

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty's response to the Constitutional Affairs Committee call for evidence on the Special Immigration Appeals Commission

February 2005

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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Introduction

1. Liberty welcomes the opportunity to respond to the Constitutional Affairs Committee consultation on the Special Immigration Appeals Commission (SIAC). The call for evidence followed the decision of the House of Lords in *A and others v Secretary of State for the Home Department* on 16 December 2004. Since publication of this consultation the Home Secretary Charles Clarke has announced his intention to end the use of SIAC to determine appeals against certification under Part 4 of the Anti Terrorism and Security Act 2001 (ATCSA). Instead he is proposing a new system of ‘control orders’. On the basis of an intelligence assessment the Secretary of State will consider whether he suspects that an individual is, or has been, concerned with terrorism. He will then be able to impose a variety of controls on the individual. Controls will range from restrictions on movement or communications to home detention. Some form of quasi-judicial or judicial appeal or review will be available to the subject. During this process material relating to the imposition, variation, review or modification of control orders will be heard in a mix of open and closed session.

2. It is clear from this that the control order appeal or review process will use special advocates. Because of this our response will focus on the use of special advocates when dealing with alleged terrorists through the proposed control orders rather than on the operation of SIAC itself. Although the purpose of this response is not to comment on the desirability of efficacy of control orders, it is appropriate to compare Part 4 ATCSA and the new system. If they are essentially the same process, the criticisms levelled at the use of special advocates for part 4 determinations in SIAC¹ will still be relevant.

¹ For example see the comments of Lord Nicholls *A v others* at paragraph 82 ‘Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission’.

3. The 2004 Home Office discussion paper ‘Reconciling Liberty and Security in an Open Society’ considered and quickly discounted plans to extend Part 4 detention to British citizens. The paper accepted that ‘while it would be possible to seek out other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be very difficult to justify’². Indefinite detention without due process is unjustifiable wherever the detention takes place. We do not believe that control orders will offer any greater semblance of due process than Part 4 ATCSA detention. If the Constitutional Affairs Committee accepts that there is merit to this argument we urge it to ask the Government to explain why it now accepts the use of such draconian powers are justified.

SIAC, Control Orders and the Human Rights Act

3. The new system will be introduced through primary legislation in the coming months. Detailed information on how control orders will operate is not available at the time of writing. Charles Clarke will give evidence to the Parliamentary Home Affairs Committee (HAC) and the Joint Committee on Human Rights (JCHR) on 7 and 8 February respectively. Unfortunately it will be too late to incorporate any of the comments he makes into this submission. The House of Lords Appellate Committee determined that detention was unlawful as it breached Article 14³ of the Human Rights Act 1998 (by being discriminatory in applying only to foreign nationals) and Article 5⁴ HRA (by being a disproportionate response to the threat faced). It also quashed the UK’s derogation from the Human Rights Act. In his statement to the House of Commons on 26 January the Home Secretary described the restrictions arising from control orders as being ‘proportionate to the threat each individual posed’. As control orders will apply to

² Home Office discussion paper paragraph 36.

³ The Prohibition on Discrimination

⁴ The Right to Liberty and Security

both British and foreign nationals they will no longer be overtly discriminatory. However, we do not agree with the assessment that residential (as opposed to custodial) detention and flexibility of orders will make them proportionate. The right to liberty does not distinguish between detention in prison or at home. While some degree of proportionality may be implicit in consideration of Articles 5 and 6⁵ HRA, detention of suspected terrorists can only ultimately be justified in anticipation of criminal proceedings. Neither control orders nor Part 4 ATCSA are processes preparatory to criminal trial. Because of this we do not believe there is any reason why the use of special advocates would be more acceptable with control orders

4. There is however one important distinction between Part 4 ATCSA and the new proposed system of control orders. Whereas the right to a fair trial is not directly applicable to the original jurisdiction of SIAC⁶, it is applicable to control orders which are domestic civil proceedings. Therefore many of the features of the special advocate process used in SIAC which are also likely to be used in relation to control orders could raise issues under Article 6. The Government has stressed that these are civil proceedings which would not attract the Article 6 protections particular to criminal process. However ECHR jurisprudence has established that the European Court of Human Rights (ECtHR) will not be tied by the vocabulary of national legislation⁷. Professor Andrew Ashworth maintains that the lead case of *Benham v UK* requires the ECtHR to consider whether the proceedings are brought by a public authority, have punitive elements and have potentially serious consequences⁸. Potentially indefinite house arrest (and even lesser restrictions such as tagging) will clearly satisfy this test. Given the strength of the argument that control orders will be considered to be criminal process for the purposes of

⁵ The Right to a Fair Trial

⁶ Although principles of procedural fairness and natural justice mean they may be indirectly relevant.

