ADVISORY OPINION ON THE HUMAN RIGHTS IMPLICATIONS OF BEHAVIOURAL CONTROL ORDERS

KING & SPALDING

King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR

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I. INTRODUCTION

1. JUSTICE is conducting a working party to explore the function and effectiveness of "Behavioural Control Orders". "Behavioural Control Orders" is a collective term which JUSTICE uses to refer to a range of civil orders, usually obtained on behalf of the State to prevent harm *via* the anticipation of wrongdoing and the imposition of behavioural conditions, the breach of which amounts to a criminal offence. Examples of Behavioural Control Orders under consideration by the Working Party include: Community Protection Notices ("**CPNs**"); Public Space Protection Orders ("**PSPOs**"); Knife Crime Prevention Orders ("**KCPOs**"); Domestic Abuse Protection Orders ("**DAPOs**"); Stalking Protection Orders ("**SPOs**"); Sexual Risk Orders ("**SROs**"); and Serious Disruption Prevention Orders ("**SDPOs**").

2. To assist the Working Party, JUSTICE has asked King & Spalding to provide an advisory opinion addressing the following question:

> *"[W]hat, if any, human rights implications arise from the imposition and enforcement of Behavioural Control Orders".*

3. More specifically, it has asked King & Spalding to consider human rights issues associated with:

   3.1 The procedure used to impose / enforce Behavioural Control Orders;

   3.2 The type of conduct targeted by Behavioural Control Orders; and

   3.3 The conditions imposed by Behavioural Control Orders.

4. This opinion is structured as follows:

   4.1 Part 1 – Introduction;

   4.2 Part 2 – Executive Summary;

   4.3 Part 3 – Analysis of human rights issues arising in relation to the procedure for the imposition and enforcement of Behavioural Control Orders. This analysis focuses in particular on Articles 6, 7 and 14 of the European Convention on Human Rights (the "**Convention**"); and

   4.4 Part 4 – Analysis of human rights issues arising in relation to the conduct targeted and conditions imposed by Behavioural Control Orders. These two aspects of the

Behavioural Control Orders regime give rise to similar human rights issues and are therefore considered together. This section of our analysis focuses in particular on Articles 5, 8, 9, 10 and 11 of the Convention.

5. This does not purport to be an exhaustive account of all potential human rights issues engaged by Behavioural Control Orders. Instead, we consider key, cross-cutting human rights issues relevant to all Behavioural Control Orders and focus in more detail on certain, specific human rights issues which are engaged by certain, illustrative examples, primarily: KCPOs; SROs; and PSPOs.

II. EXECUTIVE SUMMARY

6. **Articles 6 and 7**. The conditions imposed by certain Behavioural Control Orders (KCPOs and SROs in particular) are sufficiently serious and the penalty for breach is sufficiently grave that they are equivalent, in certain respects, to a criminal charge. In such circumstances, additional safeguards ordinarily available under the criminal limb of Article 6, in particular a standard of proof which is higher than the bare balance of probabilities standard applicable in civil cases, should apply. Legislation which directs otherwise (such as (the recently amended) section 122A(6) Police, Crime, Sentencing and Courts Act 2022 which mandates a civil standard of proof) is potentially incompatible with a recipient's rights under Article 6. Further, in such circumstances, the quality of law requirements under Article 7 will apply, meaning that both the legislative framework and the order itself must be sufficiently clear, foreseeable and accessible. Particularly in relation to non-conviction SROs (issued to recipients on the basis that they have, amongst other things, carried out "an act of a sexual nature", such term not being defined in statute or guidance), there are significant grounds for concern that the law does not always meet these requirements.

7. **Articles 5, 8, 9, 10 and 11**. Many of the conditions which can be imposed under a Behavioural Control Order will result in a *prima facie* infringement of a qualified Convention right. For example, curfews, restrictions on a recipient's ability to see friends or family members and restrictions on their use of the internet or their ability to meet in certain groups or go to certain places. Provided that such infringements are in accordance with the law, necessary and proportionate, they may nevertheless be compatible with the Convention. However, determining whether this is the case is a complex task, involving the balancing of multiple, potentially competing interests. To properly ascertain necessity and proportionality, before

imposing a Behavioural Control Order, it is necessary to assess factors such as: the gravity and scope of the infringement on an individual's Convention rights; the risk of harm which an order is intended to prevent; the nexus between that harm and the proposed condition; the likely effectiveness of the measure; and the availability of other, less intrusive measures. While the guidance for certain Behavioural Control Orders (for example SROs) goes some way to directing authorities to conduct a risk assessment of the harm the order is intended to prevent, this is not uniform for all Behavioural Control Orders. Accordingly, both the statute and guidance leave it unclear on what basis a determination of necessity and proportionality should be made, whether by an executive authority or court. When it comes to drafting the conditions themselves, the legislation is often silent and the statutory guidance provides only vague, illustrative examples. This results in the potential for a wide variation in practice amongst authorities and the imposition of conditions which are either unnecessary or disproportionate. This is a particular concern with respect to Behavioural Control Orders such as CPNs and PSPOs, which are imposed by executive authorities without consideration by a court, and interim Behavioural Control Orders, where the court has power to impose a Behavioural Control Order without the recipient having an opportunity to challenge the order in court (such as interim KCPOs and SROs).

