

CASE COMMENTARY

**HUMAN SACRIFICES AT THE ALTAR OF
TERRORIST CONTROL**

**Secretary of State for the Home Department v MB: Secretary of
State for the Home Department v AF [2007] UKHL 46**

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BACKGROUND

Joseph K in Franz Kafka's *The Trial*¹ is arrested and put on trial, but the evidence against him is never disclosed and so he is suspended in a legal nightmare.² On December 16th 2004, the House of Lords, in *A and others v Secretary of State for the Home Department*,³ ruled that indefinite detention of non-UK nationals, without charge or trial, was incompatible with Article 5 of the European Convention of Human Rights (ECHR). In *A and others v Secretary of State for the Home Department (No 2)*,⁴ Lord Carswell said, "...no court will readily lend itself to indefinite detention without charge, let alone trial."⁵ Following the House of Lords ruling and the subsequent release of the Belmarsh prisoners,⁶ the government responded with reflex immediacy, and less than three months later, on March 11th 2005, introduced the Prevention of Terrorism Act 2005 (PTA), its sole objective to provide for a new and novel legal mechanism that of a non-derogating and

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¹ F Kafka *The Trial* (London: Penguin Classics, 1994).

² See G M Smith "Reading Kafka's trial politically: Justice-Law-Power" (2008) 7 1 *Contemporary Political Theory* (23) 8.

³ [2004] UKHL 56 [2005] 3 All ER 169, [2005] 2 AC 68. Appeals allowed. Human Rights Act 1998 (Designated Derogation) Order 2001 quashed. A declaration was made that s 23 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Articles 5, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

⁴ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 1 All ER 575. "The appeals would be allowed and the cases remitted to the SIAC for reconsideration..."

⁵ *Ibid*, at para 164.

⁶ Detained in HMP Belmarsh without charge.

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derogating ‘control order.’ This provision inhabits a newly emerging area of what can be described as “utter law”, a veritable ‘no man’s land’ neither criminal nor civil,⁷ neither within the law as we have known it nor wholly outside it. Without a history or a nomenclature to describe them, such orders, are in effect an expression of the clarion call for political/ideological control to restrict, resist and defeat political/ideological activity. With its elusive perforated veneer of legality, defined under section 1(1) of the Act, a control order is an order against an individual imposing obligations on him or her for “the purpose of protecting members of the public from the risk of terrorism.”⁸ The control order adds to the expanding spectre of counter-terrorism law — which already includes, inter alia; proscribing of certain political organisations,⁹ proscribing the wearing of particular uniform,¹⁰ proscribing fund raising in connection with certain organisations,¹¹ and making illegal the possession of an article considered to be ‘involved in terrorism,’¹² a raft of additional offences more recently introduced under the Terrorism Act 2006,¹³ including, encouragement¹⁴ and the entirely novel offence of ‘glorification of terrorist activity.’¹⁵

⁷ The House of Lords did not resolve this matter, see *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF*, [2007] UKHL 46, para 17, per Lord Bingham: “...in this country...judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial.” Further, in *Customs and Excise Commissioners v City of London Magistrates’ Court* [2000] 4 All ER 763, it was held: “criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and [that]: the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant.”

⁸ See Explanatory Notes to the Prevention of Terrorism Act 2005, Chapter 2.

⁹ Terrorism Act 2000, s 12. See also *R v F*, Court of Appeal (Criminal Division) February 16th 2007 [2007] EWCA Crim 243, [2007] 2 All ER 193, in which it was held that, “... in interpreting the meaning of ‘proscribed organisation’ under section 58 of the Terrorism Act 2000, F was not entitled to argue that the provision permitted him to advance as a ‘reasonable excuse’ for possessing the relevant documents that they had ‘originated as part of an effort to change an illegal or undemocratic regime’.”

¹⁰ Terrorism Act 2000, s 13.

¹¹ Terrorism Act 2000, s 15.

¹² Terrorism Act 2000, s 57. See also *R v M* [2007] EWCA Crim 298, [2008] Crim LR 71, *R v Rowe* [2007] EWCA Crim 635, [2008] Crim LR 72.

¹³ The Terrorism Bill 2007 (commons 2nd reading stage, April 2008) seeks to extend the range of current offences.

¹⁴ Terrorism Act 2006, s 1.

