

The Continuing Futility of the Human Rights Act

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One of the most dramatic and contentious measures introduced immediately after 9/11 was the power to detain suspected international terrorists indefinitely, on the say-so of the security service. Detention without trial is an extreme measure in any country at any time, and it is one that was used in Britain on only two occasions in the 20th century. The occasions for such drastic action were the First and Second World Wars, when German nationals and others were locked up. In both cases the detentions gave rise to legal challenges, which in both cases were unsuccessful, the House of Lords in each case coming down uncompromisingly in favour of security at the expense of liberty.¹ Otherwise, powers of detention have been used in Northern Ireland, with the internment of IRA suspects taking place at various points throughout the 20th century, and most recently in 1969. Internment without trial, however, was held by the European Court of Human Rights to be a breach of the European Convention on Human Rights (ECHR),² though the power to intern long survived its use in practice. But no sooner had these powers been removed by the Terrorism Act 2000 than fresh powers of internment were taken,³ this time directed at foreign nationals based in the United Kingdom, who could not be deported because of the decision in *Chahal v United Kingdom*.⁴ The practice of detention

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¹ *R. v Halliday* [1917] A.C. 260; *Liversidge v Anderson* [1942] A.C. 206.

² *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25.

³ Anti-terrorism, Crime and Security Act 2001 ss.21–32.

⁴ *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413.

without trial was particularly emotive, because of the parallel incarceration of foreign nationals (including British nationals and British residents) by the United States at Guantanamo Bay on—but not in—Cuba. It was also a practice that was ruled unlawful by the House of Lords in the *A* (or *Belmarsh*) case,⁵ which remains the only case in which (by a majority of 8:1) the House of Lords has issued a declaration of incompatibility in relation to legislation passed since the commencement of the Human Rights Act 1998 (HRA).⁶

Detention and internment were replaced by a new regime of restraint, in the form of control orders introduced by the Prevention of Terrorism Act 2005, authorising what is sometimes pejoratively referred to as house arrest. This regime has now also been subject to intense judicial scrutiny in three cases decided on the same day,⁷ but on this occasion the House of Lords appears to have beaten a retreat. Perhaps the first sign of retreat is that the level of intensity of that judicial scrutiny was much diminished, in the sense that there was no procession of nine judges to consider the issues, which were dealt with by a more standard Bench of five. This, however, is overshadowed by the second and much more important (but perhaps concealed) sign of judicial retreat, which is that—unlike the indefinite detention powers they replaced—the control order regime has survived largely unscathed. The decisions are thus remarkably paradoxical, in the sense that while two of the three applications to challenge the control order regime were successful, the rulings are more important for what they appeared to permit rather than what they purported to prohibit. So although the decisions were initially welcomed as another step towards the “normalisation” of terrorism laws, and a positive exercise of judicial power,⁸ others were making different headlines and emphasising that “Judges Back Control Orders”.⁹ It is this permissive theme of the control order decisions that we address in this paper, beginning with an account of the control order regime; followed by an account of what it is like to live under a control order regime; followed in turn by an account of the House of Lords decisions on the control order regime: before addressing wider questions which are raised by the decisions. So far as this last issue is concerned, the three control order cases provide us with a nice snap-shot of the state of English public law, at a time of even more proposals for further government-inspired constitutional reform,¹⁰ and a time of an apparently febrile Bench, with some

⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] A.C. 68. See K. Ewing, “The Futility of the Human Rights Act—A Long Footnote” (2005) 37 *Bracton Law Journal* 41.

⁶ See below, text accompanying fnn. 90–104.

⁷ *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2007] 3 W.L.R. 642; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2007] 3 W.L.R. 681; and *Secretary of State for the Home Department v E* [2007] UKHL 47, [2007] 3 W.L.R. 720.

⁸ C. Gearty, “Judges rule ok”, *Guardian Online: Comment is Free*, October 31, 2007, (available at http://commentisfree.guardian.co.uk/conor-gearty/2007/10/judges_rule_ok.html) [Accessed August 23, 2008].

⁹ *Morning Star*, November 1, 2007. Compare on the same day the *Independent* (“Law lords rule that terror suspects’ curfews are ‘virtual imprisonment’”); the *Guardian* (“Lords back terror law orders on suspects, but give them new rights”); and *The Times* (“Curfews for terror suspects should not exceed 12 hours, law lords rule”).

¹⁰ Ministry of Justice, *The Governance of Britain*. Cm. 7170 (2007); Ministry of Justice, *Constitutional Renewal*. Cm. 7342 (2007).

senior judges making bold claims about the evolving foundations of the British constitution.¹¹ According to Baroness Hale, for example, the courts will “treat with particular suspicion (*and might even reject*) any attempt to subvert the rule of law by removing governmental action affecting the right of the individual from all judicial powers”.¹²

The control order cases thus provide a glimpse of the state of play in relation to fundamental principles such as the sovereignty of Parliament in the human rights era and the commitment of the courts to the rule of law, matters addressed in the second half of this paper. It is our contention that the control order cases reveal a deep and paradoxical respect for traditional constitutional principle, in terms of a commitment to the sovereignty of Parliament in particular, but a commitment to only a weak conception of the rule of law, giving rise to unease and concern if—as some judges now claim—“the rule of law enforced by the courts is the controlling principle upon which our constitution is based”.¹³ The weak commitment to the rule of law which the cases appear to reveal has important implications for the judicial protection of human rights, with a weak conception of the rule of law leading inexorably to low levels of protection of human rights, of which the control order decisions provide some further evidence. We address the issue of the low level of human rights protection in the penultimate section of the paper, this being an issue that raises yet wider questions about the direction of public policy on the question of constitutional reform. Although we would readily concede that too much should not be made of three cases decided on the same day, these cases nevertheless represent not only sharp differences of judicial opinion about the nature of human rights protection, but also what may be the centre of judicial gravity about the place of the HRA in the contemporary constitution. The surprising vigour of parliamentary sovereignty not only provides evidence for the deep roots and unshakeable strength of the principle, but also raises questions about the most effective way of protecting human rights under the British constitution.

Control orders

Far from vindicating a human rights culture under the HRA, the response to *A* provides evidence the other way. It did not lead to the immediate release of the detainees, who despite the Lords’ ruling on December 16, 2004 were not “liberated” from their internment until March 10 and 11, 2005, once the Prevention of Terrorism Act 2005 had eventually been rushed through. The individuals in question were initially released on “conditional bail”, and on March 12 the certification that they were international terrorists was lifted, though in each case control orders were imposed. The circumstances of their release were said by solicitors Birnberg Pierce to give rise to “many and various

¹¹ *R. (on the application of Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262.

¹² *Jackson* [2005] UKHL 56; [2006] 1 A.C. 262 at [159] (emphasis added).

¹³ *Jackson* [2005] UKHL 56; [2006] 1 A.C. 262 at [105].

practical and often exasperating difficulties”.¹⁴ Birnberg Pierce drew attention in particular to the problems of the three detainees who had been released from Broadmoor, explaining that:

“Each had already expressed his nervousness at re-entering the world abruptly; each expressed his concern that he would not be able to cope with that experience. (Broadmoor in relation to all other patients has a carefully organised gradation when discharge is anticipated, involving close liaison with local mental health professionals and social workers attached to the relevant local authority). In the case of these detainees no such liaison or gradation was satisfactorily achieved; . . . and . . . both single men, both mentally ill (and in the case of . . .), were taken by police and placed alone in premises that were in no way adapted for their particular needs. . . . suffered a complete mental breakdown during his first night of release from Broadmoor, and was admitted to the psychiatric department of the Royal Free Hospital where he remained as an inpatient for five months . . .”¹⁵

But it was not only those detained at Broadmoor who experienced difficulty. According to Birmingham-based solicitors, Tyndallwoods:

“The process of releasing the men in March 2005 and serving the Control Orders was chaotic and showed a complete lack of humanity. My client was released at 10:30 pm and taken to his accommodation address. He was released without any money and there was no food at the address. He remained without food and without money until approximately 4:30 pm the following day. He was supposed to have access to a Home Office telephone number. There was no landline installed in the accommodation and it took weeks to get it. He had no access whatsoever to the telephone. The terms of the Control Order prohibited the use of mobile phones, public call boxes and the internet. You have no means of contacting the outside world. My client was not allowed to meet anyone by arrangement or have visitors who had not been cleared by the Home Office. He was allowed to leave the accommodation between 7am and 7pm, but was cut off from all normal social contact as, unless he happened to bump into somebody by chance, he was not allowed social interaction.”¹⁶

These control orders were made under the regime introduced by the Prevention of Terrorism Act 2005. A control order is defined in the Act to mean an order “against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism”.¹⁷ Control orders are of two kinds: the first are what are referred to as derogating

¹⁴ Joint Committee on Human Rights, *Twelfth Report of Session 2005–06, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*. HL Paper No.122, HC Paper No.915 (Session 2005/06), App.7, Annex 2, para.14 (hereinafter JCHR, *Twelfth Report of 2005–06*).