8. **Article 14**. The potential discriminatory effect of Behavioural Control Orders is well-documented, particularly in relation to KCPOs. The available quantitative data on the implementation of KCPOs tends to confirm that there is unequal treatment of ethnic groups with a disproportionate number being given to black people. In the absence of any explanation of reasonable justification, this gives rise to concerns about incompatibility with Article 14. Better data collection on the status / characteristics of recipients of Behavioural Control Orders and the justification for these orders is necessary to determine whether Behavioural Control Orders generally are being implemented compatibly with Article 14.

III. PROCEDURE FOR THE IMPOSITION AND ENFORCEMENT OF BEHAVIOURAL CONTROL ORDERS

A. Article 6

(1) The General Legal Framework

9. While the guarantee of a fair trial under Article 6 (1) applies to both criminal and civil proceedings, Article 6 prescribes in paragraphs 2 and 3 additional protections applicable only in criminal proceedings.

10. It is well established in ECtHR jurisprudence that "the contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases".[1] As has been recognised, "requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6."[2]

11. The ECtHR has, over time, developed principles aimed to prevent States from treating criminal proceedings as civil with the goal of ensuring that individuals are afforded the appropriate safeguards under Article 6 (referred to as the "**Anti-subversion Doctrine**"). In determining those circumstances in which individuals are entitled to the expanded safeguards ordinarily afforded to criminal suspects, the ECtHR has focused on, *inter alia*, the nature and seriousness of the order and the severity and purpose of the penalty. Three key cases are considered in this respect.

Engel and Others v. The Netherlands[3]

12. In *Engel and others v. the Netherlands,* ECtHR held that: "[i]f the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated

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1 Case of *Dombo Beheer BV v. The Netherlands*, (Application no.14448/88), Strasbourg, Judgment, 27 October 1993, ¶ 32; Case of *Moreira Ferreira v. Portugal (no. 2)*, (Application no. 19867/12), Strasbourg, Judgment, 11 July 2017 ("***Moreira Ferreira (no. 2)***"), ¶ 67; Case of *Carmel Saliba v. Malta*, 2016, Strasbourg, Judgment, 29 November 2016, ¶ 67.

2 *Moreira Ferreira (no. 2),* ¶ 67.

3 Case of *Engel and others v. the Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgment, 3 June 1976 ("***Engel***").

to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention."[4]

13. In interpreting the phrase "criminal charge", the ECtHR confirmed that "criminal charge" has an autonomous meaning, transcending labels used in domestic law. It listed three factors relevant to whether the disciplinary charge in that case "nonetheless count[ed] as criminal within the meaning of Article 6":

13.1 whether the alleged offence is categorised as criminal in domestic law;

13.2 the nature of the offence; and

13.3 the nature and degree of severity of the possible penalty.[5]

14. The ECtHR held that, where a charge is aimed at the imposition of a serious measure, resulting in deprivation of liberty, it comes within the "criminal" sphere.[6] Thus, disciplinary orders that committed persons to a disciplinary unit for three or four months were categorized as depriving those persons of their liberty, and therefore, the recipients were afforded the heightened protections under Article 6(3) of the Convention.[7] Whereas, disciplinary orders that directed "light arrest" for two to three days were not.[8]

15. Similarly in *Campbell and Fell v. the United Kingdom*[9] (relating to disciplinary breaches in prison), the ECtHR held that the criminal limb of Article 6 applied where the gravity of the offence and severity of the penalty deprived the accused of liberty.

Ozturk v. Germany – purpose of the penalty

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4 *Engel*, ¶ 81.
For the third criteria, the Court held, "Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so[.]" *Engel,* ¶ 82.

6 *Engel*, ¶ 85.

7 *Engel*, ¶¶ 89-92.

8 *Engel,* ¶ 85.

9 Case of *Campbell and Fell v. The United Kingdom*, (Application no. 7819/77; 7878/77), Strasbourg, Judgment, 28 June 1984.

16. *Ozturk v. Germany*[10] re-affirmed the Engel criteria and additionally examined the purpose of the penalty in determining whether the offence concerned was criminal or civil in nature.

17. In this case, the applicant was fined for causing a traffic accident by colliding with another vehicle as a result of careless driving. At the hearing, the applicant was assisted by an interpreter. At the conclusion of the hearing, he was directed to bear the court costs and his expenses, including the interpreter's fees. The applicant challenged the bill of costs with regard to the interpreter's fees and claimed that it violated Article 6(3)(e) of the Convention. The government argued that the facts alleged against the applicant constituted only a regulatory offence and that the applicant was not charged with a "criminal offence" and therefore, Article 6(3)(e) did not apply.

18. ECtHR held that the offence was criminal for the purposes of Article 6 and noted that (emphasis added):

    18.1 "the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight."[11]

    18.2 "the general character of the rule and the purpose of the penalty, <u>being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature</u>."[12]

    18.3 "[t]he relative lack of seriousness of the penalty at stake […] cannot divest an offence of its inherently criminal character."[13]

19. By way of summary, even where a measure (such as a Behavioural Control Order) is characterised as civil under domestic law, the recipient may nevertheless be entitled to the heightened, criminal safeguards afforded under Article 6(2) and 6(3) in circumstances where the measure in question is sufficiently serious and / or where the general character of the rule and the purpose of the penalty suffice to show that the measure in question is, in substance, criminal in nature. Where the measure deprives the recipient of their liberty, this will

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10 Case of *Ozturk v. Germany* (Application no. 8544/79), Strasbourg, Judgment, 21 February 1984 ("***Ozturk***").
11 *Ozturk,* ¶ 52.
12 *Ozturk,* ¶ 53.
13 *Ozturk,* ¶ 54.

ordinarily be the case. However, this is not a pre-requisite and, where the character of a measure is both deterrent and punitive, such as to be treated as criminal in nature, it will also attract the higher criminal safeguards.