¹⁵ Terrorism Act 2006, s 1(3)(a)“For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every

Section 2(1) of the 2005 Act provides for the first of two control orders. The first order, the ‘non-derogating control order’ can be made against an individual by the Secretary of State, if s/he “(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.”¹⁶ Section 2(2) of the Act provides that the Secretary of State may make a control order against an individual who is already bound by a control order made by the court but only if s/he does so “(a) after the court has determined that its order should be revoked; but (b) while the effect of the revocation has been postponed for the purpose of giving the Secretary of State an opportunity to decide whether to exercise his own powers to make a control order against the individual.” Section 3(1)(a) requires permission of the court, to make such an order, although ‘in cases of urgency’¹⁷ an order can also be made without first seeking their permission. However, the Secretary of State must immediately refer the case to the court for its confirmation (section 3(2)(c)). A non-derogating control order may be made for a period of 12 months and is renewable (section 2(6)). Under section 3(2)(a) the court must consider whether the Secretary of State's decision — that there are grounds to make the order — is ‘obviously flawed.’ In determining the meaning of ‘obviously flawed’ the standard for the court is that set for determination of judicial review (section 3(11)), ie., that the decision of the court or tribunal can only be overturned if it is so unreasonable that no court or tribunal could have reached that decision.¹⁸ And, if an aspect of the order, such as a particular obligation within the order is ‘obviously flawed,’ then that part of the order must be recinded. An application for a control order may proceed in the absence of the individual against whom it is being sought, without the person being notified, or having the opportunity of making representations (section 3(5)).

statement which—(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.” ‘Glorification’ is defined in s 20(2) as including “any form of praise or celebration, and cognate expressions are to be construed accordingly.”

¹⁶ Prevention of Terrorism Act 2005, s 2(1).

¹⁷ The Secretary of State will put up to the court what the state defines as terrorism and the court will set the parameters of its meaning by accepting or rejecting competing legal constructions of the term ‘terrorism’.

¹⁸ See *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

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The second type of order, the ‘derogating control order,’ mirrors its brother order, in most respects, except that section 4(3) allows its makers to derogate from the protection otherwise promised the ‘controlee’ under Article 5 (ECHR),¹⁹ if it appears to the court:

“ (a) that there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity; (b) that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting members of the public from a risk of terrorism; (c) that the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and (d) that the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.”[sic]

Such orders are live for six months and like non-derogating orders can also be renewed “on as many occasions as the court thinks fit.”²⁰

A non-derogating or a derogating control order may be made against any suspected terrorist, including both UK and non-UK nationals in respect of international or domestic terrorist related activities.²¹ The draconian beauty of the control order is that it can be bespoke in the restrictions that can be imposed on the controlee in accordance with the dictate of the Secretary of State.²² Such an order contains the power to circumscribe the course of the daily life of the person against whom it is made and can include; controlling a persons freedom of association with others or freedom of movement or, of communication or, of residence or enjoyment of services, such as use of the telephone or the internet. It may also include a requirement to be at a specified place or in a particular area at certain times of the day (section 1(5)), including electronic tagging (section 1(6)). It also permits the police to search one’s home and remove items from premises for tests, and includes a

¹⁹ Derogations from the Convention are rare but can be justified in times of national emergency or national security. See The Human Rights Act (Designated Derogation) Order 2001, Statutory Instrument 2001 No 3644.

²⁰ Section 4(10) PTA 2005.

²¹ The Home Secretary is required to report to Parliament as soon as reasonably possible after the end of the relevant three-month period on how control order powers have been exercised during that time Control Orders Quarterly Statement (11 Sept – 10 Dec 2007) December 12th 2007.

²² Section 1(4) PTA 2005.

requirement to report to police at a specified time and place. Contravention of any obligation set down within the order constitutes a breach and is punishable with up to five years' imprisonment.²³ At the time of writing fourteen control orders were in force, eight of which were made in respect of British citizens.²⁴

The power to impose a control order turns on the definition of 'terrorist related activity.'²⁵ This phrase is insufficiently defined. It embraces under its banner a band-wagon of ills and misdemeanours²⁶ and resistance, which depend entirely on the authorities' suspicion and anxiety, such that ways of thinking and feeling – that is – intellectual and emotional moods as well as actions or contemplated actions, which are considered to be terrorist related, are all included. For example, individuals who resist oppressive regimes may be defined as terrorists. Present law would criminalise as terrorist those who resisted, arguably, the most brutal occupation of history, as when the FLN fought to wrest Algeria from the French.²⁷ Conor Gearty has recently warned:

“...the definition of 'terrorism' in the 2000 Act is far wider than is popularly assumed, covering politically, religiously or ideologically motivated serious violence to the person and serious damage to property but also similarly motivated conduct creating either 'a serious risk to the health or safety of the public or a section of the public' or

²³ See section 1(4) a-p and sections 5-8, ss 9(1) and (4)(a)). See also *Bullivant* later, n 73.