¹⁵ JCHR, *Twelfth Report of 2005–06* App 7, para.15. The names of the individuals were removed from the evidence as published.

¹⁶ JCHR, *Twelfth Report of 2005–06*, App.10.

¹⁷ Prevention of Terrorism Act 2005 s.1(1).

orders, and the second as non-derogating orders. The former are orders which involve a breach of the right to liberty in Art.5 ECHR, and would include house arrest.¹⁸ At the time the Bill was passed (and in response to severe parliamentary pressure), the government indicated that it would seek further parliamentary approval before using these powers.¹⁹ However, the latter could be almost as extensive and cover a wide range of orders of a most remarkable kind, which can be imposed where there are “reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity”.²⁰ The far-reaching range of restrictions which the Act permits in the case of a non-derogating control order on the weak grounds of reasonable suspicion are as follows:

- “(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;

¹⁸ Prevention of Terrorism Act 2005 ss.1(2)(b), 4(1)(a).

¹⁹ A designated derogation from Art.5 ECHR is also required prior to the issuing of any derogating control order: Prevention of Terrorism Act 2005 s.4(3)(c), (7)(c).

²⁰ Prevention of Terrorism Act 2005 s.2(1)(a) (emphasis added).

- (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.”²¹

For the avoidance of doubt, it is expressly provided that “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)”.²²

It is not only the scope of the substantive law that gave rise to concern. When the Prevention of Terrorism Bill was introduced, the Home Secretary proposed that he would be the person responsible for issuing all control orders. There is nothing unusual in this, given that—in our unique human rights culture—we have Home Office authorisation for warrants to tap telephones, open mail, place bugging devices and burgle property (unlike search warrants which need judicial approval in the form of a magistrate’s warrant). But because of political pressure, the government yielded in the case of control orders, and by a brilliant political manoeuvre (intended or otherwise) succeeded in incorporating the judiciary, thereby giving enhanced respectability to a process that constitutes a major violation of rights, such as the right to liberty, the right to privacy, the right to freedom of expression, the right to freedom of association and assembly, the right to family life, and the right to freedom of movement. Thus, non-derogating control orders are normally to be made by the decision of the Home Secretary with the permission of the High Court which must be granted (on a low standard of review) before the order comes into force. In some cases—urgency and specifically the foreign nationals who were involved in the *A* case—the order may be made by the Home Secretary before being approved by the High Court. In these cases, however, the order must be approved retrospectively, and this must be done within seven days.²³ In deciding whether to grant permission (in the standard case) or to confirm the order (in the special cases), the High Court is confined to ensuring that

²¹ Prevention of Terrorism Act 2005 s.1(4).

²² Prevention of Terrorism Act 2005 s.1(5).

²³ Prevention of Terrorism Act 2005 ss.2–3.

the Home Secretary's decision is not "obviously flawed",²⁴ a diluted standard which falls some way below the normal basis for judicial review. Alongside these new powers are remarkable new procedures for dealing with the judicial proceedings under the Act, which impose an overriding objective on the courts in cases involving control orders to ensure that there is no "disclosure contrary to the public interest".²⁵ The circumstances embraced by this phrase are breathtakingly broad with:

"... [D]isclosure (being) contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."²⁶

The procedure thereafter provides that the person to be controlled and his or her legal representative may be excluded from a hearing or part thereof.²⁷ A Special Advocate may make submissions at hearings from which the individual to be controlled is excluded, cross-examine witnesses at such hearings and make written submissions to the court. After the Home Secretary has served closed material on the Special Advocate, however, "the latter must not communicate with any person about any matter connected with the proceedings", with a number of exceptions which do not include the person to be controlled, his or her solicitor, or indeed other Special Advocates.²⁸

The impact of control orders

By the end of 2007, there were 14 control orders in force, of which eight were against British citizens.²⁹ Evidence produced to the Joint Committee on Human Rights (JCHR) in 2006 suggests that Lord Carlile's claim that control orders "inhibit normal life considerably" was a massive understatement.³⁰ The evidence was provided by solicitors who represent controlled persons (Birnberg Pierce and Tyndallwoods) and by organisations that provide support (Peace and Justice in East London, Campaign Against Criminalising Communities, and Scotland Against Criminalising Communities).³¹ With notable restraint,

²⁴ Prevention of Terrorism Act 2005 ss.3(10), (11).

²⁵ Prevention of Terrorism Act 2005 Sch. para.2(b); Civil Procedure (Amendment No.2) Rules 2005 (SI 2005/656) r.76.2.

²⁶ Civil Procedure (Amendment No.2) Rules 2005 r.76.1(4).

²⁷ Civil Procedure (Amendment No.2) Rules 2005 r.76.2(2).

²⁸ Civil Procedure (Amendment No.2) Rules 2005 r.76.2(5).

²⁹ The Minister of State for Security, Counter-Terrorism, Crime and Policing (The Rt Hon. Tony McNulty, *Control Orders Quarterly Statement: 11 September to 10 December 2007* (December 12, 2007) (available at <http://security.homeoffice.gov.uk/news-publications/news-speeches/control-orders-wms-dec>) [Accessed August 23, 2008].

³⁰ See Lord Carlile of Berriew, *Second Report of the Independent Reviewer Pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (February 19, 2007) (available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/Lord-Carlile-pta-report-2006.pdf?view=Binary>) [Accessed August 23, 2008], para.40.

³¹ This material is considered also by L. Zedner, "Preventive Justice or Pre-Punishment? The Case of Control Orders" [2007] 60 C.L.P. 174.

the Joint Committee found this evidence to be “disturbing”.³² According to the submission of one of these groups, control orders “amount to virtual house arrest. In this way the government in effect re-creates internment, pending a judicial process which could last for many years.”³³ The same witness wrote of the homes of controlled persons being turned into “domestic prisons” and of “collective punishment” being visited upon the families of controlled persons.³⁴ Otherwise, the submissions tell extraordinary tales of ill-treatment, isolation and illness, as well as the humiliation and indignity of controlled persons and their families, shown contempt at all levels by public authorities. The problems began from the moment the internees were “released”, as already pointed out. Apart from the issues already identified, another was said to relate to finding accommodation, a particular concern for those internees who were single men. As one of the JCHR’s witnesses pointed out, “the need for access and equipment installations by the tagging company makes landlords unwilling to let, especially if informed by the police of the nature of their proposed tenant”.³⁵ Although it might be possible in principle to obtain accommodation with a resident landlord, in practice the “conditions of life for the host are made impossible”,³⁶ with one potential landlord recounting his own experiences in relation to the bail of an asylum seeker under a related detention regime:

“The ‘surety conditions’ require me not to permit my friends, neighbours and acquaintances to enter my residence unless I provide the visitor’s name, address, date of birth and a photograph at least 3 days beforehand to the Home Office and seek its approval as to the time and date and the expected duration of the visit. My lap top can be inspected and taken away for up to 48 hours. My residence can be entered by police and immigration officials at any time without prior notice, etc. The ‘surety conditions’ are grossly restrictive and infringe on my civil liberties as a British citizen. I have been obliged to place myself and my residence under quarantine in order to seek the release of a friendless, young asylum seeker from unjust and unlawful imprisonment.”³⁷

In the case of those internees who are married, before their “release” from Belmarsh, their wives and children were free to meet with people and to have visitors. Now *all* visitors must be approved by the police, with few people being willing to go through this process of approval, to be branded as a “known associate of a terror suspect”,³⁸ an intimidating label calculated to promote the isolation of the controlled persons and their families. According to one witness:

“Many people are still waiting months after applying for vetting and in particular Muslim friends of the men—that is the friends who are

³² JCHR, *Twelfth Report of 2005–06*, para.18.

