways:

(1) First, insofar as PTA powers are in practice exercised in a discriminatory way. At present there appears to be a reasonable *prima facie* case given that the Newton Report (compiled with the benefit of access to intelligence materials) suggested that approximately 50% of those constituting a security risk due to Al Qaida affiliation were UK nationals, yet this group makes up none of the detainees.

(2) Secondly, insofar as UK nationals can show that they receive discriminatory treatment compared to EC nationals, such discrimination indubitably being on grounds of nationality and thus “status” even within the *Kjeldson* test, recently applied in *R(S)* and *Carson*.

(vii) Article 5 ECHR

22. The whole purpose of the distinction between non-derogating and derogating control orders is to draw a distinction between orders that require no derogation from Article 5 ECHR (because no loss of liberty is entailed) and those requiring derogation because detention without trial is not permitted under Article 5(1)(a) to (f). By providing contingency powers to grant derogating control orders, the Secretary of State has effectively reserved the power to revert to the old

⁹ See the reported comments of Sir John Stevens in this vein, durrency the POTB debates at <http://news.bbc.co.uk/1/hi/uk/4322611.stm>.

“Belmarsh-scenario”, albeit that in future the powers (and the detainees?) will be framed in non-nationality-based terms.

23. It is quite plain when contrasting the terms of section 1-3 PTA (non-derogating) with those of section 4 PTA (derogating), together with the background to PTA and what was said in the House of Parliament, that the distinction between the two is based primarily upon a conception of Article 5 liberty as “physical liberty”, i.e. deprivation of any or any meaningful power to determine when, where and how to go.
24. Doubtless, given the wholesale curtailment of civil liberties short of classic, physical detention, cogent arguments that the stricter forms of non-derogating order (particularly those with cumulative conditions) amount to a deprivation of liberty, as now properly understood. Liberty to my mind truly connotes the ability to participate in at least some meaningful form in civil society. Anyone denied such interaction in practice, so as to be cut off from all or almost all fellow human beings, is a person deprived of their liberty. Marginal physical freedom is liberty in only the most formalistic sense. The whole point of imprisonment (taken to its apogee by solitary confinement) is to punish by means of cutting the individual off from his or her ordinary life of family, friends, work, entertainment, social activity, personal autonomy.
25. An individual who may not speak to or associate with the people of his or her choosing (perhaps only a narrow panel of family and approved friends), who may not leave an area (and may only move within it under electronic tagging), who may not use the telephone or internet for social purposes or to share ideas or religious views, who may be confined to his or her house for large numbers of hours per day, who may not work at all or in the vocation of their calling, to repeatedly give access to his home to officials (without further warrant or authority) to allow them to search such home, to be repeatedly photographed, monitored (potentially whether in or out of the home) e.g. by electronic tagging or listening device, and to report in repeatedly each day is no more free than Winston Smith.

26. There is emerging recognition of this type of approach in the ECtHR's case law under Article 5(1) ECHR. The focal point has typically been the dividing line between Article 5(1) (labelled by the ECtHR as *deprivation* of liberty) and Article 2 of Protocol No.4 (*restriction* of liberty) which guarantees a right of free movement.¹⁰ This is well-illustrated by three Italian anti-mafia cases:

- (1) In *Raimondo v Italy* (1994) 18 EHRR 237 the applicant was placed under police supervision and required to lodge a substantial financial security. He was required to keep certain hours – i.e. to be home by 9 p.m. and not to leave before 7 a.m. unless he had pre-approved valid reasons for doing so. Neither the Court nor the Commission saw this as any more than a *restriction* of liberty, and as such fell outside Article 5 ECHR.
- (2) More telling is the case of *Guzzardi v Italy* (1980) 3 EHRR 333, where the ECtHR held that liberty was deprived by a similar regime of supervision, coupled with an obligation to live on a small part (a hamlet called Cala Reale) of a small island (Asinara, off Sardinia) which offered minimal scope for nocturnal free movement (movement between a few buildings was permitted) and limited daytime free movement on a small island, which in turn limited the possibilities of social contact with persons other than nearest relatives: see §23 to 42 for the facts which are informative. At §93 to 95, the ECtHR followed the ECommHR in finding that in substance Mr Guzzardi had lost his liberty, notwithstanding the limited community in which he could play a part, the apparent respect for his family/home life, and his largely uncensored communication with the outside world. However:

“deprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and in

¹⁰ The UK has not ratified Article 2 of Protocol 4 (which is accordingly not a Convention Right under the HRA). However, the case law under this provision may well be of relevance under any EC argument: see below.

attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States”.