²⁴ Control Orders Quarterly Statement (11 Sept – 10 Dec 2007) December 12th 2007.

²⁵ “Terrorism” is defined by the several offences created, and in the Terrorism Act 2000, s 1.

(1) In this Act 'terrorism' means the use or threat of action where—(a) the action falls within subsection (2)(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause (2) Action falls within this subsection if it—(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action,(d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

²⁶ In *R v K* [2008] EWCA 185, the appellant appealed against a decision of the judge alleging offences under s 58 of the Terrorism Act 2000. K was charged with three counts of possessing material containing information “likely to be useful to a person committing or preparing an act of terrorism.” The first count involved a copy of the Al Qaeda training manual, the second count related to a text about Jihad movements, the third count related to a text about the duty of a Muslim to work for an Islamic state. Whether such material is ‘likely to be useful’ is a matter for the jury.

²⁷ See for example “The Battle of Algiers” Gillo Pontecorvo 1966; F Fanon, *The Wretched of the Earth* (London: Penguin Classics, New Ed, 2001).

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which is 'designed seriously to interfere with or seriously to disrupt an electronic system' and that this means these control orders will be far wider than is generally understood."²⁸

So, following the House of Lords in *A*, since a person suspected of terrorist activity can no longer be detained indefinitely in Belmarsh, the control order, by replicating prison conditions, provides instead that a person can now be detained indefinitely in their own home. Also, dispensing with the principles of both logic and causation, the restrictions imposed on a controlee need not be related to the grounds for suspicion. Section 2(9) states, "It shall be immaterial, for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted by the obligations is connected with matters to which the Secretary of State's grounds for suspicion relate." This demonstrates that the ambit of the order strays far beyond what it claims – prevention – into a new punitiveness.²⁹ Neither the person subject to a control order application nor his lawyers know the nature of all the evidence against him or her, as some or all of the evidence upon which the Secretary of State relies to base his or her suspicions, is closed. Such secrecy is justified on the grounds that surveillance and other evidence should be closed in order to protect intelligence operations and those working for the intelligence services.³⁰ Thus, a suspected person does not know the evidence against him or her, and cannot hear or test the evidence against him or her (although the evidence is disclosed to a special advocate).

THE CASE AGAINST AF

AF, is one of several individuals subjected to a control order(s) who finds himself like Joseph K, in a legal nightmare where the case against him is not revealed, the evidence against him, undisclosed. The allegations against AF

²⁸ Current Legal Problems Public Lecture, University College London, March 3rd 2008.

²⁹ Lord Bingham in the House of Lords in *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46, at para 23 recognised that a "preventative measure may be so adverse as to be penal in its effects if not in its intention."

³⁰ Paras 4(2)(a) and (b) of the Schedule to the 2005 Act provided that rules of court might preclude disclosure to a party of the reasons for decisions and might make provision for hearings to be conducted in his absence. Paras 4(3)(b) to (d) of the Schedule require that the rules of court in turn require that the court permit the Secretary of State not to disclose material to a party if its disclosure would be contrary to the public interest.

are that he had links with Islamist extremists in Manchester, and that some of these individuals were affiliated to the Libyan Islamic Fighting Group.³¹ In AF's case the control order included, the following bespoke arrangements, electronic tagging, restrictions as to residence, which included an 18 hour curfew order. (This order was later revoked and a new order including a 14 hour curfew, between 6pm and 8am, substituted). Friends could visit during the hours of curfew only following prior identification and approval by the police. Contact with certain named individuals was prohibited. AF's movements outside curfew hours were restricted to a defined geographical area and there were further restrictions as to attendance for religious worship, communications, travel and travel documentation, banking, financial and employment matters, and police could enter and search his home at any time.