³³ JCHR, *Twelfth Report of 2005–06*, App.4 (Campaign Against Criminalising Communities).

³⁴ JCHR, *Twelfth Report of 2005–06*, App.4.

³⁵ JCHR, *Twelfth Report of 2005–06*, App.4.

³⁶ JCHR, *Twelfth Report of 2005–06*, App.4.

³⁷ JCHR, *Twelfth Report of 2005–06*, App.4, App.A.

³⁸ On which see the *Independent*, December 15, 2005.

willing to go through rigorous vetting procedures. Not everyone wants to put themselves in the spotlight like this. Many Muslims are afraid because, as mentioned above, they will be classified as a known associate of a terrorist suspect—a very onerous burden for Muslims, particularly without citizenship, in the current climate in Britain.”³⁹

These problems are compounded where the controlled persons are refugees and where their friends are also refugees: “no one in their circle would want to risk being tarred with the same brush of suspicion and fear is strong in the community on such matters”.⁴⁰ According to the Campaign Against Criminalising Communities many people are “intimidated, especially friends or relatives who do not hold UK citizenship and so rightly feel more vulnerable to persecution”.⁴¹ For some, the isolation can be devastating, as in the case of the controlled person who has no arms below his elbows, forced to live for five months with little furniture, and with his belongings unpacked around him, as no one could enter his home to assemble his flat packed wardrobes.⁴² Apart from isolation, there are major concerns about privacy, with complaints made about the tagging of people and the entering of their homes at “anytime of the day or night” by police and tagging companies. In evidence to the JCHR, it was claimed by one witness that:

“They live in total seclusion under very strict conditions. They exist with the certainty that they will eventually be arrested again and they suffer severe depression and post traumatic stress disorders due to their previous harrowing experiences and arrests at dawn. Their wives sleep fully clothed in trepidation of their doors being broken down in the middle of the night. The monitoring company can visit their homes at any time of the day or night and often their tagging equipment does not function properly and the families pay a distressing price for this. I know of two families living under Control Orders who had malfunctioning boxes which gave them sleepless nights without limit. The box emits a sound like a smoke alarm and their children are constantly awakened by the noise. They live in fear of their neighbours too as the constant visits from the police and tagging people alert them to their situation. Their children live in trepidation. They have witnessed their fathers’ arrests on more than one occasion and they are severely traumatized. The constant visits from the police and monitoring company, often in the middle of the night (5 police officers and 3 tagging people) alert their neighbours to their living conditions and the children are stigmatized at school. Some of the families endure the indignity of searches of their homes at any time of the day or night.”⁴³

³⁹ JCHR, *Twelfth Report of 2005–06*, App.9 (Submission from Ann Alexander, Scotland Against Criminalising Communities (SACC)).

⁴⁰ JCHR, *Twelfth Report of 2005–06*, App.8 (Submission from Peace and Justice in East London).

⁴¹ JCHR, *Twelfth Report of 2005–06*, App.4.

⁴² JCHR, *Twelfth Report of 2005–06*, App.9 (Submission from Ann Alexander, Scotland Against Criminalising Communities (SACC)).

⁴³ JCHR, *Twelfth Report of 2005–06*, App.9. See also G. Pierce, “Was it Like this for the Irish?” *London Review of Books*, April 10, 2008, p.6.

It is not only the invasion of privacy in the home that is an issue, compounded as it is by the frequent attention of the tagging companies. As one witness pointed out, the lives of the ex-internees are “dictated by the monitoring company, security services and the Home Office”.⁴⁴ They have to tell the monitoring company when they are going out, where they are going, and where they have been. As pointed out by the same witness, the controlled persons “are not allowed to write to people outside Britain so they cannot write to their families and friends abroad”.⁴⁵ And while they are permitted to have one landline into their homes, “on their small finances they cannot afford to make calls to their families”. In any event, “some cannot even afford a phone connection and have no social contact at all” while they are controlled. But “if they do have a phone, it has to be examined by the Home Office”, and one witness reported the case of a single disabled man who waited over four months to have his phone returned to him.⁴⁶ There also complaints about the failure to respect the obligations of religious worship, with one controlled person expressing concern that he had not been permitted access to the mosque, and was therefore unable to perform Friday prayers there, a right that had been respected while he had been in prison. Other concerns relate to mental and physical ill-health, with visits by medical practitioners having to be approved in advance, not all willing to be subject to this procedure. In one case:

“The man concerned suffered from polio and has had mental health issues in recent years as a direct result of his indefinite detention and harsh conditions. He has been out of prison now for three months under bail conditions. During this time his physiotherapist has not been cleared to see him for the essential work on his legs. She has been his physio for many years and cleared on previous occasions but new clearance was asked for the new conditions. Lack of treatment has brought about deterioration—he’s now confined to a wheelchair instead of being able to walk on crutches. He uses plastic leg splints—all hospital appointments to do with these have to be requested by solicitor (sic) and given clearance. One such essential visit has been cancelled in the last few days because clearance was not given in time. The GP is only 10 minutes away but is not allowed to visit, each visit has to be cleared by the Home Office.”⁴⁷

Other witnesses write about the taking away and destruction of property, the inability to use libraries (as they have internet connections), the inability to attend college courses (because all classmates have to be vetted), and of the constant harassment by the authorities and the tagging company. Perhaps even more compelling, however, are the tales of fear—fear of being arrested, fear of being deported, and fear from neighbours and local communities, with one public spirited local newspaper publishing a photograph of the home of a family where a controlled person lived.⁴⁸ On one highly publicised occasion,

⁴⁴ JCHR, *Twelfth Report of 2005–06*, App.9.

⁴⁵ JCHR, *Twelfth Report of 2005–06*, App.9.

⁴⁶ JCHR, *Twelfth Report of 2005–06*, App.9.

⁴⁷ JCHR, *Twelfth Report of 2005–06*, App.8 (Submission by Peace and Justice in East London).

⁴⁸ JCHR, *Twelfth Report of 2005–06*, App.7, para.7.

a controlled person turned up at a police station and asked to be returned to internment, not to enjoy the benefits of in-prison entertainment (on which see below), but in order to free himself and his family from the Orwellian control order experience.

Legal responses to control orders

The key decision on whether a control order results in a deprivation of liberty within the meaning of Art.5 ECHR is that of *JJ* where, by a 3:2 majority, the House of Lords dismissed the appeal by the Home Secretary. The entire court treated the Strasbourg jurisprudence as governing its approach to the meaning of deprivation of liberty, in particular, the principles laid down by the European Court of Human Rights in *Guzzardi v Italy*.⁴⁹ At one extreme of three different positions adopted by the five judges are the judgments of Lord Bingham and Baroness Hale in the majority. Applying dicta in *Guzzardi*, these judges approached the question whether there was a deprivation of liberty, as distinct from a restriction of freedom of movement,⁵⁰ as requiring consideration of “the concrete situation of the particular individual”,⁵¹ taking into account “a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question”.⁵² Applying these principles, both judges found that the control orders which bound *JJ* and others to an 18-hour daily curfew resulted in a deprivation of liberty.⁵³ Agreeing with Sullivan J., the trial judge, Lord Bingham observed that:

“The judge’s analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.”⁵⁴

At the other extreme are the dissenting judgments of Lords Hoffmann and Carswell. For both judges, it was “essential not to give an over-expansive interpretation to the concept of deprivation of liberty”,⁵⁵ curiously on grounds relating to the unqualified character of Art.5 in contrast to the qualified rights in the other articles.⁵⁶ This concept, according to Lord Hoffmann (with whom Lord Carswell agreed),⁵⁷ deals with “literal physical restraint”⁵⁸ with “[t]he paradigm case of deprivation of liberty . . . being in prison,

⁴⁹ *Guzzardi v Italy* (1980) 3 E.H.R.R. 333.

⁵⁰ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [12] (Lord Bingham).

⁵¹ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [15].

⁵² *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [16] (references omitted).

⁵³ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [24] (Lord Bingham); [63] (Baroness Hale).

⁵⁴ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [24] (Lord Bingham).

⁵⁵ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [44] (Lord Hoffmann). See also at [69] (Lord Carswell).

⁵⁶ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [34]–[35] (Lord Hoffmann).

⁵⁷ On this point, his Lordship, like Lord Hoffmann, drew support from the dissenting judgment of Judge Fitzmaurice in *Guzzardi* (1980) 3 E.H.R.R. 333 at [77]–[78].