On the facts of the case, the cumulation and combination of factors led to there being a loss of liberty.

- (3) Lastly, in the trilogy of cases, comes *Labita v Italy*, 6 April 2000, a case in which the *Raimondo* approach was taken to a fairly strict set of “preventive measures” that precluded the applicant from: (i) leaving home without notifying the authorities; (ii) associating with anyone with a criminal record; (iii) returning home after 8 p.m. or leaving before 6 p.m. unless he had valid pre-approved reasons; (iv) going to bars or public meetings; (v) going anywhere without a card containing his precise obligations under the order, as well as (vi) requiring him to report to a police station on designated hours on a Sunday. No argument was advanced under Article 5(1). Instead the Court found that the measures were an unjustified breach of Mr Labita’s freedom of movement, noting the absence of “concrete evidence” against him, absent which there was no basis to conclude he might commit future crimes. Notably, the evidence upon which the state sought to rely was informant-derived evidence that had proved insufficient to obtain a criminal conviction.
27. What these cases, together with the approach in *Ashingdane v UK* (1985) 7 EHRR 528, at §41, is that the difference between *deprivation* of liberty and *restriction* is “merely one of degrees or intensity, and not one of nature or substance”: see *Guzzardi*, §93. Domestically, this factor-based approach has been taken up to some degree by the Court of Appeal in *R(Gillan) v Commissioner of Police for the Metropolis* [2005] QB 388, paras 37-40.

C. What controls exist over PTA powers?

28. Given these far-reaching powers, even for non-derogating control orders, one would expect very substantial checks and balances. In fact, there are scant few:

- (1) The Secretary of State is empowered to make non-derogating control orders, subject only to: (a) his being satisfied that there are grounds to make such an order under §1(3) and 2(1) (i.e. reasonable grounds to suspect involvement in terrorism related activity and necessary in order to prevent terrorism-related activity); and (b) an application is made to the Court in the form required by §3(1).
- (2) The Court applies, in its first stage of review, liminal control to ensure that the non-derogating control order is not obviously flawed: see §3(3)(a) and (6) PTA.
- (3) Thereafter the Court applies judicial review style control over the Secretary of State's decision to ensure that it is not flawed: see §3(6)(b)(c) read with (8) and (10) and (11) PTA. Section 3(10) PTA seems to contemplate no role for the Court other than as reviewing Court, i.e. there will be no issue upon which it will have full jurisdiction (including jurisdiction to find relevant facts etc).
- (4) The powers of the Court are limited to powers to quash the order or one or more obligations imposed by it: see §3(12) PTA.
- (5) Section 7 PTA contains provision for the applicant to call for the Secretary of State to modify the control order to reflect a change in circumstances.
- (6) Section 8 PTA contains weak obligations on the Secretary of State and relevant Chief Constable to consider criminal prosecution prior to the making of a control order, and throughout its duration.

- (7) Section 11 PTA provides that “control order decisions ... are not to be questioned in any legal proceedings other than- (a) proceedings in the court”, which is defined by §11(2) to mean the tribunal designated under section 7 HRA as competent to deal with such issues.¹¹

D. Challenges to expect

(i) Scope of the Court's powers of review

29. The first obvious terrain for argument is as to the extent of the Court's review powers. The following points immediately emerge:
- (1) First, conventional judicial review is broken down into (post HRA) four grounds of review – error of law, procedural unfairness, irrationality and breach of the HRA.
 - (2) Whilst the language of §3(10) might be thought to constitute some form of weakly attempted ouster of anything other the power of factual review, that is gainsayed by §3(11) and by the common law ouster rules.
 - (3) Numerous important questions will be issues of law. Most obviously, whether or not a particular non-derogating control order: (a) amounts to a deprivation of liberty under Article 5(1); or (b) engages the criminal aspects of Article 6 ECHR are questions of law for the Court: see, by parity of reasoning, *R(G) v Mental Health Tribunal* [2004] EWHC 2193 (existence of detention a question of law for the Court), at para 20 per Collins J.

¹¹ See the new CPR inserting the new Part 76. The relevant SI can be found at <http://www.opsi.gov.uk/si/si2005/20050656.htm>.