⁷ *Benham v UK* (1996) 22 E.H.R.R 293

⁸ Professor Andrew Ashworth, Article 6 and the fairness of trials (1999) Crim L.R. 261

Article 6 the following elements of the Article do not sit comfortably with the use of special advocates:

- 6 (3) (a) to be informed promptly...in detail, of the nature of the accusation against him;
- 6 (3) (c) to defend himself in person or through legal assistance of his own choosing;
- 6 (3) (d) to examine or have examined witnesses against him.

5. In both civil and criminal proceedings Article 6 requires that there be equality of arms - a fair balance between the parties. The fact that the appellant will not be present throughout control order appeal proceedings and will not have access to much of the material makes it clear that there will not a fair balance between the parties. A further prerequisite of criminal proceedings under Article 6 is the presumption of innocence, the concept that goes to the heart of fair trial and extends back to the Magna Carta. Concerns as to how control orders will undermine the presumption of innocence have already been expressed widely. We are sure the Committee is well aware of them and would only emphasise that the use of special advocates will compound these concerns.

6. If control orders are introduced it is difficult to see how they will be compatible with Articles 5 and 6. The Government clearly anticipates that this will not be. As Charles Clarke said in his statement to the Commons, 'The Government, of course, intends to ensure that any future powers we take in legislation are wholly compatible with the provisions of the ECHR, if necessary employing a new derogation to that effect.' This is somewhat strange in implying that a human rights opt out legitimises intentional convention breaches. It also suggests that the Government has not appreciated the significance of the House of Lords judgment. Paying lip service to proportionality does

not negate the Lords' crushing indictment of detention without trial. The Government should also appreciate that the Lords were willing to quash the previous derogation.

The use of special advocates

7. There is a fundamental problem with the use of special advocates which makes them inappropriate for proceedings where the state is seeking recourse against an individual based on allegations of actions or behaviour by him. As there is no possibility of taking instructions the special advocate cannot properly test the evidence against him. As any criminal law practitioner is aware, testing the case against their client and putting their client's case to prosecution witnesses is the heart of an effective defence. If, for example, the prosecution is alleging that the defendant was somewhere at a particular place and time, how is it possible to challenge the assertion without instructions? It would be difficult enough to effectively defend a criminal trial on this basis. In civil or SIAC proceedings, where the burden of proof for the state is substantially lower, it is virtually impossible. This central concern was summarised by the JCHR in its report on anti terrorism powers which said;

*'we consider it a significant problem that the special advocate for the detainee is appointed by the Attorney General, who not only represents a party to the proceedings before SIAC, but is the only legal representative present during the closed hearings, in the absence of the detainee or their legal representative.'*⁹

8. Concerns over the uses made of special advocates have often come from advocates themselves. Scathing comments made by special advocates who have resigned, such as Ian MacDonald QC who referred to Part 4 ATCSA as an 'odious blot on our legal

landscape'. These criticisms are likely to increase should legislation allowing control orders be passed. In February 2004 six special advocates¹⁰ wrote an open letter to the Home Secretary expressing concerns at plans then circulating to use them in criminal trials saying,

'We are convinced that both basic principles of fair trial in the criminal context and our experience of the system to date make such a course untenable. It would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one's peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused. The special advocate system is utterly incapable of replacing these essential fundamentals of a fair trial.'

This disquiet arose from concern that they would be used in criminal trials. However the criminal process contains greater protection for the defendant than civil law. We imagine these views would be expressed in even stronger terms in relation to control orders.

9. Special advocates do have a place in the English legal system. Their use (and the creation of SIAC) arose from the decision of the ECtHR in 1996 in the case of *Chahal v UK*¹¹. Mr. Chahal was an Indian Sikh separatist who the Government wished to deport. He claimed that if removed he would be likely to face torture. The creation of SIAC was a response to his case. For someone in Mr. Chahal's position there were two questions to determine. Firstly, whether or not he was conducive to public good in the UK and therefore not entitled to stay. Secondly, whether he would be safe if deported to India. By definition, secret intelligence would be more pertinent to the first question and it is here that special advocates would play a role. Rightly or wrongly due process and presumption

⁹ JCHR 'Review of Counter-terrorism Powers', 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713)

¹⁰ Nicholas Blake QC, Andrew Nicol QC, Manjit Singh Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, letter to *The Times*, 7 February 2004

¹¹ 23 EHRR 413

of innocence are not relevant to determining whether a foreign national is entitled to stay in the country. This was therefore, legally, an administrative decision.

10. There is a profound distinction between the use of special advocates for administrative determinations and for quasi criminal tribunals. Making Part 4 ATCSA part of the immigration process or describing control orders as civil law powers does not reflect their true nature. The use of special advocates cannot be justified when there is to be the consideration of evidence that can result in an individual being restricted of liberty or freedom of movement other than preparatory to trial. The House of Lords said that the use of special advocates during Part 4 ATCSA determinations was insufficient cure for fundamental departures from the rule of law. There is nothing in the Government's new proposals to suggest that a future House of Lords ruling will not be equally damning.

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