⁵⁸ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [36] (Lord Hoffmann).

in the custody of a gaoler”.⁵⁹ Their Lordships went on to uphold the appeal by dismissing the argument that the control orders resulted in a deprivation of liberty.⁶⁰ For Lord Hoffmann, in particular, it was “impossible” to say that the controlled persons were “in prison”.⁶¹ To characterise their conditions in this way would, according to his Lordship, be “an extravagant metaphor.”⁶²

Splitting the difference between these two positions is the majority judgment of Lord Brown, who found that the *Guzzardi* statements provided very limited guidance, and that “[u]ltimately, therefore, these appeals fall to be decided as ‘a matter of pure opinion’”.⁶³ In the event, Lord Brown found that by imposing a curfew of 18 hours, the control orders deprived the controlled persons of their liberty within the meaning of Art.5. Unlike Lord Bingham,⁶⁴ Baroness Hale⁶⁵ and Lord Carswell,⁶⁶ Lord Brown ventured to suggest the point at which a curfew under a control order would result in a deprivation of liberty. According to his Lordship, while an 18-hour curfew would amount to a deprivation of liberty, “12 or 14-hour curfews . . . are consistent with physical liberty”.⁶⁷ Importantly, his Lordship added that he considered the “acceptable limit to be 16 hours”,⁶⁸ though later in his judgment, his Lordship stated that a 16-hour curfew “should be regarded as the *absolute* limit”.⁶⁹ Article 5 issues also arose in the other two decisions. In *Home Secretary v E*, the House of Lords unanimously concluded that a control order that imposed a 12-hour daily curfew did not involve a deprivation of liberty. Lord Hoffmann,⁷⁰ Lord Carswell⁷¹ and Lord Brown⁷² did so by simply referring to their judgments in *JJ*, while Lord Bingham and Baroness Hale found that the “core element of confinement” was not sufficiently severe to result in a deprivation of liberty.⁷³ Similarly, in *Home Secretary v MB and AF*, the House of Lords unanimously concluded that the control order that subjected AF to a 14-hour daily curfew did not deprive him of his liberty. As in the case of *E*, Lord Hoffmann,⁷⁴

⁵⁹ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [36]. In advancing imprisonment as the paradigm case of deprivation of liberty, Lord Hoffmann drew support from the dissenting judgment of Judge Fitzmaurice in *Guzzardi* and added that he did “not think that the majority [in *Guzzardi*] would have disagreed with this statement of principle”: *JJ* at [41]. The last statement may be questioned not least because of Judge Fitzmaurice’s characterisation of the majority judgment as involving “a serious and avoidable miscarriage of justice”: *Guzzardi* (1980) 3 E.H.R.R. 333 at [13] (Judge Fitzmaurice).

⁶⁰ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [45] (Lord Hoffmann); [84] (Lord Carswell).

⁶¹ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [45] (Lord Hoffmann).

⁶² *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [45].

⁶³ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [102] (Lord Brown). See also at [17] (Lord Bingham).

⁶⁴ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [16] (Lord Bingham) (references omitted).

⁶⁵ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [63].

⁶⁶ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [84] (Lord Carswell).

⁶⁷ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [105] (Lord Brown) (emphasis in original).

⁶⁸ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [105] (emphasis added).

⁶⁹ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [105] (emphasis added).

⁷⁰ *E* [2007] UKHL 47; [2007] 3 W.L.R. 720 at [23] (Lord Hoffmann).

⁷¹ *E* [2007] UKHL 47; [2007] 3 W.L.R. 720 at [31] (Lord Carswell).

⁷² *E* [2007] UKHL 47; [2007] 3 W.L.R. 720 at [36] (Lord Brown).

⁷³ *E* [2007] UKHL 47; [2007] 3 W.L.R. 720 at [11] (Lord Bingham); [25] (Baroness Hale).

⁷⁴ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [47] (Lord Hoffmann).

Lord Carswell⁷⁵ and Lord Brown rested their judgments on their decisions in *JJ*. Lord Bingham—with whom Baroness Hale agreed⁷⁶—overturned the trial judgment of Ouseley J. on the ground that the latter did not have the benefit of the Court of Appeal’s decision in *Home Secretary v E*, which was handed down after Ouseley J.’s judgment and, if he did, “he would in all probability have found on balance that there was no deprivation of liberty in AF’s case”.⁷⁷

In contrast to *JJ* and *E*, the issues in *MB and AF* were concerned principally with Art.6 rather than Art.5. The first issue was whether control order proceedings involve a determination of a criminal charge and whether the use of the procedures in the cases was in breach of Art.6. The court unanimously found that control order proceedings did not involve a determination of a criminal charge and, hence, were not subject to the more stringent safeguards guaranteed by Art.6. The principal reason, according to Lord Bingham—with whom the rest of the court agreed⁷⁸—was that control orders are “preventative in purpose, not punitive or retributive”.⁷⁹ It was necessary nevertheless that the control order procedures should generally provide “such measure of procedural protection as is commensurate with the gravity of the potential consequences.⁸⁰ But here the Lords were unclear about what would be required to “prevent significant injustice to the controlled person” in breach of Art.6,⁸¹ in view of the role of the judges and the Special Advocates in the procedure.⁸² Lord Hoffmann went the furthest by concluding that the procedures would always be Art.6-compliant because the “special advocate procedure provides sufficient safeguards to satisfy article 6”.⁸³ In both *MB* and *AF*, however, the gist of the case for their control orders was in closed material and was not disclosed to them. Nevertheless, only Lord Bingham was willing to conclude firmly that Art.6 was breached in these situations,⁸⁴ with Lords Carswell⁸⁵ and Brown⁸⁶ perhaps inclined to the same conclusion, but reluctant to proffer a definitive view. Baroness Hale was even more equivocal and stated that:

⁷⁵ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [78] (Lord Carswell).

⁷⁶ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [56] (Baroness Hale).

⁷⁷ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [11] (Lord Bingham). The conclusions of Lord Bingham and Baroness Hale are surprising, not least because the impact of the control order in AF’s case was more severe than that in E’s situation. AF was subject to a 14-hour daily curfew while a 12-hour daily curfew applied in E’s case. In AF’s case, he was “cut off from the outside world” (at [8] (Lord Bingham)), while E was found to have been “left with wide opportunities, and in fact does engage in everyday activities” (*Secretary of State for the Home Department v E* [2007] EWCA Civ 459; [2007] 3 W.L.R. 1 at [67] (Pill, Wall and Maurice Kay JJ.); see also at [66]).

⁷⁸ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [48] (Lord Hoffmann); [56] (Baroness Hale); [79] (Lord Carswell); [90] (Lord Brown).

⁷⁹ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [24] (Lord Bingham). On this point, see also Zedner, “Preventive Justice or Pre-Punishment?” [2007] 60 C.L.P. 174.

⁸⁰ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [24].

⁸¹ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [35] (Lord Bingham).

⁸² *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [70] (Baroness Hale); [85] (Lord Carswell); [90] (Lord Brown).

⁸³ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [54] (Lord Bingham).

⁸⁴ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [41], [43] (Lord Hoffmann).

⁸⁵ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [86]–[87] (Lord Carswell).

⁸⁶ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [92] (Lord Brown).

“It is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed.”⁸⁷

Because of his view that control order proceedings are always Art.6-compliant, Lord Hoffmann refused to find a breach of Art.6 in these cases.⁸⁸ But declining to declare the procedure incompatible with Convention rights, the majority sent the matter back to the lower court, with the House of Lords using s.3 of the HRA to subject the duty of the courts to prevent “disclosure contrary to the public interest”, to the condition “except where to do so would be incompatible with the right of the controlled person to a fair trial”.⁸⁹

Control orders, parliamentary sovereignty and the rule of law

The control order cases are important for a host of reasons, but not least because they provide us with further evidence of the nature of human rights protection, litigation and jurisprudence as we approach the 10th anniversary of the enactment of the HRA. For although the applicants succeeded in two of the three cases, as already suggested the real story about these decisions lies not in what they prohibited but in what they appeared to permit. Most notably, they continue to permit the making of control orders, which involve detention for long periods of time and restrictive non-curfew conditions, which mean that the subject is never free from severe restraint. The most striking feature of the litigation, however, is that no one thought it appropriate to argue that the regime of non-derogating control orders, as distinct from particular orders, was incompatible with human rights; that no attempt was made to secure a declaration of incompatibility on the substance of the law; and that such an attempt was made only in relation to the extreme procedural limitations under which individuals laboured before control orders were made against them. This is despite the claim by the JCHR that:

“. . . [T]he control order legislation itself is such as to make it likely that the power to impose non-derogating control orders will be exercised in a way which is incompatible with Article 5(1) in the absence of a derogation from that Article.”⁹⁰

This failure to address control orders on the high plains of s.4—after a flurry of excitement and misplaced optimism caused by the declaration of incompatibility in the *A* case—provides further evidence, if any were needed, of the enduring influence of the principle of parliamentary sovereignty, from which it seems impossible to break free. This failure to engage with s.4 on the

⁸⁷ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [74] (Baroness Hale).