- (4) In any event, when assessing questions of proportionality, two factors will be of particular importance. First, proportionality-based review is not a static standard like rationality, but will vary according to the circumstances; secondly, particularly strong scrutiny will be required where the effect of the Control Order is to deprive the applicant of the essence of any Convention right; lastly, where numerous rights are so traduced the Court will have to give careful attention to their cumulative impact and potential to amount to a *de facto* deprivation of liberty.
- (5) My suspicion is that the real difficulty in effective judicial scrutiny is not the limitation of the Court to judicial review principles (such principles are inherently mutable and can, as *A v SSHD* shows, lead to searching review), but lies in the statutory threshold set for the exercise of the Secretary of State's powers, under section 2(1)(a) and (b), namely the tests of "reasonable grounds to suspect" (the same low test used in SIAC) and perceived "necessity" of action. Even here there is material, for a Court so inclined, to build a more effective and intrusive standard of review, most obviously by: (i) creating a variable standard of reasonable suspicion, dependent upon the nature of the alleged activity; (ii) linking the strength and nature of the grounds for suspicion to necessity; and (iii) by strictly scrutinising the issues of necessity against substantive and procedural proportionality standards (e.g. has the Secretary of State considered alternatives? What were they? What reasons were there for rejecting them? Will the measure be adequate? If not, what is its justification? Etc).

(ii) Article 5

30. With such an approach in mind, one obvious area for argument will be as to whether or not the combination of obligations imposed by the Secretary of State amounts to a deprivation of liberty under Article 5 ECHR. *Guzzardi* shows this to be a fact sensitive inquiry, but it would appear that the Secretary of State has been careful to ensure that the first wave of non-derogating control orders does not stray too close to the Article 5 line. That said, there is still an argument to be

had based upon a real analysis of the actual (as opposed to formal) level of freedom enjoyed by applicants under such control orders. In conducting such analysis, I would suggest that the actual condition, vulnerabilities and needs of the applicant must be fully taken into account. The inevitable suspicion is that as control orders become more familiar, government lawyers will be emboldened to seek more and more stringent conditions (the scenario is familiar to anyone with experience of search and freeze orders, which have departed more and more from the standard form 'norm'). This problem is therefore likely to become more acute over time.

(iii) Art 6/Use of special advocates

31. The other obviously pivotal area of debate is likely to be as to the compatibility of the use of the Special Advocate procedure with Article 6 ECHR. That debate in turn raises the following important points of principle:
 - (1) first, are proceedings under ATCSA and/or under the new Control Order provisions "criminal" in nature or proceedings sufficiently close in nature to "criminal" proceedings as to call for the legal principles developed in a criminal context to be transposed to such proceedings; and
 - (2) in either case, do the special exigencies of the current situation call for an exception to the application of the conventional principles of a fair criminal trial.

32. For present purposes I leave that issue to the other speakers. Suffice it to say that the frequent loose talk of the Special Advocate system having been approved by the ECtHR in cases such as Chahal and others is misplaced.

(iv) SIAC determinations

33. A further issue of real practical significance is as to the lasting effect, if any, of previous SIAC determinations under ATCSA. Do such determinations in any way bind the High Court hearing control order applications (e.g. as to reasonable grounds for suspicion), or should consideration start afresh?

(v) EC remedies

34. Whilst the problem has barely surfaced as yet (largely as a result of the legacy of the so-called “three sided prison”), there seems to real scope for conflict between the standards applied by PTA and those required by relevant provisions of EC law. Council Directive 64/221 (which applies basic principles inherent in the EC Treaty rather than develops them) sets a high standard to be crossed by any member state wishing to exclude or deport an EC national. Such “public policy” or “national security” action has to be based upon a danger posed by potential future conduct, as assessed on an individual by individual basis conducted in accordance with fundamental human rights: see e.g. Case C-482/01 *Orfanopoulos* [2005] 1 CMLR 18, the latest application of the so-called *Bouchereau* criteria. Even serious prior criminal convictions were inadequate without more to meet that test; rather it appears as such is only potentially evidence of a present threat, which must be shown to some balance of probabilities standard. Moreover, Article 9 of Directive 64/221 guarantees minimum rights of appeal to an independent authority, in particular to ensure that an exhaustive examination of all the facts and circumstances relevant to the case is carried out: see e.g. Case C-175/94 *R v SSHD, ex part Gallagher* [1995] ECR I -4253, para 17. The latest ECJ case-law suggests that judicial review will be an appropriate safeguard, but the extension of that case-law to a control order type restriction, particularly one preventing an EC citizen leaving the UK, and doing so on the basis of secret/closed evidence is highly questionable: see Case C-1111/95 *Radiom & Shingara* [1997] 3 CMLR 703. These minimum appeal rights call into question the very structure of non-derogating control orders, in particular the Secretary of

State's power to make such orders without prior judicial approval or on the basis of closed evidence.