SECTION 3 HEARING

At the supervisory hearing on March 30th 2007, in respect of the control order, a series of issues were raised³² including, whether the order constituted a deprivation of liberty within Article 5 ECHR, whether the lack of disclosure resulted in a breach of Article 6, and whether the order was made unlawfully as it was made by a person delegated to do so and not by the Secretary of State herself. Ouseley J, quashed the second order – (PTA/33/2006) – on the grounds that the restrictions it imposed on AF cumulatively amounted to a deprivation of liberty under Article 5(l) ECHR.³³ Significance was attached to the cumulative effect of the restrictions, especially those preventing AF from visiting mosques, places of education and places offering employment opportunities. Added to which, the fact that some of the restrictions could be renewed for a number of years was also a weighty consideration. On Article 6 – the right to fair trial – specifically the fact that the evidence was undisclosed to AF, Ouseley J, said that the order was 'not flawed' merely because of non disclosure, nor because the Secretary of State had not made it herself and had delegated her powers to another government official, although he said that the evidence against AF had been 'scarcely gisted.' Ouseley J, dismissed AF's application for a declaration of incompatibility, but granted a certificate which permitted both parties to appeal directly to the House of Lords. The issues for the House included:

³¹ The Libyan Islamic Fighting Group is a group opposed to Moammar al-Qadhafi, and is a proscribed organisation under Schedule 2 of the Terrorism Act 2000.

³² *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) [2007] All ER (D) 21 Apr para 9.

³³ As set out in Sch I to the Human Rights Act 1998) (the convention), [2007] EWHC 651 (Admin) [2007] All ER (D) 21 (Apr).

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“(i) whether the obligations imposed on AF by the control order amounted to a deprivation of liberty within the meaning of art 5(1) of the convention; (ii) whether a non-derogating control order constituted a criminal charge for the purposes of art 6 of the convention; and (iii) whether the procedures provided for by s 3 of the 2005 Act and the rules of court were compatible with art 6(1) of the convention in circumstances where they had resulted in the case made against an individual being in its essence entirely undisclosed to him and in no specific allegation of terrorism-related activity being contained in open material. The judge ... decided issue (i) in favour of AF and issues (ii) and (iii) in favour of the Secretary of State. The Secretary of State appealed and AF cross-appealed.”³⁴

HOUSE OF LORDS

Because AF’s appeal involved a point of law with respect to deprivation of liberty (Article 5) and fair trial (Article 6), rights which were also the subject of other appeal cases, these appeals were heard together in the House of Lords in what has been called a ‘leap frog procedure.’³⁵ The hearing took place in July 2007 and the speeches were delivered on October 31st 2007. The House allowed the Home Secretary’s appeal on the first issue, although they agreed that control orders involving curfews of 18 hours were indeed in breach of Article 5. In relation to Article 6, the second issue, the House of Lords unanimously held that whilst a non-derogating control order does not amount to a criminal charge,³⁶ “...nevertheless those against whom such orders are proposed or made are entitled to such measure of procedural

³⁴ *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46 HL [2008] 1 All ER 657 at 658. (Hereafter *AF* [HL]).

³⁵ The judge may grant a certificate under s 12(3)(b) of the Administration of Justice Act 1969 if he is satisfied (a) that the relevant conditions are fulfilled; (b) that a sufficient case has been made to justify taking to the House of Lords an application for leave; and (c) that all the parties to the proceedings consent to the grant of a certificate. The relevant conditions are that a point of law of general public importance is involved and that the point of law either (a) relates wholly or mainly to the construction of an enactment or of a statutory instrument and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or House of Lords in previous proceedings and was fully considered in the judgments of the Court of Appeal or House of Lords in those previous proceedings.

³⁶ This was not the view of the Joint Committee on Human Rights (Twelfth Report of Session 2005-2006, HL Paper 122, HC 915), which held that the criminal limb of Article 6(1) applied, see para 49.

protection as is commensurate with the gravity of the potential consequences.”³⁷ On the third point, relating to the compatibility of section 3 of the 2005 Act with Article 6, it was further held by a majority that procedures for the courts to review non-derogating control orders – in particular the procedures for withholding closed material – do not inevitably amount to a breach of the civil limb of Article 6, but it would they said depend entirely on the circumstances of the case in hand. They generally favoured the conclusion that there had been a breach in the instant case and therefore remitted the matter.