⁸⁸ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [54] (Lord Hoffmann).

⁸⁹ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [72] (Baroness Hale). See also at [44] (Lord Bingham), [84] (Lord Carswell), [92] (Lord Brown).

⁹⁰ JCHR, *Twelfth Report of 2005–06*, para.38.

substance of the control orders is thus not exceptionable, with the report of the House of Lords Constitution Committee in 2007 informing us that only one post-2000 statute had been declared incompatible by the Lords, which had also overturned a number of declarations of incompatibility made by lower courts.⁹¹ Despite individual judges claiming a democratic mandate to make such declarations,⁹² and despite bold rhetoric about the rule of law trumping parliamentary sovereignty, the reality is very different, and is reinforced by the following exchange between the chairman of the JCHR and Lady Hale some three years after her radical remarks in *Jackson*⁹³:

“Q192 Chairman: Perhaps we can start with you Lady Hale. Do you think the courts in our country would ever be comfortable with a power to strike down legislation passed by parliament?

Baroness Hale of Richmond: I think we would find it extremely novel, quite alarming and would hesitate to use it. That is about as far as I need to go.”⁹⁴

There are of course many possible explanations for this failure to use s.4 more freely. One is that the tendency of government in the period since 2000 has not been to restrict liberty, though this seems an implausible explanation in light of the evidence (including that relating to the 2005 Act). A second is that pre-legislative scrutiny of Bills by both the executive and the legislature is effective so that any human rights violations are “nipped in the bud”, an explanation that seems as unlikely as the first. And a third is that the standard at which the level of rights’ violations is set is now so low that even serious restraints on liberty can cross the hurdle of legality with relative ease. Our sense is that the search for an explanation takes us closer to the third than to the first of these possible explanations, though this is to be seen in the context of a continuing deference to the sovereignty of Parliament and an apparent reluctance to challenge legislation, especially that passed post-1998, otherwise paradoxical in view of the fact that legislation in this era has been more far-reaching on its threat to liberty than at any time since the end of the Second World War. This evolving picture of deference to parliamentary institutions is perhaps to be seen painted more vividly in the *MB and AF* case, than in the *JJ* case where—unlike on the substantive law—procedural aspects of the control order regime were challenged as being incompatible with Convention rights and a declaration of incompatibility sought. Although

⁹¹ See House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*. HL Paper No.151 (Session 2006/07), App.6.

⁹² See esp. *A* [2004] UKHL 56, [2005] A.C. 68, esp. per Lord Bingham at [42]; and Lord Bingham, “The Rule of Law and the Sovereignty of Parliament”, Commemoration Oration, King’s College London, October 31, 2007 (available at <http://www.kcl.ac.uk/content/1/c6/01/45/18/TheRuleofLawandtheSovereigntyofParliament.pdf>) [Accessed August 23, 2008].

⁹³ *Jackson* [2005] UKHL 56; [2006] 1 A.C. 262.

⁹⁴ JCHR, *A British Bill of Rights, Corrected Oral Evidence given by Baroness Hale of Richmond, a Member of the House of Lords, and Lord Justice Maurice Kay; Professor Vernon Bogdanor, Brasenose College, Oxford, Rt Hon Kenneth Clarke QC MP and Mr Henry Porter; 3 March 2008*. HC Paper No.150-v (Session 2007/08).

a majority was inclined to conclude that the procedures in those cases violated Art.6 ECHR, the House of Lords (by a majority) gave what appear to be three unconvincing strategic reasons for relying on s.3 rather than s.4,⁹⁵ in circumstances that clearly disappointed the JCHR, which once again urged the courts to be more robust in the exercise of their powers under the HRA. In what must be a very unusual example of a legislative body rebuking the judges for *not* trespassing on Parliament's toes, the JCHR expressed the view that:

“. . . [I]t would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests.”⁹⁶

The approach to s.4 was unconvincing partly because of the doubtful assumptions on which it was based and the weak level of procedural protection which it appeared to produce. Doubtful assumptions in the sense that it appears to have been assumed that the government would derogate from its Convention obligations rather than bring forward amending legislation.⁹⁷ This is despite the fact that less than five months later the author of the House of Lords reasoning on this point (Baroness Hale) had expressed apparent satisfaction with the government's response to declarations of incompatibility in her appearance before the JCHR:

“Q193 Chairman: Do you think there is any judicial appetite for more extensive powers than those in the Human Rights Act, the certificate of incompatibility and so forth?

⁹⁵ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [73] where Baroness Hale said: “First, when Parliament passed the 2005 Act, it must have thought that the provisions with which we are concerned were compatible with the convention rights. In interpreting the Act compatibly we are doing our best to make it work. This gives the greatest possible incentive to *all* parties to the case, and to the judge, to conduct the proceedings in such a way as to afford a sufficient and substantial measure of procedural justice. This includes the Secretary of State, who will, of course, be anxious that the control order be upheld. *A declaration of incompatibility, on the other hand, would allow all of them to conduct the proceedings in a way which they knew to be incompatible.* Secondly, there is good reason to think that Strasbourg would find proceedings conducted in accordance with the Act and rules compatible in the majority of cases. Inviting a derogation in order to cater for the minority where it might not so find may risk even greater incursions into the fundamental requirements of a fair trial which have not yet been shown to be necessitated by the exigencies of the situation. Thirdly, and above all, there are powerful policy reasons in support of procedures which enable cases to be proven through the evidence of infiltrators and informers rather than upon evidence which may have been obtained through the use of torture. Not only is the latter abhorrent, there is good reason to believe that it is generally unreliable and counter-productive. This House has ruled that such evidence is always inadmissible, but has placed the burden of proving this upon the person who wishes to challenge it: see *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221. It is particularly difficult for a person subject to control order proceedings to do this. Devising a sufficient means of challenging the evidence is an incentive to the authorities to rely on better and more reliable sources of intelligence. That may sometimes mean keeping their identity, and sometimes some of the surrounding circumstances, secret. But that is an overall price worth paying for the good of all.” Emphasis added.

⁹⁶ JCHR, *Ninth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*. HL Paper No.50, HC Paper No.199 (Session 2007/08), para.47.

⁹⁷ See fn. 95 above. See especially the sentence in italics.

Baroness Hale of Richmond: I have not detected any in the cases we have heard so far. Perhaps that is partly because of the approach we have taken to declarations of the incompatibility and because of the approach that the government and parliament have then taken to what to do about declarations of incompatibility.”⁹⁸

Indeed, a view may be developing of an emerging convention whereby the government will introduce amending legislation to give effect to a conclusive declaration of incompatibility. Although it may be too early to say whether such a convention (if it exists) applies to post as well as pre-HRA legislation, it is nevertheless the case that amending legislation was brought forward to deal with the indefinite internment provisions of the Anti-terrorism, Crime and Security Act 2001, and there is no reason to believe that the government would not have brought forward amending legislation to address the concerns of the court in *MB and AF* were it invited to do so.⁹⁹ It is true that the government might be expected to do the minimum necessary to comply with any declaration of incompatibility. But it is also true that the level of procedural protection won by the House of Lords in *MB and AF* is quite limited. The scope of “disclosure contrary to the public interest” means that material will be withheld in a wide range of circumstances; circumstances that go beyond the government’s original claim that closed hearings were required to avoid “exposing sensitive capabilities or endangering sources of information”.¹⁰⁰ Despite this, Lord Carswell said that “there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6”, on the ground that “the legitimate public interest in withholding material on valid security grounds should be given due weight”, while also noting that the courts “should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6”.¹⁰¹ In the same vein, Baroness Hale’s view was that only “a few cases” under the Prevention of Terrorism Act would breach Art.6.¹⁰² Lord Brown also appeared to be inclined to the view that it would be “wholly exceptional” cases where “despite the best efforts of all concerned by way of redaction, anonymisation, and gisting” it will be impossible to indicate with sufficient detail the nature of the case against the suspect, despite also acknowledging that the special advocate procedure “cannot invariably” be guaranteed to safeguard the suspect against “significant injustice”.¹⁰³ Small wonder then that Lord Carlile should conclude that legal “challenges will not be regarded as an

⁹⁸ JCHR, *Ninth Report of 2007–08*.