(2) Standard of Proof

20. The question of the appropriate standard of proof when imposing measures akin to Behavioural Control Orders in a series of domestic cases.

21. In *B v. Chief Constable of Avon and Somerset Constabulary,*[14] which concerned a "sex offender order" under section 2 of the Crime and Disorder Act 1998, Lord Bingham CJ said that the proceedings were civil in domestic law and for the purposes of the Convention but —

> "…the civil standard of proof does not invariably mean a bare balance of probability, and does not mean so in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters… In a serious case such as the present, the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in section 2(1)(a) [i.e., if it appears to a chief officer of police that the person is a sex offender] is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard."

22. The House of Lords adopted a similar approach in *McCann*[15]*,* a case which involved the procedure for the imposition of an Anti-Social Behaviour Order ("**ASBO**") under the Anti-Social Behavioural Act[16] ("**ASBO Act**"), breach of which could have given rise to criminal liability and a custodial sentence of up to five years.

23. The House of Lords first categorised the proceedings under the ASBO Act as civil,[17] confirming that "the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply."[18] However, it went on to observe that "given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be

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14 *B v. Chief Constable of Avon and Somerset Constabulary* [2001] 1 W.L.R. 340, ¶¶ 353-354.

15 *R (on the application of McCann) v. Manchester Crown Court, Clingham v. Kensington and Chelsea RLBC* [2002] UKHL 39; [2003] 1 A.C. 787 ("***McCann***").

16 Anti-social Behaviour, Crime and Policing Act 2014.

17 *McCann*, ¶ 34.

18 *McCann*, ¶ 37.

necessary."[19] The House of Lords also endorsed Lord Bingham's view that the "heightened civil standard and the criminal standard are virtually indistinguishable"[20] before noting that "there [were] good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made."[21]

24. In *Commissioner of Police of the Metropolis v. Ebanks,*[22] the High Court recognised that "[i]t is clear… that there are a range of cases where the proceedings are civil, but because of the serious potential consequences of the proceedings the standard of proof should be the criminal standard." The Court specifically noted that the "nature of the order of a RHSO [Risk of Sexual Harm Orders] is obviously of the utmost seriousness and so are the consequences of breach."[23]

25. Similarly, in *MB*,[24] which related to imposition of a control order under the Prevention of Terrorism Act 2005, the House of Lords held that, although control orders did not constitute a criminal charge, there was a need for more stringent application of the civil limb of the right to a fair trial. According to Lord Hoffmann:

> "[I]n any case in which a person is at risk of an order containing obligations of the stringency found in this case… the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences. This has been the approach of the domestic courts…and it seems to me to reflect the spirit of the Convention."[25]

26. Recently, in *Jones v Birmingham CC and Secretary of State for the Home Department* (the "**Jones Case**"),[26] the UKSC dismissed an appeal in which it was argued that the higher, criminal standard of proof should be applied in the context of gang injunctions under section 34 of the Policing and Crime Act 2009. In doing so, the UKSC dismissed the notion of a flexible civil standard of proof and held that any reasoning in McCann in support of such a proposition was

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19 *McCann*, ¶ 37.
20 *McCann*, ¶ 37.
21 *McCann*, ¶¶ 82, 83.
22 *Commissioner of Police of the Metropolis v. Ebanks* [2012] EWHC 2368 (Admin) ("***Ebanks***").
23 *Ebanks,* ¶ 30.
24 *Secretary of State for the Home Department v MB; Same v. MF* [2007] UKHL 46; [2008] 1 A.C. 440.
25 *MB,* ¶ 24 per Lord Hoffmann.
26 *Jones v Birmingham CC and Secretary of State for the Home Department* [2023] UKSC 27.

"wrong".[27] It also rejected the submission that Article 6 ECHR required the application of the criminal standard of proof. However, *Jones* must be read in the context of gang injunctions specifically and the corresponding legislative regime. Neither is within the scope of this report. The statute provides a number of safeguards and restrictions which limit the severity of the measures which can be imposed under a gang injunction. For example, Section 36(2) imposes a maximum 2-year time limit for any measures under a gang injunction. Section 36(2) – 4(a) makes provision for review hearings with the purpose of considering whether to vary or discharge an injunction. Further the breach of a gang injunction is not a criminal offence. In such circumstances, it was common ground between the parties that a gang injunction did not amount to a criminal offence and therefore did not attract the more protective criminal safeguards under Articles 6(2) and 6(3).[28] This, as explained below, is not the case for many of the measures imposed under the Behavioural Control Orders which are the subject of this report.

27. In summary, despite *Jones,* notwithstanding the characterisation of a measure (such as a Behavioural Control Order) as "civil", where it is sufficiently "serious" and entails grave consequences (including but not limited to a deprivation of liberty), the imposition of that order requires more than proof on a mere balance of probabilities and should attract a higher standard, equivalent to the criminal standard. Legislation which directs authorities to do otherwise is potentially incompatible with Article 6.