In reviewing the question of compatibility of section 3 of the 2005 Act with Article 6, Lord Bingham, in carefully considering two strands of authorities, said “the law on this subject is not altogether straightforward.”³⁸ The first strand of authority considered held that Article 6 was absolute, (here relying on Lord Hope in *Brown*³⁹ who had said that the right to a fair trial was “fundamental and absolute” and also McLachlin CJ, for the Supreme Court of Canada, in *Charkaoui v Minister of Citizenship and Immigration* (2007)⁴⁰ who observed “Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it,” and also O'Connor J, in *Hamdi v Rumsfeld* (2004))⁴¹ who said, “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.”⁴² The other strand which Lord Bingham considered encompassed the Strasbourg jurisprudence which held that in the context of national security the right to fair trial and disclosure is not absolute.⁴³ The House of Lords regrettably lacked consensus on this point revealing instead different shades of opinion with regard to whether the general question of non-disclosure, of necessity, amounted to a breach of Article 6. In the instant case Lord Bingham said, “. . . I . . . see force in the argument that a declaration of incompatibility should be made and the orders quashed. Having, however, read the opinions of my noble and learned friends Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood, I see great force in the contrary argument, and would not wish to press my opinion to the point of dissent. I therefore agree that s 3 should be applied, and the cases referred back, as they propose, for

³⁷ *AF* [HL], at para 24 per Lord Bingham.

³⁸ *AF* [HL], at para 17.

³⁹ *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2LRC 612, [2003] 1 AC 681, 719 and in *DS v Her Majesty's Advocate* [2007] UKPC D1, 2007 SCCR 222 (22 May 2007, unreported).

⁴⁰ [2007] 1 SCR 350 para 53.

⁴¹ (2004) 542 US 507.

⁴² *Ibid* at 533.

⁴³ *AF* [HL] para 32.

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consideration in each case by the judge in the light of the committee's conclusions.”⁴⁴ In considering whether non-disclosure of the closed material was consistent with the right to a fair trial, Lord Hoffman decided that it was a judicial question and not one for the Secretary of State: but he came down on the side of finding that the special advocate procedure provided sufficient safeguard to satisfy Article 6:⁴⁵

“ The Canadian model is precisely what has been adopted in the United Kingdom, first for cases of detention for the purposes of deportation on national security grounds (as in *Chahal*) and then for the judicial supervision of control orders. From the point of view of the individual seeking to challenge the order, it is of course imperfect. But the Strasbourg court has recognised that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest. The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security. There is no Strasbourg or domestic authority which has gone to the lengths of saying that the Secretary of State cannot make a non-derogating control order (or anything of the same kind) without disclosing material which a judge considers it would be contrary to the public interest to disclose. I do not think that we should put the Secretary of State in such an impossible position and I therefore agree with the Court of Appeal that in principle the special advocate procedure provides sufficient safeguards to satisfy art 6.”⁴⁶

Baroness Hale, drawing on her experience of child and family law where non-disclosure was, on occasion, considered in the best interests of child welfare⁴⁷ cited, first, child case law, and then, cited the case of *Botmeh*⁴⁸ (a terrorism case) where the court said that disclosure would not abrogate a fair trial provided that the procedure was fair. Citing what she considered to be the most important passage:

⁴⁴ *AF* [HL], at para 44.

⁴⁵ *AF* [HL], at para 54.

⁴⁶ *AF* [HL], at para 54.

⁴⁷ *AF* [HL], at para 60.

⁴⁸ *R v Botmeh* [2001] EWCA Crim 2226 [2002] 1 WLR 531.

“However, . . . the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence as are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.”⁴⁹

Baroness Hale was of the opinion that, in most cases, the special advocate, could ensure fairness, with the proviso that:

“All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.”⁵⁰

Whilst, Lord Brown said it was not necessary to sacrifice fair trial in the interests of terrorist legislation, he also said that there may be exceptional cases where Article 6 would in effect be suspended:

“There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at – consider, for example, the judge's remarks in AF's own case, set out by my noble and learned friend Baroness Hale of Richmond at para 67 of her opinion), he would have to conclude that the making or, as the case

⁴⁹ *AF* [HL], at para 62.

⁵⁰ *AF* [HL], at para 66.

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may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even “a substantial measure of procedural justice” (*Chahal v United Kingdom* (1996) 23 EHRR 413 at para 131) notwithstanding the use of the special advocate procedure; “the very essence of [his] right [to a fair hearing] [will have been] impaired” (*Tinnelly & Sons Ltd and McElduff and others v United Kingdom* (1998) 27 EHRR 249, para 72).⁵¹

The House concluded by finding, as Lord Carswell summarised, “The judge has not made a decision on the overall fairness of the hearing and its compliance with Article 6, and in these circumstances I would allow the Secretary of State's appeal, reverse the judge's order quashing the control order and send the case back to the Administrative Court for reconsideration in the light of the opinions expressed by the House.”⁵²

THE AFTERMATH - AF REMITTED⁵³

Following the House of Lords judgement there have been four hearings in the High Court with regard to AF on matters ongoing and matters related to the substance of the House of Lords ruling. I deal with three of them here.

