The Government Reply to

the Report by Lord Carlile of Berriew Q.C.

Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005

Cm 7194

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Lord Carlile of Berriew QC
House of Lords
London SW1A 0PW

24 JUL 2007

Dear Lord Carlile

SECOND ANNUAL REPORT ON THE OPERATION OF THE PREVENTION OF TERRORISM ACT 2005

Thank you for your report on the operation, in 2006, of the Prevention of Terrorism Act 2005. I am grateful to you for providing another detailed review. I attach the Government's formal response to the main recommendations in your report. A copy of this letter and the Government response will be placed in the House library and on the Home Office website.

With your valuable input, we will continue to scrutinise the legislation and the operation in practice of the control orders system, to ensure that it remains a necessary and proportionate means of protecting the public from terrorism, and that it works as efficiently and effectively as possible.

As you know, we are also considering further what more can be done in relation to absconds. We will also consider whether any further changes are necessary in light of the forthcoming House of Lords judgment in relation to control order issues.

Yours

Jacqui Smith

GOVERNMENT RESPONSE TO LORD CARLILE'S REPORT ON THE OPERATION IN 2006 OF THE PREVENTION OF TERRORISM ACT 2005

Necessity and proportionality of control order system

I would prefer it if no control order system was necessary. However, in my view it remains necessary given the nature of the risk of terrorist attacks and the difficulty of dealing with a small number of cases. Control orders provide a proportional means of dealing with those cases, if administered correctly... (Paragraph 7)

I remain of the view that, as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society. There are problems in the administration of the orders, not least the issue of constant surveillance. However, the disappearance of a small minority does not necessarily undermine the benefits of the orders in relation to the majority. It is plainly doubtful that any well-organised terrorism cell would wish to rely in a significant way on someone who is being sought by police internationally, so the absconders probably present little risk provided that they are sought diligently. (Paragraph 59)

The Government welcomes your overall conclusion that the control order system remains a necessary and proportionate means of protecting the public from terrorism. While the Government has consistently stated that it is impossible to prevent determined individuals from absconding, we are considering what further can be done to in relation to absconds. While police investigations into absconds might make an individual less attractive to terrorist cells, individuals subject to control orders, including absconders, are considered a threat to national security and we are not complacent about the risk that these individuals pose.

Enforcement of control orders

The viability of enforcement should always be considered when a control order is under consideration: it would not be appropriate for them to be regarded simply as a prophylactic. (Paragraph 23)

We agree. Enforcement is taken into account when considering whether to impose a control order, and the particular obligations that should be placed on an individual.

Surveillance of individuals subject to control orders

[Recent absconds] commend constant reconsideration of the surveillance and observation needs of each controlee, given the risk that each might present to national security if uncontrolled. (Paragraph 24)

We agree. The surveillance and observation requirements for individuals subject to control orders are kept under review.

Minimum delay between quashing of an old order and service of a new order

Another [controlee] disappeared immediately prior to the decision of the Court of Appeal to uphold the quashing of his control order by the High Court, and before a new order could be served. When such circumstances may arise, in future there should be provision for this eventuality – in the sense that there should be the minimum delay between the quashing of the old and the service of the new order if that is the appropriate course in the case. The police were ready to serve the new order as soon as they were allowed to under the terms of the judgment. (Paragraph 25)

The Government agrees. Procedures are in place to minimise the risk of a repeat of such an incident. As you acknowledge, in the case to which you refer, the police were ready to serve him with a new, modified control order (as they did the other five individuals in question) immediately after the judgment, at the earliest point that the order could legally have been served, but he had already absconded. We are working with the courts so that they continue to take such risks into account when making practical arrangements for the hand down of judgments.

Pursuit of individuals subject to control orders who are in breach; involvement of community

[One abscond] raises questions about how generally to approach sensitive issues such as presence in a mosque, church or other place of worship. The straightforward approach would be to make it clear that if controlees are in breach of anything other than minor aspects of conditions, the police will pursue them wherever they are situated after allowing them a short time to emerge voluntarily. Although I am not aware of any evidence of inappropriate behaviour by anyone connected with the mosque in that case, it is worth saying the following for the future. Anyone knowingly giving shelter from legal obligations has a clear civic duty to facilitate compliance with the law. If they do not do so, they will have little cause for complaint if police enter their premises. In so entering the police must show full respect for the nature of the premises concerned, and do the minimum reasonably necessary to fulfil their duty. Every effort should be made to involve community leaders and avoid giving offence. (Paragraphs 26-27)

The Government agrees that the police should pursue those in breach of control orders as appropriate, while being sensitive to any wider community issues that this may raise. These issues are likely to be particularly acute in relation to any place of worship. The precise action to take would be a matter for operational judgment by the police, and would need to be decided on a case by case basis.