(3) Hearsay Evidence

28. Article 6(3)(d) of the Convention provides a person who is criminally charged the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

29. Pursuant to Article 6(3)(d), before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity

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27 *Jones*, ¶ 56.

28 *Jones,* ¶¶ 15 - 21.

to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[29]

30. In the *McCann* case, the House of Lords deferred to the lower court's categorisation of proceedings under the ASBO Act as civil. Having concluded that the proceedings were civil both under domestic law, as well as Article 6, the Court permitted admission of hearsay evidence for the imposition of the order. However, the Court was mindful to state (as the lower court did too) that "[t]he weight of such evidence might be limited. On the other hand, in its cumulative effect it could be cogent. It all depends on the particular facts."[30]

31. It thus appears that the UK Courts are inclined to permit hearsay evidence for the imposition of a preventive order, where the "charge" is not criminal under Article 6 (as per the factors laid down in Engel).[31] However, in circumstances where a measure is equivalent to a criminal charge, it is questionable whether the admission of hearsay evidence will be compatible with Article 6.

(4) Application to specific Behavioural Control Orders

32. In this section, we apply these principles to three, illustrative examples of Behavioural Control Orders.

(5) KCPOs and Article 6

33. The Offensive Weapons Act 2019 introduced KCPOs in Part 2, enabling the imposition of a KCPO on anyone aged 12 or over who is deemed to be at risk of becoming involved in knife crime. Notable features of the KCPO regime relevant to Article 6 include:

33.1 Broad powers to impose a range of often burdensome conditions. Where a KCPO is made on application other than on conviction, it "(a) requires the defendant to do anything described in the order"; and/ or "(b) prohibits the defendant from doing

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29 Case of *Al-Khawaja and Tahery v. the United Kingdom* (Application nos. 26766/05 and 22228/06), Strasbourg, Judgment, 15 December 2011 ("***Al-Khawaja and Tahery***"), ¶ 118; Case of *Hümmer v. Germany* (Application no. 2617/07), Strasbourg, Judgment, 19 July 2012, ¶ 38; Case of *Lucà v. Italy*, 2001, (Application no. 33354/96), Strasbourg, Judgment, 27 February 2001, ¶ 39; Case of *Solakov v. the former Yugoslav Republic of Macedonia*, (Application no. 47023/99), Strasbourg, Judgment, 25 January 2001, ¶ 57.

30 *McCann*, ¶ 35.

31 A.P. Simester and Andrew von Hirsch, "Regulating Offensive Conduct through Two-Step Prohibitions", in Andrew von Hirsch and AP Simester (eds.), *Incivilities* (Oxford: Hart Publishing 2006), pp.175-177; *Chief Constable of Lancashire v. Wilson and others* [2015] EWHC 2763.

anything described in the order."[32] Illustrative examples are provided in the statutory guidance and, in practice, these conditions have included curfews and the curtailment of movement to certain locations.[33]

33.2 Breach of KCPOs may result in imprisonment for up to 2 (two) years.[34]

33.3 For a non-conviction KCPO, the court must be satisfied on the balance of probabilities that, on at least two occasions in the relevant period, the defendant had a bladed article with them without good reason or lawful authority in a public place in England and Wales; on school premises; or on further education premises.[35] The standard of proof for determining breach of KCPOs is the criminal standard.

33.4 KCPOs are considered civil orders, and hearsay evidence is admissible at the imposition stage. Hearsay evidence is not admissible at the breach stage.[36] According to the KCPO Practitioner's Guidance, "Hearsay evidence is admissible; however hearsay should only be used: To prove minor or uncontentious issues (e.g. a copy of previous convictions); [or] For key issues, where oral evidence cannot be called (for example because the only witness has made a statement but cannot be found)."

34. In practice, the restrictions imposed by KCPOs are serious and may effectively deprive a defendant of their liberty, for example, in cases of curfews which last for up to 6 months combined with other restrictive measures. While the Home Office describes KCPOs as "preventative", the nature of certain conditions imposed under a KCPO (such as a curfew or bans on socialising with certain people) could equally be characterised as punitive. Further, breach of a KCPO is a criminal offence which can result in imprisonment for up to 2 years. In such circumstances, application of the bare balance of probabilities standard to the imposition of a KCPO is potentially incompatible with a recipient's fair trial rights under Article 6.

(6) SROs and Article 6

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32 Offensive Weapons Act 2019, Part 2, Section 14 (7).
33 Metropolitan Police, Freedom of Information Request Reference no: 01.FOI.22.022741.
34 Offensive Weapons Act 2019, Part 2, Section 29.
35 Offensive Weapons Act 2019, Part 2, Section 14 (3).
36 Knife Crime Prevention Orders (KCPOs), Practitioners' Guidance, July 2021 ("***KCPO Practitioners' Guidance***"), available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998039/KCPO_Practitioners__Guidance_-July_2021.pdf.