Queen's Bench Division

(i) November 30th 2007

Stanley Burnton J,⁵⁴ considered the case of AF in November 2007. The hearing before him was formally listed as a hearing for directions for the substantive hearing in relation to control order PTA/4/2007 and the issue of recusal. However, since the decision of the House of Lords had supervened it had the effect of retrospectively provisionally reviving PTA/33/2006, (which had earlier been quashed by Ouseley J, in March 2007) and remitting it for consideration to the administrative court.⁵⁵

On the question of the weight of the recusal application and possible bias, Stanley Burnton J said this: “The liberty of AF will be substantially affected

⁵¹ *AF* [HL], at para 90. See also *Secretary of State for the Home Department v AF (Proceedings under the Prevention of Terrorism Act 2005)* [2008] EWHC 453 (Admin) para 6.

⁵² *AF* [HL], at para 87.

⁵³ [2007] EWHC 2828 (Admin) November 30th 2007, *The Times*, December 17th, 2007.

⁵⁴ From April 1st 2008 appointed Lord Justice of Appeal.

⁵⁵ [2007] EWHC 2828 (Admin) November 30th 2007, para 5.

by the result of these proceedings; they are akin to criminal proceedings; those facts, and the particular importance of decisions in this area commanding public confidence, make it particularly important that there should be no appearance of pre-judgment bias. The opinions in the House of Lords do not indicate that the remitted issue should be determined by a judge other than Ouseley J, but they heard no argument on the present issue.”⁵⁶ And found “...there is no basis for recusal on the basis of objective pre-judgment since a different judge would equally be bound by the earlier findings.”⁵⁷

In giving directions for the substantive hearing he said that, “...for the purposes of s 3(10) the court must consider whether the control order was necessary (applying judicial review principles) when made and until a decision is made under that subsection...”. Whilst for the purposes of s 10(4)(a) (which relates to renewal), he said; “...this requires the court to consider the lawfulness of the renewal or refusal to revoke it.”⁵⁸ He went on to say:

“This does not mean that in the present case on the s 3(10) hearing on PTA/4/2007 the court is bound to reach the same factual conclusions as those originally reached by Ouseley J in the hearing in relation to PTA/33/2006. The evidence will differ, in that it will have been brought up to date by both parties; there may be additional evidence quite apart from the consequences of the decision of the House of Lords; the Secretary of State may decide to disclose evidence that was previously closed, which may lead AF to supplement his evidence; he may decide to testify; the court may preclude the Secretary of State from relying on some evidence on which he was previously able to rely; and the court will have to consider the consequences of the passage of time during which AF has been subject to control orders. Inevitably, as all counsel recognise, the decisions of the court on the admissibility of evidence on which the Secretary of State seeks to rely will impact on the issue remitted by the House of Lords on PTA/33/2006.”⁵⁹

(ii) March 10th 2008

In this hearing, before Stanley Burnton J, the question of whether the procedure involving the special advocate was compatible with the right to a

⁵⁶ [2007] EWHC 2828 (Admin) November 30th 2007, para 6.

⁵⁷ [2007] EWHC 2828 (Admin) November 30th 2007, para 10.

⁵⁸ *Secretary of State for the Home Department v AF* [2007] EWHC 2828 (Admin) [2007] All ER (D) 481 (Nov) para 16.

⁵⁹ *Ibid*, at para 20.

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fair hearing, was considered. Stanley Burnton J enumerated what factors in his view would be relevant. The court found that with regard to control order PTA/33/2006, AF had not had the basic allegation explained to him in open sessions and could not give instructions to the special advocate, and also that the lower court could have precluded the Secretary of State from relying on the withheld information if it had formed the view that in the absence of disclosure to the respondent such reliance would have resulted in an unfair hearing. With regard to control order PTA/4/2007, it had been submitted by counsel for AF and also by the special advocate that it could not be Article 6 compliant unless further disclosures were made to AF by the Secretary of State.⁶⁰ Stanley Burnton J, reviewed the law on Article 6 and detailed the three judicial opinions⁶¹ expressed by the House of Lords in *AF* and *MB*, of particular relevance were the first two opinions, first, that fairness required a balance between the public and the respondent and that the proceedings will satisfy the requirement of fairness ‘provided all that can reasonably be done to represent and to protect his interests’ (Lord Hoffman’s position)⁶² and the second view that proceedings cannot be fair unless the person knows the allegations and is given the opportunity to effectively disprove them (Lord Bingham’s position).⁶³ He also reviewed in some depth the provisions for special advocates and the House of Lords opinions on the special advocate procedure. In this regard, he cited Baroness Hale who had said in the House that it was necessary to “probe the claim that the closed material should remain closed with great care and considerable scepticism.”⁶⁴ He concluded that the section 3(10) proceedings had not complied with Article 6 of the Convention and that in drawing on the Lord Brown exception (“that there was an exception to the general requirements of Article 6 if the court could feel quite sure that in any event no possible challenge could conceivably have succeeded”) he took the view that Article 6 compliance could only be secured if there was no conceivable challenge to the closed material. On this basis, Stanley Burnton J found that the judge in the lower court should address the question of whether there might conceivably be a challenge to the closed material in order to adequately consider the question of Article 6 compliance.

