



JUDICIARY OF
ENGLAND AND WALES

MR JUSTICE SILBER

ADDRESS TO BAR COUNCIL CONFERENCE: CONTROL ORDERS

6 NOVEMBER 2010

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1. I must congratulate the organisers of this conference on selecting this topic which is so topical although when I was asked to speak, this could not have been foreseen. I must give three warnings about what I am going to say. First, although I have practical experience of making judgments on control orders, I am not an expert on the dangers of terrorism and in particular how to identify or to appraise the dangers. Second, I do not speak on behalf of the judiciary. Third, I have no views on whether control orders should continue, especially as I have no knowledge of the risks of terrorism and I am not a politician.
 2. Control orders were introduced by the PTA 2005 which came into force on 11 March 2005. They were introduced after the House of Lord found the previous regime incompatible with article 5 of the ECHR in the Belmarsh case .In that case the House of Lords reversed a decision of the Court of Appeal which had upheld the right of the Secretary of State to detain suspected terrorists.
 3. There are according to the Secretary of State for the Home Department now only 9 control orders in place all of which are in respect of British nationals. This shows a marked reduction but many of the previous orders have been revoked. As you know control orders are highly controversial because they seek to resolve conflicts of interest of great importance in constitutional and personal liberty terms. They have been upheld as being capable of complying with the requirements of the ECHR.
 4. First there is the conflict between the rights of the individual to freedom and the rights of the State to protect its citizens against terrorist activity. A second conflict of equal importance is between the right of people subject to control orders to know the case against them but that has to be considered in the light of the right of the state to withhold details of the results of its intelligence on the basis that its disclosure would put lives at risk and deter other sources of intelligence from coming forward. I am one of a group of judges who deal with control orders and we are deeply conscious of the rights of the individual and our duty to protect them
 5. Let me now remind to you of what conventional control orders entail in their most stringent terms. They impose curfews of sometimes up to 16 hours a day during which the controlled person cannot leave his or her home. He or she is required to wear an electronic tag at all times. During non-curfew hours, they

are limited to areas often of about 9 square miles bound by a number of identified main routes. They have to report to a monitoring company on first leaving their home after a curfew period has ended and on their last return before the next curfew period begins.

6. The homes of those subject to control orders are liable to be searched by the police at any time and during curfew hours they are not allowed to let any person enter their homes except certain specified people, children under the age of ten or people agreed to by the Home Office in advance but such potential visitors are required to supply to the Home Office the names, addresses, dates of birth and photographic identification.
7. There are also limits on who the person subject to a control order can communicate with at any time and often they are only permitted to attend one place of worship, they cannot have any communication equipment of any kind and they have to surrender their passport. They are prohibited from visiting airports, sea ports or certain railway stations and they are subject to additional obligations pertaining to their financial arrangements.
8. The practical consequences of these orders are very substantial because friends are unwilling to visit those subject to a control order. Those subject to control orders are often refused permission to visit other people or to allow them to come and visit them. In many ways they are cut off from the outside world although the Secretary of State has the heavy task of showing in respect of each and every obligation in the control order that it was necessary for purposes connected with protecting members of the public from a risk of terrorism to make a control order imposing other obligations.
9. Now you might ask what has to be proved before they can obtain such an order. The position is that under section 2(1) of the Prevention of Terrorism Act 2005 the Secretary of State can make a control order if two conditions are satisfied. The first is that he or she has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activities and the second is that the Secretary of State considers it necessary for purpose connected with protecting members of the public from a risk of terrorism to make a control order imposing each and every obligation in the control order.
10. Each of these obligations is subject to detailed and close scrutiny. Judges often try to see if a less stringent obligation will suffice in the case in question.
11. The fact that only reasonable grounds are required of the Secretary of State means that the matter has got to be looked at through the eyes of the Secretary of State in the light of the information available to him or her. The next question is how the Secretary of State shows these two requirements.
12. You will not be surprised to hear that much of the evidence relied on by the Secretary of State will consist of confidential material obtained from Intelligence sources. The Secretary of State might well be very reluctant to disclose that information some of this information will come from what we have been told by Sir John Sawers head of MI6 in his recent speech that there are over 200 partner services around the world. They operate what is known as the control principle which means that who ever first discovers the intelligence has the right to control how it is used, who else can use it and what action can be taken.

13. He said that the intelligence and security agencies have to make sure that those secrets do not become the property of those who are threatening our country we have to protect our partner's secrets.
14. The position of the state was described graphically by Sir John Sawers the Chief of the Secret Intelligence Service when he was giving a lecture at the end of last month he said that: -

"If our operations and methods become public, they won't work.

Agents take risks. They will not work with SIS, will not pass us the secrets they hold, unless they can trust us not to expose them.

Foreign partners need to have certainty that what they tell us will remain secret – not just most of the time, but always.

Without the trust of agents, the anonymity of our staff, the confidence of partners, we would not get the intelligence. The lives of everyone living here would be less safe. The United Kingdom would be more vulnerable to the unexpected, the vicious and the extreme.

Secrecy is not a dirty word. Secrecy is not there as a cover up. Secrecy plays a crucial part in keeping Britain safe and secure.

And without secrecy, there would be no intelligence services, or indeed other national assets like our Special Forces. Our nation would be more exposed as a result.

Without secrecy, we can't tackle threats at source. We would be forced to defend ourselves on the goal-line, on our borders. And it's more than obvious that the dangers of terrorism, nuclear proliferation and cyber attack are not much impressed by international borders."

15. He explained that if operations become public they will not work explaining "agents take risks they will not work with the intelligence services will not pass us the secrets they hold unless they are not to be exposed As I explained the courts have to balance against this the human rights of those subject to a control order is to ensure that he or she obtain as much information about the allegations against them so that they can refute them and it is said that those rights should trump those of the State.
16. In those cases the Secretary of State has to disclose their case but they have the right to withhold this information from the person subject to the control order but that information has to be set out in a closed document. The closed document is given to the special advocates who are a group of people specially selected in the sense they have security clearance and who act on behalf of the individual concerned. Unlike normal advocates they cannot take instructions from the controlled person after they have received the closed information. Not surprisingly bodies like Liberty consider that the present regime is unfair because the person subject to the control order does not see this information

or is able to give instructions in respect of it. They also object to the terms of the control orders as being unfair.

17. To obtain a level playing field in a case called AF (No.3) against the Secretary of State the House of Lords had to resolve this problem and they explained that considerations of national security could not justify the non disclosure but it may be acceptable not to disclose the sources of evidence that form the basis of suspecting that somebody has been involved in terrorism
18. The position is therefore that where this form of material has to be disclosed to the person subject to a control order, the Secretary of State has a choice of either disclosing it or being unable to rely on it.
19. There might well be a case where the person who has given the information on which the Secretary of State relies has a personal motive or a grudge against the controlled person and wishes to give information, which is untrue. In my experience the Secretary of State or rather the agent who gives evidence on behalf of the Secretary of State will explain why they might be concerned about the reliability of a witness or a source of information in the closed session.

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