Intercept as evidence

That is not to say that there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and

converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the Law should be amended to a limited extent to achieve that. (Paragraph 35)

The Government's position remains that we will only change the law to permit intercept evidence if the necessary safeguards can be put in place to protect sensitive techniques and capabilities, and the potential benefits outweigh the risks. As you will know, the Government recently announced an independent review of intercept as evidence measures on Privy Counsellor terms.

Circumstances for use of control orders

In some cases control orders against UK citizens have been founded on solid intelligence of their intention to join insurgents in Iraq or Afghanistan, with resulting risks to British and other allied troops. Whilst such uses of the legislation are appropriate in the cases I have seen, they are at the lowest end of the potential range of use for control orders. The greatest care must be taken to ensure that the orders are used only in those cases where there is a clear intention to put the stated desire into effect, as opposed to extravagant expressions of support or wishes. (Paragraph 37)

We agree with the principle expressed here. However, control orders remain an important way of preventing an individual from travelling abroad to engage in terrorism-related activity.

Mental health of individuals subject to control orders

I have received some representations about and am alive to the potential psychological effects of control orders. In judicial review proceedings in the High Court relating to controlee E, expert evidence has been given of adverse psychological reaction, directly related to the existence and terms of the control order. This is certainly a relevant consideration in relation to the obligations imposed by such an order. Those representing the controlees must (and surely have a professional and ethical duty to) ensure that any such evidence is drawn to the attention of the Home Office as early as possible. Subject to verification, such evidence should be acted upon whenever possible. There is support in case law for the proposition that, where the State takes coercive measures that could affect the physical or mental well-being of the individual, it is under a duty to monitor effectively the impact of those measures. (Paragraph 41)

The recent High Court judgments demonstrate the importance of considering the mental health of individuals subject to control orders. But they also confirm the Government's judgment that mental health concerns do not necessarily obviate the need for a control order. In the case of *Secretary of State for the Home Department v Mahmoud Abu Rideh* [2007] EWHC 804 (Admin), handed down on 4 April, the High Court concluded that 'While account must be given to Rideh's mental health problems, they do not trump the national

security case against him. That national security case means it is legitimate for him to be subjected to a control order with consequent restrictions.'

The mental health of an individual is taken seriously by the Home Office when a control order is considered and imposed, and on an ongoing basis. One of the ways in which this is done is through the quarterly Control Order Review Group (CORG), which considers this formally. Information from those representing individuals subject to a control order will be another source of information. The Home Office invites representations from those representing individuals subject to control orders as appropriate.

Proportionality of control order obligations

The key to the obligations is proportionality. In each case they must be proportional to the risk to national security presented by the controlee. The minimum obligations consistent with public safety are the only acceptable basis for control orders. (Paragraph 43)

The Government considers, and regularly reviews (including formally in CORG), the necessity and proportionality of all obligations imposed on an individual subject to a control order.

The need for an exit strategy

...there has to be an end of the order at some point, in every case. Some of the controlees have already been the subject of their orders for a considerable time. Their orders cannot be continued indefinitely – that was never intended and would not be permitted by the courts. As a matter of urgency, a strategy is needed for the ending of the orders in relation to each controlee: to fail to prepare for this now whether on a case-by-case basis or by legislation (if appropriate) would be short-sighted. (Paragraph 43)

The Government already considers exit strategies for individuals subject to control orders, but as a result of your recommendation has ensured this is placed on a more formal basis. To that end, any possible exit strategy is formally considered quarterly for each individual subject to a control order, with a view to deciding whether a control order remains necessary, whether there are other options to address the risks, and to see whether the control order obligations remain necessary and proportionate.

The main current potential exit strategies available are:

- Prosecution. The prospect of prosecution is kept under review by the police in all cases.
- Deportation. Nine individuals previously subject to control orders have been served with notice of deportation and their control orders revoked, of whom six have been deported.
- Modify the obligations in a control order. Both control orders and individual obligations are kept under regular review to ensure they remain necessary and proportionate to protect the public from a risk of terrorism; it follows, therefore, that obligations may be reduced or removed as a result of these

reviews (conversely, obligations could be increased, if that were necessary).

- Non-renewal or revocation of a control order, if the Secretary of State concludes that a control order is no longer necessary to protect the public from a risk of terrorism.

The Government believes it is important to consider whether de-radicalisation and rehabilitation programmes could be deployed to help individuals subject to a control order. Such initiatives would form another potential exit strategy, though consideration would need to be given – as part of the CORG process – to the appropriateness of such action in relation to each individual. The identification and evaluation of suitable programmes is at an early stage. An assessment of their applicability to individuals subject to control orders will be made in due course.