(iii) April 9th 2008

In the April 9th 2008 hearing,⁶⁵ Stanley Burnton J considered whether he should determine the point of law on Article 6, and, secondly following

⁶⁰ Para 41-42.

⁶¹ Para 17.

⁶² See *MB* [2006] EWCA 1140.

⁶³ *AF* [HL], at para 18.

⁶⁴ *AF* [HL], at para 32.

⁶⁵ *Secretary of State for the Home Department v AF(Proceedings under the Prevention of Terrorism Act 2005)* [2008] EWHC 689 (Admin).

submissions made by counsel for AF,⁶⁶ considered whether Lord Brown's exception represented the law concluding that:

“(1) In the instant case it was open to the court to consider whether Lord Brown's exception represented the law. The issue should have been addressed in the previous judgment and the instant case was an opportunity to rectify that error and to deal with the point. Secondly, the judgment was not a final judgment, but an interlocutory one for the purposes of the control order. Thirdly, the issue was one of law, divorced from the facts and no question arose of further evidence being relevant to its determination. Moreover, it was better that the Court of Appeal had a first instance judgment on the issue, which had been comprehensively argued. Fourthly, the Secretary of State was unable to point to any prejudice she would suffer if the point was determined. Lastly, if the exception was available it would not infrequently be sought to argue that it did apply. It would provide an escape valve from the general requirement of disclosure of the substance of the case against a respondent.”⁶⁷

He then went on to consider whether there was authority for such an exception and was referred by counsel for AF to the case of *Botmeh*⁶⁸ where the Court of Appeal held that the material against the defendant[s] should be considered ex parte and that there was no breach of Article 6 because public interest immunity was rightly granted given that disclosure would have resulted in a threat to life and the matter before the Court of Appeal added nothing of significance to what was before the trial judge. Stanley Burnton J, said that the case of *Botmeh* was a long way from AF since, unlike in *Botmeh*, in AF ‘everything of significance’ was withheld. Stanley Burnton J, held that neither the Court of Appeal, nor the ECHR provides authority that nothing of significance need be disclosed.⁶⁹ Stanley Burnton J, then went on to consider the status of Lord Brown’s exception considering whether it was a statement which received the approval of the House of Lords. He noted that the exception did not receive the authority of the majority members of Appellate Committee,⁷⁰ therefore concluding that it was not part of the ratio decidendi of the Appellate Committee. Further, he considered whether it had been the

⁶⁶ Mr Tim Otty QC.

⁶⁷ *Secretary of State for the Home Department v AF (Proceedings under the Prevention of Terrorism Act 2005)* [2008] EWHC 689 (Admin).

⁶⁸ *R v Botmeh* [2001] EWCA Crim 2226 [2002] 1 WLR 531.

⁶⁹ *Secretary of State for the Home Department v AF (Proceedings under the Prevention of Terrorism Act 2005)* [2008] EWHC 689 (Admin) para 45.

⁷⁰ *Ibid* [2008] EWHC 689 (Admin) para 21.

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subject of subsequent authority and concluded it had not.⁷¹ Finally, on the point of whether it formed part of our law, he said, that the exception confused procedure with substance. Subject to appeal to the Court of Appeal, he put it to the Secretary of State whether she wished to disclose further allegations or evidence. For AF he said that there would have to be a further hearing, whether or not his rulings were appealed to the Court of Appeal.