⁹⁹ Proceeding as if the House of Lords in *MB and AF* had made a declaration under s.4, the JCHR has already proposed that “it is now incumbent on Parliament to consider again, in detail, exactly what a ‘fair hearing’ requires in this particular context, in light of the House of Lords judgment, and to amend the control order legislation accordingly”: JCHR, *Ninth Report of Session 2007–08*, para.47.

¹⁰⁰ Home Office, *Accompanying Paper 3: Reconciling Liberty and Security* (2005), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/Paper3?view=Binary> [Accessed August 23, 2008], p.5.

¹⁰¹ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [85].

¹⁰² *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [68].

¹⁰³ *MB and AF* [2007] UKHL 46; [2007] 3 W.L.R. 681 at [90].

acceptable means of opening the door to wide disclosure if national security is to be affected”.¹⁰⁴

Control orders, the European Convention on Human Rights and the rule of law

Apart from drawing attention to a surprising deference to the power of parliamentary sovereignty, the control order cases also raise questions about the rule of law. Indeed, the strong commitment to parliamentary sovereignty sees a correspondingly (but not inevitably) enfeebled commitment to the rule of law, at a most basic level. One of the most fundamental principles of the rule of law, perhaps so fundamental that it is rarely articulated in scholarly work or judicial reasoning, is that the judges should follow the direction of Parliament. In the words of Baroness Hale in her evidence to the JCHR, it is the job of “the judiciary [to] do whatever parliament [tells] them to do”, and it is “for parliament to decide what, in the end, they would like the judiciary to do”.¹⁰⁵ The rule of law issue arises here because of the way in which the courts have responded to s.2 of the HRA, which requires them to “take into account” the jurisprudence of the Strasbourg court and the other supervisory bodies established by the Convention. In requiring the courts to have regard to the Strasbourg jurisprudence, however, Parliament is instructing the courts to have a different relationship with the Convention than it has with the EU Treaty where the jurisprudence of the Luxembourg court is effectively binding on the British courts. This was made clear in the course of the parliamentary history of the HRA, with the government rejecting a Conservative amendment that in applying Convention rights, the domestic courts should be bound by the Strasbourg jurisprudence. In joining the government and others in successfully opposing the amendment, the influential Lord Lester said that:

“I hope that I will never be accused of undue chauvinism, but, speaking for myself, I believe that our judges will be able to give a lead to Strasbourg in developing jurisprudence under the convention. I would not like to fetter them in any way.”¹⁰⁶

Yet as the control order—and other—cases make clear, the courts are doing more than taking into account the Strasbourg jurisprudence, which they appear to be treating as a ceiling. With this serious and severe self-restraint on judicial reasoning, the House of Lords is thus apparently willing to tolerate examples of striking injustice and inhumanity, as a result of a palpable desire to avoid “implying far more into our obligations” under the Convention “than is warranted by the Strasbourg jurisprudence”.¹⁰⁷

¹⁰⁴ Lord Carlile of Berriew, *Third Report of the Independent Reviewer Pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (February 18, 2008), para.64 (available at <http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary>) [Accessed August 23, 2008].

¹⁰⁵ JCHR, *Ninth Report of 2007–08*, Q 194, 195.

¹⁰⁶ See *Hansard*, HL Vol.584, cols 1268–1270 (January 19, 1998).

¹⁰⁷ *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296 at [71]. See also *R. (on the application of S) v South Yorkshire CC* [2004] UKHL 39; [2004] 1 W.L.R. 2196: “we

It could be argued, of course, that the failure of the courts to give effect to the wishes of Parliament—as expressed in s.2 of the HRA—reinforces the continuing power of constitutional principle in the form of the sovereignty of Parliament, particularly in relation to statutes passed post-1998. Although it could be argued that the sovereignty of Parliament is diminished by the failure of the courts to give full effect to s.2, it might also be argued that the *continuing* sovereignty of Parliament is enhanced by a reluctance on the part of the courts to allow post-1998 Act legislation to be unduly constrained by an expansive reading of an Act of a *predecessor* Parliament. There is, however, a more compelling rule of law issue, which flows from the apparent insecurity that leads the courts to hug so closely to the moorings in Strasbourg. Apart from the obligation to follow the direction of Parliament, a second rule of law issue—again so fundamental that it is rarely mentioned, though it is surely implicit in at least one of Fuller’s eight principles¹⁰⁸—is that words must bear their ordinary meaning. Here we are about to encounter an unfortunate resonance with *Liversidge v Anderson*, in which Lord Atkin said famously in relation to an earlier regime of executive detention:

“I know of only one authority which might justify the suggested method of construction. “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean, neither more nor less.” “The question is,” said Alice, “whether you can make words mean different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”” (Looking Glass, c. vi.)¹⁰⁹

This authority was cited in response to the decision of the majority of the House of Lords, upholding the detention of *Liversidge* under the Defence of the Realm Regulations, which authorised the Home Secretary to detain anyone whom he had “reasonable cause to believe” was a person of hostile origin or association. “By all accepted canons of interpretation” wrote Wade and Forsyth, “this language required the Secretary of State to show cause which the court would adjudge to be reasonable.”¹¹⁰ In this case, however:

“The words ‘had reasonable cause to believe’ only meant that the Home Secretary must direct personal attention to the matter. It was sufficient for him to have a belief which in his mind was reasonable. The courts would not enquire into the grounds for his belief.”¹¹¹

Memories of this controversy are revived by the apparent acceptance by the House of Lords in the control order cases that detention under a control order does not constitute a “deprivation” of liberty, a conclusion based on both a

must interpret the Convention rights in a way which keeps pace with rather than leaps ahead of the Strasbourg jurisprudence as it evolves over time”, at [78].

¹⁰⁸ L. Fuller, *The Morality of Law* (1969 edn), p.39.

¹⁰⁹ *Liversidge v Anderson* [1942] A.C. 206.

¹¹⁰ H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 9th edn (2004), p.430.

¹¹¹ E.C.S. Wade and G.G. Phillips, *Constitutional Law*, 6th edn (1960), p.675.

contradiction and the acceptance of a redefinition of plain words, in the latter case in a manner closer possibly to George Orwell than to Lewis Carroll.¹¹²

The contradiction arises from the recognition by Baroness Hale that “[u]ndoubtedly, these people [the so-called controlees] were deprived of their liberty during the curfew hours”.¹¹³ If—as appears to be the case—a curfew is thus a deprivation of liberty (at least for the period of the curfew), how is it that a curfew of any length of time—and particularly one of 16 hours (as prescribed by Lord Brown)—can be said to be consistent with the right to liberty? The question arises all the more urgently when we examine the text of Art.5 ECHR. This provides clearly a right to liberty, and is equivocal only to the extent that it has a number of equally clearly expressed exceptions. These do not provide for the house arrest or other detention of people suspected of terrorism or any other wrongdoing, who have not either been convicted of an offence or committed for trial on suspicion of having committed an offence. So how can a deprivation of liberty for which no provision is made in the treaty be consistent with Art.5? The answer lies only with the Lewis Carroll and George Orwell schools of treaty and statutory interpretation, it being “common ground” between the parties to the case (controlled person and government alike) that “article 5 on depriving a person of his liberty has an *autonomous meaning*: that is, it has a Council of Europe-wide meaning for purposes of the Convention, whatever it might or might not be thought to mean in any member State”.¹¹⁴ Or, one might say, whatever it might or might not be thought to mean in ordinary standard language. Applying not the “ordinary” and “standard”, but the “*autonomous*” and “*extraordinary*” meaning of the right not to be deprived of one’s liberty, we are able to say that a curfew of up to 16 hours is only a *restriction* on liberty, but crucially not also a *deprivation* of liberty. The effect of this “autonomous” approach is that Art.5 thus guards not against the deprivation of liberty per se—as expressly stated—but against deprivation of liberty that lasts for a sufficient—but indeterminate—period of time, a point recognised obliquely by the Court of Appeal in *E* when it stated that:

“One of the criteria stated in Guzzardi’s case . . . is the duration of implementation of a measure in question. This concept is not without difficulty because, on the face of it, *article 5 would be expected to protect against deprivations of liberty even for a short period.*”¹¹⁵

In this way, the House of Lords may be said to compound a weak perception of the rule of law, with its failure to apply the direction of Parliament, leading it into a private world with a private language. As masters of the fundamental rights’ text, the judges have distorted its language, the treaty rewritten (*pace* Orwell) to strip words of even their orthodox meaning, in

¹¹² In his famous appendix drafted at the same time that we are told English lawyers were drafting the ECHR, “the danger theoretically existed that in using ‘Newspeak’ words one might remember their original meanings”.