35. SROs were introduced in 2015 by the Anti-Social Behaviour, Crime and Policing Act 2014. SROs are designed to manage and restrict the activities of individuals who pose a risk of sexual harm to the public. Notable features of the regime relevant to Article 6 include:

35.1 Broad powers to "(a) prohibit the defendant from doing anything described in the order;" and/or "(b) require the defendant to do anything described in the order."[37]

35.2 An SRO may prohibit foreign travel for up to five years,[38] impose electronic monitoring,[39] and require notifications to authorities, including before engagement in sexual activity.[40]

35.3 The term "act of a sexual nature" is not defined in the legislation. The UK Home Office Guidance on Part 2 of the Sexual Offences Act 2003 states that "a court will determine whether behaviour constitutes such an act considering the individual circumstances of the behaviour and its context."[41] Thus, the powers of the Court are very wide.

35.4 Breach of SROs may result in imprisonment of up to 5 years.[42]

35.5 In 2022, the Police, Crime, Sentencing and Courts Act 2022 amended Section 122A(6) explicitly to state that the court need only be satisfied on the "balance of probabilities" that a defendant has done at least one act of a sexual nature as alleged.

35.6 The applicable rules of evidence in relation to hearsay are the civil rules. The Civil Evidence Act 1995 and the Magistrates' courts (Hearsay Evidence in Civil Proceedings) Rules 1999 therefore apply and allow the introduction of hearsay evidence in hearings for applications for SROs.[43]

36. As with KCPOs, the restrictions imposed by SROs are serious and may in substance amount to a deprivation of liberty. Further, breach of an SRO is a criminal offence which may result in a lengthy custodial sentence. In such circumstances, application of the bare balance of

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37 Sexual Offences Act 2003, Section 122A(7).
38 Sexual Offences Act 2003, Section 122C.
39 Police, Crime, Sentencing and Courts Act 2022, Section 178 (11), which amends Section 122A of the Sexual Offences Act to include the following language *"[a] sexual risk order may require the defendant to submit to electronic monitoring of the defendant's compliance with the prohibitions and requirements imposed by the order…*"
40 Sexual Offences Act 2003, Section 122F.
41 Guidance on Part 2 of the Sexual Offences Act 2003, March 2023, p. 55.
42 Sexual Offences Act 2003, Section 122H.
43 Guidance on Part 2 of the Sexual Offences Act 2003, March 2023, p. 59.

probabilities standard to the imposition of an SRO is potentially incompatible with a recipient's fair trial rights under Article 6.

(7) PSPOs and Article 6

37. PSPOs were introduced as part of the Anti-Social Behaviour, Crime and Policing Act 2014, and were one of the several new tools for use by local authorities to address anti-social behaviour in their local areas.[44] Notable features of the regime relevant to Article 6 include:

37.1 A PSPO may be drafted "from scratch" on the basis of the "individual and specific issues being faced in a particular public space."[45] Such orders may "prohibit certain activities, such as the drinking of alcohol, as well as placing requirements on individuals carrying out certain activities, for instance making sure that people walking their dogs keep them on a lead in designated areas."[46]

37.2 Authorities are empowered to implement restrictive measures if activities carried out in an area have a "detrimental effect on the quality of life of those in the locality."

37.3 A person failing to comply with a PSPO notice is liable on summary conviction to a fine not exceeding level 3 on the standard scale.[47]

37.4 There is no guidance on admissible evidence to issue a PSPO, however, considering that a PSPO is civil in nature, hearsay evidence will be admissible for such orders in accordance with the Evidence Act 1995.

38. Relative to SROs and KCPOs, the conditions imposed by PSPOs are less serious and could not ordinarily be characterised as depriving the recipient of their liberty. Further, they do not entail a custodial sentence for breach. Accordingly, the application of the lower, civil standard of proof for imposition of PSPOs is less likely to be incompatible with Article 6. However, since the scope of conditions which can be imposed under a PSPO is wide and heavily dependent

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44 Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals, March 2023 ("***Anti-Social Behaviour Guidance***"), p. 64, available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146322/2023_Update_ASB_Statutory_Guidance_-_FINAL__1_.pdf

45 Anti-Social Behaviour Guidance, p. 68.

46 Anti-Social Behaviour Guidance, p. 68.

47 Anti-social Behaviour, Crime and Policing Act 2014, Part 4, Section 63.

on the individual circumstances and the activities being covered, there may be instances where a higher standard of proof is required.

B. Article 7

(1) General Legal Framework

39. Article 7 of the Convention provides that:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

40. The ECtHR has held that Article 7 should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[48]

41. For Article 7 to be applicable, a person must have been "found guilty" of committing a criminal offence. The test in *Engel and Others v. the Netherlands* for assessing whether a charge is "criminal" within the meaning of Article 6 is also relevant to Article 7.[49]

42. The concept of "penalty" set out in Article 7(1) of the Convention is also autonomous in scope.[50] In order to ensure the efficacy of the protection secured under this Article, the ECtHR must be free to go beyond appearances and autonomously assess whether a specific measure is, substantively, a "penalty" within the meaning of Article 7(1).

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48 Case of *S.W. v. the United Kingdom*, (Application no. 20166/92), Strasbourg, Judgment, 22 November 1995, ¶ 34; Case of *C.R. v. the United Kingdom*, (Application no. 2010/92), Strasbourg, Judgment, 22 November 1995, ¶ 32*;* Case of *Del Río Prada v. Spain*, (Application no. 42750/09), Strasbourg, Judgment, ¶ 77; Case of *Vasiliauskas v. Lithuania,* (Application no. 42750/09), Strasbourg, Judgment, ¶ 153).