DISCUSSION

Any thorough critique of this provision is beyond the purpose of this commentary. However, a few points of necessity must be made. First, as a general comment the provision of the 'control order' has little historical or legal parallel. Possibly the closest parallel is 'house arrest'. The authority of the control order is suspended in a political and 'utter legal' vacuum. Neocleous argues: "The general feeling is that the declared state of emergency has so transformed the legal landscape that we are in a 'lawless world'; detainees are living in a legal 'black hole' or the 'legal equivalent of outer space.'"⁷² Critics have said if there is insufficient evidence to charge a person with an offence defined in law then that is the end of it. The omnipotent power vested in the Secretary of State to impose a control order subverts due process. Certainly, this enveloping paranoid suspicion has had a devastating impact on individual liberty as demonstrated in the case of *Secretary of State for the Home Department v Bullivant* (proceedings under the Prevention of Terrorism Act 2005).⁷³ The evidence against Cerie Bullivant was that on January 30th 2005, he went to Heathrow airport to meet A. He was questioned at Heathrow and in reply said he was traveling to Syria to study Arabic. As A was the subject of a control order, both A and Bullivant were detained by the authorities and interviewed separately. Their accounts of their intended activities in Syria differed in one respect. Bullivant said that a friend would be waiting at the airport for them whilst A failed to mention this fact. It was then discovered that they were going to visit Bangladesh with two other friends. Bullivant said that he intended visiting Bangladesh with a view to helping in the running of an orphanage. However, the Secretary of State was of the opinion that Bullivant had an intention to travel overseas for a terrorism-related purpose and on that basis imposed a control order, which Bullivant subsequently breached. Explaining why he breached the order Bullivant said: "The combination of the conditions, coupled with the 'not knowing' when this

⁷¹ Ibid [2008] EWHC 689 (Admin) para 26.

⁷² M Neocleous "The Problem with Normality: Taking Exception to "Permanent Emergency" (2006) 2 *Alternatives* 191.

⁷³ *Secretary of State for the Home Department v Bullivant* (proceedings under the Prevention of Terrorism Act 2005) [2008] All ER (D) 322 (Feb).

is all going to end, has led me into the depths of despair. ...I feel like my life is on hold while this is going on. My life has been turned upside down for reasons that will never truly be explained to me.”⁷⁴ Second, the House of Lords judgement still leaves questions unanswered with regard to Article 6 ECHR and section 3 of the 2005 Act, and Article 6 of the ECHR and section 3 of the Human Rights Act 1998, it is a pity that a lack of clarity remains when there might have been certainty. The House of Lords was provided with an opportunity to clarify existing law in a difficult and hugely important area. They did not do so. Third, whilst the consequences of a control order are draconian and punitive, disturbingly, the standard of proof is the civil standard “on the balance of probabilities” where under section 3(2)(a) an order may remain in force only if the court is “satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity.” Fourth, with regard to control orders generally, new rules of the game under the auspices of a special court have been devised where sensitive ‘closed material’ is withheld from the person concerned and his or her lawyers, and where necessary a security-cleared ‘special advocate’ can represent his or her interests. Ashworth argues that: “these measures stretch the legal status of innocence considerably at the pre-trial stages because those so subject to control orders do not know the evidence against them and so can not challenge it.”⁷⁵ Like a corridor of connected rooms, this new vista incorporates cell trials within trials.

Joseph K, head in his hands, one snowy morning reflects on the trial:

“...the trial would not be public, if the court deems it necessary it can be made public but there is no law that says it has to be. As a result, the accused and his defence don't have access even to the court records, and especially not to the indictment, and that means we generally don't know - or at least not precisely - what the first documents need to be about it's only by a lucky coincidence. If anything about the individual charges and the reasons for them comes out clearly or can be guessed at while the accused is being questioned, then it's possible to work out and submit documents that really direct the issue and present proof, but not before.”⁷⁶ ...Counsel for the defence are not normally allowed to be present while the accused is being questioned, [and]...of course, there's no way of

⁷⁴ A mental health nursing student at South Bank University, see report in the *Nursing Standard*, 8th January, Vol 22 no 17 2008.

⁷⁵ A Ashworth “Four Threats To The Presumption of Innocence” (2006) 10 4 *The International Journal of Evidence & Proof* 241.

⁷⁶ The Project Gutenberg EBook of *The Trial*, by Franz Kafka. Translated by David Wyllie, 2003, Chapter Seven p 64.

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defending yourself from this, something said in private is indeed in private and cannot then be used in public, it's not something that makes it easy for the defence to keep those gentlemen's favour."⁷⁷

⁷⁷ The Project Gutenberg EBook of *The Trial*, by Franz Kafka Translated by David Wyllie, 2003, Chapter Seven p 65.