While the Government accepts that control orders should not continue indefinitely if at all possible, it does not accept that a control order should be revoked according to an arbitrary timetable. Control orders remain the best available means of dealing with individuals who cannot be prosecuted or, in the case of foreign nationals, deported. If, to protect the public from the risk of terrorism posed by an individual, a control order is still necessary and proportionate, it is the Government's responsibility to renew that control order.

Consultation on the prospects of prosecution

I have seen letters from chief officers of police in relation to each controlee certifying that there was no realistic prospect of prosecution. Little is given by way of reasons. The letters remain very short, but do give slight reasons for the conclusion that there is not evidence available that could realistically be used for the purposes of a terrorism prosecution. I should still like to see more detail in those letters – for example, and if necessary in a closed version, an explanation of the sensitivity of material that could not be placed before a court of trial. If there is a thorough and continuing examination of whether a prosecution could be brought, the evidence of that examination remains unconvincing in some cases. It must never be regarded as a vestigial exercise. In my view the decision whether to prosecute should be taken following detailed and documented consultation in every case between the CPS, the police, the Security Service and the Home Office, on the basis of full consideration of the evidence and intelligence. Given the small number of cases, this cannot be an excessive request. As independent reviewer, I would hope to be shown the minuted results of that process in every case, as a matter of routine. (Paragraph 57)

The Home Office routinely consults the police about the possibility of prosecution, as required by the Prevention of Terrorism Act 2005. The Act also requires the police to consult the Crown Prosecution Service (CPS). In the case of *AF*, the police did not consult the CPS because they considered there to be insufficient admissible evidence, and did not believe there was anything that the CPS could sensibly be consulted on. The High Court concluded that though this decision was flawed and would normally lead to an

order being quashed, it did not believe that the order should be quashed automatically, 'where that failure had no possible consequences.' In this particular case the court concluded the police assessment that there was insufficient admissible evidence to prosecute *AF* was accurate; it therefore did not quash the control order on this basis.

As a result of this and other judgments and your conclusions, the police and CPS have reviewed procedures in relation to prosecution. New procedures are now in place. In every case, an advice file is prepared by the police and examined – along with any available primary evidence – by the CPS. The CPS returns that file to the police, along with their recorded advice; the police subsequently write a letter to the Home Office advising on the prospect of prosecution, as required by section 8 of the 2005 Act. The letter from the police to the Home Office will explain the conclusion the police have reached and how it was arrived at. The letters now include more detail than previously.

Ongoing review of the possibility of prosecution

I believe that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction. I encourage such investigation to continue. Information about international contacts, financial support for insurgents in Iraq or Afghanistan, and the use of guarded language to refer to potential terrorism targets might be progressed to evidence of significant terrorism crime. (Paragraph 58)

The courts, in the case of *E*, have also emphasised the importance of ongoing review of the possibility of prosecution. Prosecution is, and will remain, the Government's preferred way of dealing with terrorists. As you know, to strengthen our ability to prosecute terrorist suspects, new offences (including ones enabling the prosecution of those involved in encouraging terrorism, preparation of acts of terrorism and terrorist training) were introduced by the Terrorism Act 2006. Up to 31 December 2006, 22 individuals had been charged with new offences introduced by that Act. Including those 22 individuals, in total in 2006 85 individuals were charged after being arrested under the Terrorism Act 2000 or under other legislation where the investigation was conducted as a terrorist investigation. The Government announced on 7 June 2007 its intention to bring forward a new counter-terrorism bill which will include measures (such as post-charge questioning) that will further strengthen the Government's ability to prosecute individuals for an offence relating to terrorism.

A decision on whether to prosecute a particular individual is, of course, an operational matter for the police and the CPS. The making of a control order does not preclude further investigation of the prospects of prosecution; indeed the police are under a duty to keep under review the possibility of prosecution of individuals subject to a control order. The possibility of prosecution is considered on an ongoing basis and this is formally captured on a quarterly basis via the CORG. As with the initial consideration of the possibility of prosecution, new procedures are in place. The police review any new material

brought to their attention and, where it is necessary to do so, update the existing police file and consult the CPS.

Court's ability to take into account a change of circumstances for an individual subject to a control order

In my view a controlee should be able to say to the court that the facts upon which the order was based can be shown to be seriously erroneous, or that subsequent events have caused a substantial change to the situation. For example, a very young person may be able to show, truly, their abandonment of an earlier expressed commitment to violent jihad. It seems to me a matter of common sense that the court should be able to take into account such a change of circumstances. (Paragraph 65)

We agree. This can already be done. The judgment in *MB* made clear that the court should consider the circumstances at the time of the court hearing, and is not limited to the circumstances at the time the order was made – this would include any change in circumstances. This was confirmed by the High Court and Court of Appeal judgments in *E*: in both, new material was taken into account in determining whether the control order remained necessary.