49 Case of *Brown v. the United Kingdom* (Application no. 52770/99), Strasbourg, Judgment, 4 June 2022; Case of *Société Oxygène Plus v. France (dec.),* (Application no. 76959/11), Strasbourg, Judgment, 17 May 2016, ¶ 43; Case of *Žaja v. Croatia*, (Application no. 66553/12), Strasbourg, Judgment, 4 October 2016, ¶ 86).

50 Case of *G.I.E.M. S.R.L. and Others v. Italy,* (Application no. 1828/06), Strasbourg, Judgment, 28 June 2018, ¶ 210.

43. The concept of "law" within the meaning of Article 7, as in other Convention articles (for instance Articles 8 to 11), comprises qualitative requirements, in particular those of accessibility and foreseeability. These requirements must be satisfied as regards both the definition of an offence[51] and the penalty the offence in question carries or its scope.[52] An insufficient definition of the offence or the applicable penalty constitutes a breach of Article 7 of the Convention.[53]

44. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.[54]

45. There may sometimes be grey areas at the fringes of the definition of the offence. This does not necessarily result in an incompatibility with Article 7, provided that it proves to be sufficiently clear in the large majority of cases. However, the use of overly vague concepts and criteria in interpreting a legislative provision can render the provision itself incompatible with the requirements of clarity and foreseeability as to its effects.[55] In effect, this is likely to be a particular problem in circumstances where an individual is unable to access legal support.

46. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.[56]

(2) Application to Behavioural Control Orders

47. As a threshold issue, Article 7 will only be engaged where the imposition of a Behavioural Control Order amounts, in substance, to a "criminal charge". As discussed above in relation to Article 6, this turns on the character of the measure under domestic law, the nature of the condition, and on the severity of the punishment on breach of that order. Where Article 7

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51 Case of *Jorgic v. Germany*, (Application no. 74613/01), Strasbourg, Judgment, 12 July 2007 ("***Jorgic***"), ¶¶ 103-114).

52 Case of *Kafkaris v. Cyprus*, (Application no. 21906/04), Strasbourg, Judgment, 12 February 2008 ("***Kafkaris***"), ¶ 150; Case of *Camilleri v. Malta*, (Application no. 42931/10), Strasbourg, Judgment, 22 January 2013, ¶¶ 39-45).

53 *Kafkaris*, ¶¶ 150 and 152.

54 Case of *Cantoni v. France*, (Application no. 17862/91), Strasbourg, Judgment, 11 November 2016 ("***Cantoni***"), ¶ 29; *Kafkaris*, ¶ 140; Case of *Del Río Prada v. Spain*, (Application no. 42750/09), Strasbourg, Judgment, 21 October 2013 ("***Del Río***"), ¶ 79.

55 Case of *Liivik v. Estonia*, (Application no. 12157/05), Strasbourg, Judgment, 25 June 2009, ¶¶ 96-104.

56 Case of *Kononov v. Latvia,* (Application no. 12157/05), Strasbourg, Judgment, 25 June 2009, ¶ 235; *Cantoni*, ¶ 35.

does apply, the order must meet the accessibility and foreseeability requirements under Article 7.

48. Recipients of a Behavioural Control Order will not automatically have access to legal aid at the implementation stage, as they would if they were the subject of a criminal charge. This makes it particularly important that the conditions imposed and the consequences for breach are clear and foreseeable. It also gives rise to the question of whether the recipient of a Behavioural Control Order which is equivalent, in substance, to a criminal charge should have the same access to legal aid as a criminal suspect.

(3) KCPOs and Article 7

49. As stated above in relation to Article 6, certain KCPOs are substantially equivalent to a criminal charge and therefore engage Article 7. Given that the statute is silent on the nature of the conditions which can be imposed and the guidance provides only illustrative examples, authorities are given wide discretion to craft specific, individualised conditions. This gives rise to a concern that the conditions themselves, which amount in substance to a personalised criminal code, will not always meet the quality of law requirements under Article 7.

50. For KCPOs on conviction, Section 19 provides that where the recipient is convicted of an offence which the court, on the balance of probabilities, is satisfied is a "relevant offence", it may impose a KCPO.[57] An offence is a relevant offence if "(a) the offence involved violence, (b) a bladed article was used, by the defendant or any other person, in the commission of the offence, or (c) the defendant or another person who committed the offence had a bladed article with them when the offence was committed." Section 19(11) also clarifies that the term "violence" in Section 19(10) also includes a threat of violence.[58] While there is some ambiguity in this definition, it is unlikely to reach the level required to offend against the clarity and foreseeability requirements under Article 7.

51. For applications other than on conviction, the police can apply for a KCPO against a recipient merely on the basis of a suspicion that they are carrying a bladed article, and that the recipient has had on two occasions in the relevant period, carried a bladed article with them without good reason or lawful authority.[59] The fact that the police have wide ranging powers to make

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[59] KCPO Practitioners' Guidance, p. 7.

such applications simply based on suspicion potentially gives rise to concerns that the legislation itself is insufficiently foreseeable to meet the quality of law requirements under Article 7. Specifically, it is impossible for a recipient to know what actions / inactions on their part can trigger suspicion in the police's minds and result in the imposition of a KCPO.

(4) SROs and Article 7

52. As discussed above in relation to Article 6, certain SROs will amount, in substance, to a criminal charge and therefore engage Article 7, including the quality of law requirement.