¹¹³ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [61].

¹¹⁴ *JJ* [2007] UKHL 45; [2007] 3 W.L.R. 642 at [13] (emphasis added).

¹¹⁵ *Secretary of State for the Home Department v E* [2007] EWCA Civ 459; [2007] 3 W.L.R. 1 at [56] (emphasis added).

order to permit—for reasons which are by no means clear—what can only be regarded as an exceptional violation of human rights, albeit human rights apparently not protected by the ECHR.

Control orders, human rights and the rule of law

What might be referred to as a diluted commitment to the rule of law thus has serious implications for the nature of the protection for human rights under the HRA. Indeed, the commitment to only a weak conception of the rule of law sees a correspondingly weak commitment to the substance of human rights. The judges have only shaved the worst features of the control order regime, and have helped to forge a regime that can only with some bewilderment be said to be one in which the human rights of the individuals in question are fully respected. On one side of the human rights balance sheet, it is true that the House of Lords has held that indefinite detention of foreign nationals without trial is not consistent with Convention rights, and that evidence obtained by torture is not admissible if the suspect is able to convince a court that on a balance of probabilities torture has been used.¹¹⁶ On the same side, it has also been held that 18-hour house arrest is not permissible and that individuals who are subject to a control order must have some knowledge of the case against them to enable them to contest the application. But as we celebrate these advances, we should also look at the other side of the balance sheet and ask what has been achieved for the individuals who were successful in these different cases. Although we cannot be sure because of the anonymity of the parties involved, it remains possible that individuals who started on this long journey of litigation some seven years ago remain in detention, albeit under house arrest in an “open prison” rather than internment in a closed institution (albeit one with three walls in the memorably shocking analysis of the government’s lawyers in the *Belmarsh* case). Although it may be argued that house arrest for fixed periods of indefinite number is better than indefinite imprisonment, what has been secured in terms of the quality of detention has been surrendered in terms of the breadth of detention, with the control orders applying to British as well as non-British nationals. While it is also true that the courts also managed to reduce detention under control orders from 18 to 16 hours a day, the settlement on 16 hours as being a permissible period during which people can be detained in accordance with their human rights emboldened the government perversely to consider “strengthening some existing orders” with a view to increasing the period of detention of those who were being detained for less.¹¹⁷

The commitment to a diluted concept of the rule of law is not, however, confined to questions of statutory interpretation and the distortion of ordinary

¹¹⁶ See respectively *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68; *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, [2006] 2 A.C. 221.

¹¹⁷ *Guardian*, November 1, 2007, where it was also pointed out that “ruling has no practical effect on any suspect currently held, as the 18-hour curfews have all been reduced by the Home Secretary, Jacqui Smith”.

words by the creation of a new private vocabulary. It applies also to diluted substantive procedural principles of the rule of law, even adopting a very formalistic and unambitious conception of the rule of law. In 1936, in the wake of *Thomas v Sawkins*¹¹⁸ and *Duncan v Jones*¹¹⁹ and what was seen as another war against what was thought by some to be a different kind of terror, Professor Goodhart railed against the powers of the police to interfere with people not because they had committed an offence but because they might commit an offence: in English law people were to be punished for what they had done, not in anticipation of what they might do.¹²⁰ Nevertheless, these preventive powers of the police were tolerated by the courts as being consistent with the common law. It is impossible to say what Professor Goodhart would make of the current spate of preventive powers,¹²¹ which contain even more swingeing restrictions on the liberty of those who have not been found to have committed a criminal offence and extend well beyond the question of terrorism. These powers are now tolerated and legitimised by the courts as being consistent with human rights.¹²² But it is not only detention without conviction that raises questions about the rule of law; there are also concerns about the arbitrariness that pervades the whole procedure, from Lord Brown's disarming comment in *JJ* that it is all "a matter of pure opinion", to the conditions under which the controlled persons are subjected, and the arbitrary treatment they claim they are forced to endure. Under the system of non-derogating control orders:

- People are being deprived of their liberty (using these terms in Oldspeak rather than Newspeak) indefinitely.
- People are being deprived of their liberty without having been found guilty of any offence.
- People are being deprived of their liberty on the basis of reasonable suspicion rather than beyond reasonable doubt.
- People are being deprived of their liberty following secret "trials", from which the individuals may be excluded.
- People are being deprived of their liberty without the right to full legal representation.
- People are being deprived of their liberty without seeing all the evidence against them.
- People are being deprived of their liberty without being given an opportunity to confront their accusers.
- People are being subjected to a regime of arbitrary interference by unaccountable public officials and private companies.

Responsibility for these departures from the rule of law, of course, lies with Parliament in enacting the control orders regime and the executive in operating it.

¹¹⁸ *Thomas v Sawkins* [1935] 2 K.B. 249.

¹¹⁹ *Duncan v Jones* [1936] 1 K.B. 218.

¹²⁰ (1936) 6 C.L.J. 22.

¹²¹ On which see A. Ashworth, "Social Control and 'Anti-Social Behaviour': The Subversion of Human Rights?" (2004) 120 L.Q.R. 263.

¹²² See *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39; [2003] 1 A.C. 787.

The House of Lords is not, however, free from culpability. After all, they are self-described guardians of the rule of law and “specialists in the protection of liberty”.¹²³ Moreover, it is through treating the Strasbourg authorities as a ceiling that results in the control order cases barely denting what is a continuing affront to the rule of law. The decisions also make only marginal gains in the wider cause of protecting human rights. It is not only the right to liberty (Art.5) and the right to a fair trial (Art.6) under this procedure that are diminished if rarely violated. There are also questions about the right to privacy, both in terms of the powers of the state and its public and private sector agents, and the manner of exercise of these powers. Most significantly, control orders typically appear to provide that the controlled person:

“. . . [M]ust 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 are complying with the obligations imposed by this control order. Such monitoring may *include but is not limited to*:—

- (a) a search of your residence or any vehicle controlled by you;
- (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; and
- (e) the taking of your photograph.”¹²⁴

Apart from issues of privacy of the controlled person, there are also concerns—raised by the JCHR—about the privacy of the controlled person’s family (as already seen above), as well as concerns about “affronts to their religious and cultural sensitivities, in particular towards female members of the household” (Art.9), “interferences with their right to freedom of expression and to receive information due to the restrictive nature of the measures concerning the use of telephones and access to the internet” (Art.10), and “interferences with their right to freedom of association as a result of the high degree of surveillance and the deterrent effect of the process for approving visitors to the house or other arranged social interaction” (Art.11).¹²⁵

¹²³ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 at [39] (Lord Bingham), approving an observation by La Forest J. of the Supreme Court of Canada.

¹²⁴ Lord Carlile of Berriew, *First Report of the Independent Reviewer Pursuant to s.14(3) of the Prevention of Terrorism Act 2005* (February 2, 2006) (available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary>) [Accessed September 9, 2008], p 31. Emphasis supplied.

¹²⁵ JCHR, *Twelfth Report of 2005–06*, para.85.