35. There is an obvious argument that if such test is the benchmark for expulsions, it must also form the benchmark for similar decisions made by the state when: (a) restricting the free movement rights of EC nationals within the state's territory (at which juncture the *Rutili* and *Labita* case law requiring "concrete evidence" becomes of relevance; or (b) refusing to allow UK or EC nationals to move abroad.

(vi) Third parties

36. Despite attempts to control collateral challenges to the Control Orders, the position of third parties is curiously vague in a number of respects:
- (1) First, the criminal offences for breaches of control orders by third parties are curiously limited under section 9. §9(1) makes it an offence for a person to breach a control order imposed "on him"; §9(3) leads to an offence by any party of obstructing the exercise by any party of a power conferred by §7(9) (i.e. the power to enter premises to search for an individual in order to serve a control order on them). No other express third party offence is created.¹²
 - (2) Secondly, despite the justifiable concerns of campaigning groups such as JUSTICE I am not convinced that §11 PTA ousts judicial review brought by affected third parties. It simply requires any judicial review proceedings to be brought in the Court designated by the appropriate rules as the one for control order proceedings; as such, it may require such judicial review to be brought under the strictures of the new Part 76.

¹² Implicit in this structure, it would seem, is a series of potentially highly inappropriate assumptions about the ability of the subject of the control order to control access to his or her home.

The most obvious affected third parties are family members, but other potential candidates are landlords, employers, friends and associates, political colleagues etc.

37. This second factor is a very important one. The potential impact of a control order is not restricted to its direct subject. To assess the necessity for and/or the proportionality of such an order its wider effects must be taken into account (e.g. the disruption to the applicant's wife, children, family, friends, community), and it would be artificial in the extreme if such direct interests were excluded from consideration.

APPENDIX A - SAMPLE CONTROL ORDER

Prevention of Terrorism Act 2005, section 2

CONTROL ORDER

This Order is effective from:

Name of Controlled Person:

Date of Birth:

Nationality:

Place of Residence:

Under the powers conferred on the Secretary of State by sections 2 and 3(1)(a) of the Prevention of Terrorism Act 2005 (referred to below as 'the Act'), this Order has been made against you because:

- (a) he has reasonable grounds for suspecting that you are or you have been involved in terrorism-related activity; and
- (b) he considers it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to impose certain obligations upon you in order to prevent or restrict your further involvement in terrorism-related activity.

The basis for this decision is:

The obligations imposed on you under section 1(3) of the Act are set out in the Schedule to the Order – **see attached.**

You are required to meet the obligations set out in the Schedule to the Order. **By virtue of section 9(1) and (2) of the Act if, without reasonable excuse, you contravene any of these obligations, you shall be liable on conviction to a term of imprisonment or to a fine or to both.**

If while you are subject to this Order, you consider there has been a change of circumstances affecting it, you may apply under section 7(1) of the Act, for a revocation of the Order or for the modification of an obligation imposed by the Order.

This Order is effective until the end of 2006 (Order made for 12
months).

The Secretary of State applied to the court for permission to make this order and
has been granted that permission on [INSERT DATE].

.....

Secretary of State

Prevention of Terrorism Act 2005, Section 2

SCHEDULE

This schedule sets out the obligations imposed on:

OBLIGATIONS

The following obligations form part of the Control Order and are imposed on the above named controlled person by virtue of section 1(3) of the Prevention of Terrorism Act 2005:

Upon the service of the control order and thereafter for the duration of this control order:-

- (1) You shall permit yourself to be fitted with and shall thereafter at all times wear an electronic monitoring tag ("the tag").

- (2) You shall permit yourself to be taken and thereafter reside at, *****, ("the residence"), and shall remain in the residence at all times save for a period of 12 hours between 7 am and 7 pm, or as specified in the directions given in writing referred to at (7) below. "Residence", in the case of a flat encompasses only the flat and, in particular, does not include any communal area either inside or outside to which any person not within the residence would have unrestricted access; and in the case of a house, encompasses only the house and does not include any outside space associated with it.