High Court's ability to take into account new evidence or errors of fact of sufficient importance to affect the appropriateness of a control order

Judicial Review, as an examination of its developing history shows, is a robust jurisdiction where it applies. It certainly stands any international comparison, both in terms of accessibility and results. However, it does not always work as intended, especially where it is a creature of statute. It is clear to me that it was intended by Parliament that the judicial review of control orders should encompass the correction of any serious mistakes, even factual, that could be established by evidence. I am strongly of the view that the High Court should be able to take into account any new evidence or error of fact of sufficient importance potentially to affect the appropriateness of a control order. If the decision in *Secretary of State for the Home Department v MB* (quoted from extensively at paragraph 50 above) fails to achieve this with sufficient certainty, the possibility of amending the legislation should be considered. This is a matter for detailed advice to Ministers. (Paragraph 66)

As noted above, the judgment in *MB* achieves this, so no legislative amendment is required. The High Court and Court of Appeal judgments in relation to *E* confirm this.

Frequency of regular reports to Parliament on the exercise of the Secretary of State's powers under the Prevention of Terrorism 2005

As required by *section 14(1)* the Secretary of State has reported every three months to Parliament about the exercise of the control order powers. Contrary to my view expressed a year ago, in the light of the

level of activity under the Act in 2006, this regularity of reporting is reasonable. (Paragraph 71)

We agree.

Content of reports to Parliament on the exercise of the Secretary of State's powers under the Prevention of Terrorism 2005

During the course of the year I was invited to advise publicly on the form and content of the Secretary of State's quarterly statements to the House of Commons. I attach that advice as Annex 2. I am pleased to report now that considerably more information is now being provided in those quarterly statements; and that an additional Parliamentary Ministerial statement was made following the disappearance of one controlee. (Paragraph 71)

As you acknowledge, the quarterly Written Ministerial Statements from December 2006 onwards have contained additional information, following your recommendations. Additional statements have also been made in the light of further absconds.

Anonymity of individuals subject to control orders

I have received direct representations concerning anonymity. All have been in favour of its retention. However, I am well aware that publicized breaches have frustrated the media, who wished to publish names of which they were aware. They could not do so, as publication would have been in breach of court orders. As a general principle, the press should be free to publish absent a clear determination that it is in the public interest that they should not... In my view the grounds for continuing anonymity in the case of the two disappearances remain as good as when made, possibly better. Again on the facts of the cases, it seems to me that the authorities may well be more likely to ascertain the whereabouts of the two men without publicity. This may change, and may have to be determined eventually by the Courts. As independent reviewer I agree with the Home Secretary's decision, based on the operational advice of the National Co-ordinator of Terrorist Investigations, that anonymity should remain for the present at least. However, cases might arise in the future in which the public interest might require the open circulation of the name, description and details of a controlled person – whether it be because they were suspected of dangerousness whilst at large, or for their own protection. That should be for operational judgment in each case. If the legislation needs to be amended so that these matters are clear, it might usefully be included in a forthcoming Bill. (Special report, paragraphs 12, 22, 23)

No legislative amendment is necessary to achieve this. The issue of anonymity for absconders is considered on a case by case basis. As you will know, in May 2007, three individuals subject to control orders absconded and, on police operational advice, and to assist the investigation, my predecessor approached the High Court to lift the anonymity orders for these three individuals. The request was agreed and, as a result, the police were able to

make a public appeal as part of their ongoing investigation. In contrast, again on police operational advice, anonymity was maintained in relation to the June 2007 abscond.

Remedies available to court

As a connected observation, though strictly outside the Home Secretary's letter to me of the 18th October 2006, it may well be that *section 3* and *section 15(3)* of the 2005 Act would benefit from amendment to enable the Court to make relevant amendments to non-derogating control orders so that an obviously flawed obligation (e.g. an over-long curfew) need not be quashed but may be altered. If there remains any doubt about this, a clarifying legislative amendment would be a matter of common sense and should be made. (Special report, paragraph 24)

As you know, the court does not currently need to quash an entire order or an entire obligation (although it can do both of those things): it can also direct the Secretary of State to modify the obligations imposed by an order. We agree that modification is preferable to quashing wherever possible – though the Government's view is that is for the Secretary of State, not the court, to modify control order obligations.

The appropriate remedy in particular circumstances is one of the issues recently considered at the House of Lords hearing on control order matters. We will consider whether any further legislative changes are necessary in the light of the judgment.

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