Conclusion

By their decisions in a number of cases, the courts have revealed that they are unquestionably a major irritant for the government in a number of fields. So much is reflected in the frustration expressed by David Blunkett in his diary,¹²⁶ and in the request by his successor for a meeting with the senior judges to consider aspects of counter-terrorism policy.¹²⁷ Apart from revealing alarming signs of constitutional illiteracy on the part of the minister, such proposals also reveal as fantasy the dialogue metaphor now used by many scholars and practitioners to justify judicial review of legislative power in a democracy:¹²⁸ there can be no meaningful or sensible “dialogue” consistently with the principles of judicial independence and the separation of powers which rights instruments are designed to sustain and nourish. It is important to emphasise, however, that the courts are an *irritant* rather than an *obstacle*, with what was then the Department for Constitutional Affairs pointing out in 2006 that “[i]n general . . . the Human Rights Act has not seriously impeded the achievement of the Government’s objectives on crime, terrorism or immigration”, while also contending that “[a]rguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have been considerably exaggerated”.¹²⁹ Although generally an irritant rather than an obstacle, the control order decisions have also revealed a contradiction of the HRA, which is that the courts can help rather than hinder the development of government policy. In the case of control orders, for example, the Home Secretary took the *JJ* decision to be a licence to extend the length of detention of people who were on control orders for less than 16 hours, despite the claim by the JCHR that Lord Brown’s speech offered only a “slender” basis for the government’s position.¹³⁰ Nevertheless, the decisions in these cases have also provided the government with an opportunity to resist political pressure to liberalise the control order regime, on the basis that they provide a ceiling beyond which it is not necessary to go in the direction of greater safeguards for suspects.¹³¹ Although the legal process thus provides a

¹²⁶ See D. Blunkett, *The Blunkett Tapes* (2006), pp.386–387, and also (on judicial review generally), p.607.

¹²⁷ See House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*. HL Paper No.151 (Session 2006/07), paras 94–97.

¹²⁸ See T. Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” [2005] P.L. 306. Also K. Roach, “Sharpening the Dialogue Debate: The Next Decade of Dialogue Scholarship” (2007) 45 *Osgoode Hall Law Journal* 169.

¹²⁹ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf [Accessed August 23, 2008], p.4.

¹³⁰ See Joint Committee on Human Rights, *Tenth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*. HL Paper No.57, HC Paper No.356 (Session 2007/08), para.41.

¹³¹ In response to a series of recommendations made by the JCHR (including amendments to cap the length of daily curfews under non-derogating control orders and provide for more fair trial safeguards) (JCHR, *Ninth Report of 2007–08*. See also JCHR, *Twentieth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*. HL Paper No.108, HC Paper No.554 (Session 2007/08), Ch.6), the government has curtly responded by saying that “as a result of the House of Lords’ judgments of October 2007, control orders legislation is fully

vehicle for the development of human rights law, in these ways it may also tend to sap the ability of the political process to deal with human rights abuses.

At a more general level still, the cases are important for providing a snapshot of the current state of play relating to constitutional principle and the role of the courts in protecting human rights.¹³² The most obvious point to emerge is the divisions on the Bench in relation to human rights compatibility, with Lord Brown (a former Intelligence Services Commissioner)¹³³ splitting the difference between two quite different extremes in *JJ*, though the differences in *MB and AF* were much less marked. The deep human rights fissure which the *JJ* case exposed, however, is indeed one of the most notable features of these decisions, revealing that neither the HRA nor its guardians are any more certain about the human rights implications of government policy than any other political institution, or any of the rest of us. It is true that judicial uncertainty is unclouded by partisan political motives, but it is also true that—as already pointed out—this uncertainty can readily be seized upon and exploited by those whose judgment is not so unconstrained. Not unrelated to this is a second point to emerge, namely, that behind all the hyperbole about the emergence of legal constitutionalism, we find a strong lingering sense of deference by the courts to the political branches, in the sense that the centre of gravity on the Bench appears at the present time to be tolerant and accepting of measures that would have been regarded as inconceivable restraints on liberty at the time the HRA was introduced. A third point to emerge is that despite the claims by Lord Hope in *Jackson* (repeated by Moses J. in *BAE Systems*) about the rule of law being the dominant constitutional principle (a claim that promises more than can be delivered),¹³⁴ we see a commitment to a weak conception of the rule of law in practice, and indeed a telling claim by Lord Brown who, in providing the synthesis between two extremes, appeared to suggest that this was barely a legal issue, but simply “a matter of opinion”. A weak commitment to the rule of law in the sense of (1) the approach to interpretation; (2) the acceptance of punishment or restraint without conviction; and (3) the tolerance of various forms of arbitrary conduct by state officials at various levels.

So after the excitement following the *Belmarsh* case, normal service appears thus to have been resumed, in terms of the approach of the courts. The approach is not necessarily improper or inappropriate, but so profound is the respect by the judges for the continuing sovereignty of Parliament that even parliamentary institutions appear unhappy with the approach of the Bench, which indicates the limitations of the strategy of protection of human

compliant with the European Convention on Human Rights and *no amendments to the legislation are necessary*”: Secretary of State for the Home Department, *The Government Reply to the Tenth Report from the Joint Committee on Human Rights* (2008) 1 (available at <http://security.homeoffice.gov.uk/news-publications/publication-search/general/Govtresponse/CHR2008?view=Binary>) [Accessed August 23, 2008] (emphasis added).

¹³² On which see also the excellent article by A. Tomkins, “The Rule of Law in Blair’s Britain” (2007) 26 *University of Queensland Law Journal* 255.

¹³³ See *Report of the Intelligence Services Commissioner for 2004*. HC Paper No.548 (Session 2005/06).

¹³⁴ See *Jackson* [2005] UKHL 56; [2006] 1 A.C. 262 at [107].

rights by the HRA. The prevailing pull of parliamentary sovereignty and the corresponding weakness of the rule of law which these cases reveal, have implications for public policy on the development of human rights protection. If the courts are to continue to defer to the sovereignty of Parliament and if the rule of law is to be a fairly “weak reed” in this “dismal swamp”,¹³⁵ it makes sense to focus attention on Parliament rather than the courts as a source of restraint on the executive.¹³⁶ The problem of liberty in the British constitution is a symptom of the problem of institutional power, which will not be addressed by rights, lawyers or judges, heretical to some though such claims may be. The problem of institutional power is a political problem rather than a legal one, and it is a problem of how best to constrain the power of the executive by building up the countervailing power of Parliament, with strategies that will enable Parliament more easily politically to use the legal powers at its disposal. As ministers have made clear,¹³⁷ although we have the JCHR and although MPs and peers may make use of the HRA and decisions thereunder, the government acts on its own legal advice, and not on the legal advice it receives from Parliament or its committees,¹³⁸ however eminent their membership. As a result, the HRA only marginally adds to the power of Parliament, which is more likely to be moved by human rights concerns based on principle rather than legality,¹³⁹ hardly surprising in view of the contested nature of Convention rights (as the control order cases vividly demonstrate). In any event, as we have seen, it is unlikely that the HRA or the JCHR will lead to a major change of policy on human rights grounds. The control order cases strongly suggest also that the HRA cannot adequately protect human rights, with a divided and now unpredictable court. Intoxicated by the heady brew of rights talk, some have argued that this shows we need even more rights; a more sober response might be that, on the contrary, it shows nothing of the kind; rather, it shows a need instead for less loose talk about “rights”, and more serious talk about how to create powerful representative institutions.

¹³⁵ The phrases are Tushnet’s and Chafee’s respectively: see M. Tushnet, “The Political Constitution of Emergency Powers—Parliamentary and Separation of Powers Regulation” (2007) 3 *International Journal of Law in Context* 275; and Z. Chafee, “The Internal Affairs of Associations Not for Profit” (1930) 43 *Harvard Law Review* 993.

¹³⁶ See also J.-C. Tham and K.D. Ewing, “Limitations of a Charter of Rights in the Age of Counter-Terrorism” (2007) 31 *Melbourne University Law Review* 465, 498–502.

¹³⁷ See JCHR, *Human Rights Policy, Oral Evidence and Memoranda given by Rt. Hon. Harriet Harman QC MP, Minister of State, Mr. Edward Adams, Head of Human Rights Division, and Ms Vina Shukla, Legal Division, Department for Constitutional Affairs*. HL Paper No.143, HC Paper No.830-i (Session 2005/06), Q 45. Ms Harman said in response to a question about the impact of the work of the JCHR: “When you are doing stuff which really is very much like legal advice I am not sure that that is terribly helpful because we are likely to be in court and dealing with it in front of the courts and will be found to be right or wrong, and we feel we have got enough legal advice”.

¹³⁸ Contrast House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*. HL Paper No.151 (Session 2006/07), para.107.

¹³⁹ On which see D. Nicol, “The Human Rights Act and the Politicians” (2004) 24 *L.S.* 451.