53. One of the conditions which must be satisfied for the imposition of an SRO is whether the recipient has done an act of a sexual nature as a result of which there is reasonable cause to believe that it is necessary for an SRO to be made.[60] However, there is no statutory definition of "an act of a sexual nature".

54. The UK Home Office Guidance on the Sexual Offences Act, 2003 states in this respect:

54.1 "'Act of a sexual nature' is not defined in legislation, and therefore a court will determine whether behaviour constitutes such an act considering the individual circumstances of the behaviour and its context.

54.2 This term intentionally covers a broad range of behaviour. Such behaviour may, in other circumstances and contexts, have innocent intentions. It also covers acts that may not in themselves be sexual but have a sexual motive and/or are intended to allow the perpetrator to move on to sexual abuse."[61]

55. On the basis of the legislation and guidance, it is extremely difficult to determine what acts will be considered sexual in nature and potentially give rise to the imposition of an SRO. Such ambiguity may, in time, be cured by interpretation and guidance from the courts.[62] However, in the meantime, there are serious concerns that the law on SROs does not meet the qualitative requirements of Article 7.

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60 Sexual Offences Act, 2003, Part 2, Section 122A.

61 Guidance on Part 2 of the Sexual Offences Act 2003, March 2023, p. 59, available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148607/Part_2_Guidance_March_2023_FINAL_3003.pdf.

62 The existing case law does little to address the issue. In *Chief Constable of Kent Police v. Carter* [2022] EWHC 1972 (Admin), the court held that "[t]hough the statutory guidance does not make it explicit, an act of a sexual nature does not necessarily involve commission of a sexual offence, though committing a sexual offence inevitably will involve an act of a sexual nature."

56. Further, the concerns expressed above at paragraph 49 in relation to the conditions imposed under KCPOs also applies to SROs.

C. Article 14

(1) General legal framework

57. Article 14 provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

58. Article 14 has "no independent existence",[63] but prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention. However, the ECtHR has established that the ancillary nature of Article 14 does not mean that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision.[64] This is also reflected in domestic jurisprudence.[65]

59. Article 14 prohibits both direct and indirect discrimination. Direct discrimination has been defined as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations".[66] Indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group.[67] Indirect discrimination does not necessarily require a discriminatory intent[68] but requires that there is no reasonable or objective justification.[69]

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63 Case of *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" ("**The Belgian linguistic case**") v. Belgium,* (Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Strasbourg, Judgment, 23 July 1968, ¶ 9 of "The Law" part; *Carson and Others v. the United Kingdom* (Application no. 42184/05), Strasbourg, Judgment, 16 March 2010 ("***Carson***"), ¶ 63; Case of *E.B. v. France* (Application no. 43546/02), Strasbourg, Judgment, 22 January 2008 ("***E.B.***") , ¶ 47.

64 Case of *Sommerfeld v. Germany,* (Application no. 31871/96), Strasbourg, Judgment, 12 December 2000; *Marckx v. Belgium*, (Application no. 6833/74), Strasbourg, Judgment, 13 June 1979; *The Belgian linguistic case*, 1968, ¶ 4 of "The Law" part.

65 *R. (on the application of Carson) v. Secretary of State for Work and Pensions* [2002] 2 All ER 994, ¶ 12; *Ghaidan v. Godin-Mendoza* [2003] Ch. 380, 387, ¶ 9.

66 Case of *Carvalho Pinto de Sousa Morais v. Portugal*, (Application no. 17484/15), Strasbourg, Judgment, 25 July 2017.

67 *Biao v Denmark,* (Application no. 38590/10), Strasbourg, Judgment, 24 May 2016 ("***Biao***"), ¶ 103.

68 *Biao,* ¶ 103; Case of *D.H. and Others v. the Czech Republic* (Application no. 57325/00), Strasbourg, Judgment, 13 November 2017 ("***D.H. and Others***"), ¶ 184.

69 Case of *Dakir v. Belgium*, (Application no. 4619/12), Strasbourg, Judgment, 11 July 2017, ¶ 65.

60. Article 14 does not prohibit differences in treatment which are founded on "an objective assessment" of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.[70] In the Court's words, a difference in treatment will be discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[71]

61. ECtHR jurisprudence provides guidance on the "legitimate aim" and "proportionality" requirements:

61.1 Legitimate aim: in order to justify a difference in treatment, in the first place States have to base the measure at issue on a "legitimate aim". Moreover, they have to show that there is a "link" between the legitimate aim pursued and the differential treatment alleged by the applicant.[72]

61.2 Proportionality: the difference in treatment must strike a reasonable balance between the preservation of the interests of the community and respect for the individual's rights and freedoms.[73] There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[74]

(2) Application to KCPOs and Behavioural Control Orders generally

62. The potential discriminatory effect of certain Behavioural Control Orders is well documented. For example, in relation to KCPOs:

62.1 In 2020, Linda Logan, chair of the Magistrates Association's Youth Court Committee noted that "[the] use [of these orders] may worsen existing overrepresentation of

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70 Case of *G.M.B. and K.M. v. Switzerland* (Application no. 36797/97), Strasbourg, Judgment, 27 September 2001*;* Case of *Zarb Adami v. Malta,* (Application no. 16631/04), Strasbourg, Judgment, 27 September 2005, ¶ 73; *Molla Sali*, ¶ 135; Case of *Fabris v. France,* (Application no. 16574/08), Strasbourg, Judgment, 24 October 2012, ¶ 56; *D.H. and Others*, ¶ 175*;* Case of *Hoogendijk v. the Netherlands* (Application no. 58641/00), Strasbourg, Judgment, 6 January 2005.