- (3) Each day, you must report to the monitoring company by telephone on the first occasion you leave the residence and on the last occasion you return to it.
- (4) You shall not permit any person to enter the residence, save for:
 - (a) your wife and child;
 - (b) your nominated legal representative as notified to the Home Office;
 - (c) your probation officer
 - (d) in an emergency, members of the emergency services or health care or social work professionals;
 - (e) any person aged 10 or under; and
 - (f) any person required to be given access under the tenancy agreement for the residence, a copy of which shall be supplied to the Home Office.

You shall not permit any other individual to enter the residence except with the prior agreement of the Home Office. In relation to those other individuals, you must supply the name, address, date of birth and photographic identity of the individual. The prior agreement of the Home Office shall not be required for subsequent visits by an agreed individual, but this does not prevent the Home Office withdrawing that agreement at any time.

- (5) You shall not, outside of the residence:
 - (a) meet any person by prior arrangement, other than:
 - (i) those persons referred to in (4) (a) (b) and (c) above,

- (ii) for health or welfare purposes at an establishment on a list provided to and agreed by the Home Office before your first visit, or
 - (iii) for educational purposes, at an establishment identified to and agreed by the Home Office before your first attendance;
or
- (b) attend any pre-arranged meetings or gatherings other than:
- (i) attending group prayers at a mosque and;
 - (ii) reporting to your probation officer at *****in accordance with any instructions given to you in connection with your licence conditions. This applies for the length of time that you are considered by the probation service to be under licence conditions.

save with prior agreement of the Home Office. For the avoidance of doubt, a meeting shall be deemed to take place outside of the residence if one or more parties to it are outside of the residence.

- (6) You must permit entry to police officers and persons authorised by the Secretary of State or by the monitoring company, on production of identification, at any time to verify your presence at the residence and/or to ensure that you can comply and/or are complying with the obligations imposed by this control order. Such monitoring may include but is not limited to:-
- (a) a search of the residence;
 - (b) removal of any item;

- (c) inspection/modification or removal for inspection/modification of any article to ensure that it does not breach the obligations imposed by this control order;
 - (d) permitting the installation of such equipment as may be considered necessary to ensure compliance with the obligations imposed by this control order;
 - (e) the taking of your photograph.
- (7) In order to secure compliance with the obligations imposed by the control order, you shall comply with such other prohibitions or restrictions on your movement as may be required by directions given in writing at the time of service of the control order by a police officer or other person authorised by the Secretary of State. Such prohibitions or restrictions shall cease 24 hours after the giving of such directions, or on earlier direction.
- (8) You shall not:-
- (a) bring or permit into the residence, or
 - (b) use (whether in or outside the residence)

any communications equipment or equipment capable of connecting to the Internet or components thereof (including but not limited to any mobile phones, fax machines, pagers and public telephone and/ or internet facilities), other than:-

- (i) one fixed telephone line in the residence; and
- (ii) one or more computers.

Any computer permitted into the residence must be disabled from connecting to the Internet and shall not have installed any commercial, third party or bespoke encryption software programmes or packages. The telephone and any computer must be delivered up to a person authorised by the Secretary of State for inspection and approval prior to it being permitted into or to remain in the residence.

It shall not be a breach of this obligation to permit:-

- (aa) any person specified in (4) (a)-(f) above;
- (bb) an individual who is allowed to enter the residence under (4) above by reason of the prior agreement of the Home Office,

to bring into the residence a mobile phone, provided that any such mobile phone shall remain switched off at all times whilst you are in the residence.

For the avoidance of doubt, you may not use, nor may you permit whilst you are in the residence any other person to use, any mobile phone in the residence.

- (9) You must notify the Home Office of any intended departure from the UK and notify it of the port of embarkation. You must also notify the Home Office if and when you intend to return to the UK and to report to the Home Office immediately upon arrival, that you are or were subject to this control order. The requirement to report on arrival shall continue to apply whether or not this control order remains in force at the time of your return to the UK.

- (10) You shall not hold more than one account. Such account must be held with a bank or other approved financial institution within the UK. Details of this account must be provided to a person authorised by the Secretary of State within 14 days from the date of service of this control order or the opening of the account whichever is sooner. You must obtain statements of the account on a monthly basis and provide such statements to the person authorised by the Secretary of State within 7 days of receipt.
- (11) You shall not transfer any money, or send any documents or goods to a destination outside the UK (whether yourself or through an intermediary) without the prior agreement of the Home Office.