



JUDICIARY OF
ENGLAND AND WALES

Summary of the Judgments

This summary forms no part of the judgments

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Secretary of State for the Home Department -v- MB Secretary of State for the Home Department -v- JJ, KK, GG, HH, NN & LL

1. The Court of Appeal heard two appeals brought by the Secretary of State for the Home Department against decisions by Sullivan J in the High Court, relating to control orders made by the Secretary of State under the Prevention of Terrorism Act 2005 (the 'PTA').
2. Both appeals concerned non-derogating control orders made by the Secretary of State under section 2 PTA.

Secretary of State for the Home Department -v- MB

3. The appeal in *Secretary of State for the Home Department -v- MB* was against Sullivan J's decision that procedure under the PTA was incompatible with the right to a fair trial under Article 6 of the European Convention of Human Rights ('the Convention').
4. There were four strands of reasoning that led Sullivan J to reach this conclusion.
5. First, Sullivan J found that the only function that the court was permitted to perform under section 3(10) PTA was to consider whether, at the time that his decision was made and on the material that was then before him, the Secretary of State's decision was flawed. The Court of Appeal found that it was implicit that the Secretary of State has a duty to keep the decision to impose a control order under continual review, so that the restrictions that a control order imposes are no greater than necessary. Such an approach accorded with the approach of the court under ordinary principles of judicial review. Section 3(10) PTA required the court to consider whether the decisions of the Secretary of State in relation to the control order were flawed as at the time of the court's determination.
6. Second, Sullivan J found that under the PTA the function of the court was to review the decision of the Secretary of State, not to form its own view of the

merits of the case. Sullivan J considered that Article 6 of the Convention required that the court should carry out a 'full merits review' of the justification for the control order and its terms. The Court of Appeal did not consider that the terms of section 3(10) PTA, when read in the light of section 11(2), restricted the court to a standard of review that fell short of that required to satisfy Article 6.

7. Third, Sullivan J held that in reviewing the decision of the Secretary of State, the PTA required the court to apply a particularly low standard of proof. The PTA authorised the imposition of obligations where there are reasonable grounds for suspicion. The correct approach was for the court to consider whether there were reasonable grounds for suspicion, such consideration to take into account a matrix of alleged facts, some of which would be clear beyond reasonable doubt, some of which would be established on balance of probability and some of which would be based on no more than circumstances giving rise to suspicion. This exercise differed from that of deciding whether a fact has been established according to a specified standard of proof. It was the procedure for determining whether reasonable grounds for suspicion exist that must be fair if Article 6 was to be satisfied.
8. Fourth, Sullivan J held that the in approving the control order the court reached its decision on the basis of closed evidence of which MB was unaware and which he was therefore not in a position to controvert. Sullivan J did not find that the PTA provisions for the court to consider closed material were necessarily incompatible with a fair trial, but in the circumstances of this case the fact that the most material evidence was not disclosed to MB made a significant contribution to the overall unfairness of the proceedings. It was clear that to deny a party to legal proceedings the right to know the details of the case against him was, on the face of it, fundamentally at odds with the requirements of a fair trial. However, both Strasbourg and domestic authorities have accepted that there are circumstances where the use of closed material is permissible. If the requirements of Article 6 could in no circumstances be satisfied without full disclosure of material evidence, the implications would be far reaching. The PTA empowered the Secretary of State to impose obligations, which fall short of infringing Article 5, in order to prevent or restrict the risk that someone who is suspected of having been involved in terrorism will take part in terrorism in the future. Article 6 could not automatically require disclosure of the evidence of the grounds for suspicion. Reliance on closed material could only be with appropriate safeguards in place and the PTA contained such appropriate safeguards.
9. The appeal was allowed. Sullivan J erred in holding that the provisions for review by the court of the making of a non-derogating control order by the Secretary of State did not comply with the requirements of Article 6. The validity of the order was to be reconsidered, adopting an approach that accorded with the judgment.

Secretary of State for the Home Department -v- JJ, KK, GG, HH, NN & LL

10. In Secretary of State for the Home Department -v- JJ, KK, GG, HH, NN & LL the Secretary of State brought appeals against Sullivan J's decision that the

obligations imposed by six control orders made against the respondents were in breach of Article 5(1) of the Convention and that the Secretary of State did not have the power to make non-derogatory control orders imposing such obligations.

11. The appeals raised two issues. The first was whether Sullivan J was correct to hold that the obligations imposed by the control orders amount to deprivation of liberty contrary to Article 5. The second issue was that if Sullivan J was correct to so hold, whether it was appropriate to quash the orders rather than to quash or modify the obligations.
12. Sullivan J correctly took as his starting point the physical restriction that confined each respondent to a small flat for eighteen hours a day. In addition, Sullivan J was required to weigh in the balance other material factors, although these were not the principal factors that led him to conclude that the orders amounted to a deprivation of liberty. The other restrictions did not, individually, constitute a deprivation of liberty, but were relevant in considering whether the restrictions taken together crossed the boundary between restriction on the freedom of movement and deprivation of liberty.
13. Sullivan J carefully considered the Strasbourg authorities on Article 5. He correctly concluded that these authorities left a gap between 24 hour house arrest seven days per week (which was a deprivation of liberty) and a curfew/house arrest of up to 12 hours per day on weekdays and for the whole of the weekend (which was a restriction on movement). He was right to conclude that while there was no direct guidance on how to fill this gap, it was necessary to apply the principles to be derived from the European Court of Human Rights' decision in the case of *Guzzardi*. There was nothing wrong in Sullivan J's application of those principles.
14. The facts of this case differed markedly from those of any other Strasbourg decision. Sullivan J therefore had to make a value judgment as to whether, having regard to the type, duration, effects and manner of implementation of the control orders, they effected a deprivation of liberty.
15. The facts of this case fell on the wrong side of the dividing line. The orders amounted to a deprivation of liberty contrary to Article 5. For that reason the appeal against Sullivan J's decision on the first issue was unsuccessful.
16. Sullivan J held that he was entitled to quash the orders under section 3(12) PTA. He held that it was appropriate to exercise this power because each order was made without jurisdiction and was a nullity. An additional reason for quashing the orders was that LL faced criminal charges for alleged breaches of his order. If the order was quashed, he would have a defence to those charges; if it was simply modified he would not.
17. The reasons given by Sullivan J for quashing the orders were compelling. Further, paragraph 8 of the Schedule to the PTA gave the Secretary of State power, should he decide, in the absence of a derogation order, to make new control orders under section 2 to replace those that Sullivan J quashed. If the Secretary of State decided to exercise this power, he would have to devise a

new package of obligations imposing controls on the respondents. The Secretary of State was better placed than the court to perform that function.

18. The appeals were dismissed.

Lord Phillips of Worth Matravers, Lord Chief Justice
Sir Anthony Clarke, Master of the Rolls
Sir Igor Judge, President of the Queen's Bench Division

1 August 2006