71 *Molla Sali v. Greece,* ¶ 135; *Fábián v. Hungary,* ¶ 113; Case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (Application no. 9214/80; 9473/81; 9474/81), Strasbourg, Judgment, 28 May 1985, ¶ 72; *The Belgian linguistic case*, ¶ 10 of "the Law" part.

72 Case of *Ünal Tekeli v. Turkey*, (Application no. 29865/96), Strasbourg, Judgment, 16 November 2004, ¶ 66.

73 *The Belgian linguistic case*, ¶ 10 of "the Law" part.

74 *Molla Sali v. Greece*, ¶ 135*; Fabris v. France*, ¶ 56; Case of *Mazurek v. France,* (Application no. 34406/97), Strasbourg, Judgment, 1 February 2000, ¶¶ 46 and 48*;* Case of *Larkos v. Cyprus,* (Application no. 29515/95), Strasbourg, Judgment, 21 May 1997, ¶ 29.

black, Asian and minority ethnic young people in the justice system and [that] this issue must therefore be at the heart of the evaluation of the pilot."[75]

62.2 According to Professor Jennifer Hendry: "[n]ot only are KCPOs likely to contribute further to the over-policing of Black, Asian and minority ethnic communities through, for example, the use of alleged compliance ensuring techniques such as surveillance and heightened stop and search, but such measures are also liable to result in more Black children subject to a KCPO being disproportionately found to be in breach."[76]

63. The available data related to KCPOs tends to confirm an unequal impact on certain sectors of society. In response to a Freedom of Information Request, the Metropolitan Police reported that 57% of KCPOs it had issued were imposed on black people.[77]

64. This is a small sample, relating to only one specific Police force, one specific protected characteristic and one specific Behavioural Control Order. In order to make firm conclusions on the discriminatory effect of KCPOs (still more Behavioural Control Orders generally), more data is required. This will require the public authorities responsible for implementing Behavioural Control Orders systematically to collect data on the status and protected characteristics of recipients.

65. In relation to KCPOs specifically, the Home Office clearly anticipates potential issues under Article 14. In its legal memorandum on KCPOs, it states that: "[i]n the event that the rights of those of a particular religious affiliation, gender, race, or other national or social origin, may indirectly be disproportionately affected in comparison to other members of society the Government is of the view that there is reasonable and objective justification (namely, the prevention of disorder and crime and the threat posed to public safety by knife crime)."[78]

66. While this is undoubtedly a legitimate aim, the Home Office does not engage in the critical question of whether there is a link between this aim and potential differential treatment, still less the question of proportionality. Given the evidence suggesting unequal treatment, such

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75 Magistrates Association Statement (6 March 2020), 'Linda Logan, Chair', MA Youth Committee, available online at https://www.magistrates-association.org.uk/News-and-Comments/knife-crime-preventionorders-to-be-piloted-in-london.

76 Jennifer Hendry, 'The Usual Suspects': Knife Crime Prevention Orders and the 'Difficult' Regulatory Subject', The British Journal of Criminology, 2022, Vol. 62, No. 2, 378-395.

77 https://www.met.police.uk/foi-ai/metropolitan-police/d/may-2022/knife-crime-prevention-orders-kcpos-and-serious-violence-reduction-orders-svros/.

78 Offensive Weapons Bill European Convention on Human Rights Supplemental Memorandum by The Home Office, ¶ 25.

an absence of reasonable justification gives rise to grounds for concern that the KCPO regime is not being implemented in a way which is compatible with Article 14.

IV. THE CONDUCT TARGETED AND CONDITIONS IMPOSED BY BEHAVIOURAL CONTROL ORDERS

67. In the following part of this report, we consider certain human rights issues associated with the conduct targeted by Behavioural Control Orders and the conditions imposed thereunder. In particular, we consider issues under Articles 5, 8, 9, 10 and 11 of the Convention.

A. Article 5

(1) General legal framework

68. Article 5 of the Convention provides that "[e]veryone has the right to liberty and security of person" and "no one shall be deprived of his liberty" except in certain circumstances as set out in Article 5 and "in accordance with a procedure prescribed by law."

69. Article 5 aims to ensure that no person is deprived of their liberty in an arbitrary manner. Article 5 is not, however, concerned with mere restrictions on liberty of movement.[79] The difference between a deprivation of liberty and a restriction on movement is one of degree or intensity, not one of nature or substance. [80]

70. In determining whether there has been a deprivation of liberty within the meaning of Article 5, the ECtHR has considered the concrete situation and the whole range of criteria, including the type, duration and the effect and manner of implementation of the measure in question.[81] A deprivation of liberty contains both an objective element of confinement and a subjective element in that the person has not consented.[82] Relevant factors to be considered in assessing the objective element include whether a person had the possibility to leave the area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.[83] The fact that a person is not handcuffed, put in a cell or

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79 *Creangă v. Romania* (Application no. 29226/03) 23 February 2012 at § 92-93; *Engel and Others v. the Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 2976 at § 58 ("*In proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion … it does not concern mere restrictions upon liberty of movement*.").

80 *Guzzardi v. Italy* (Application no. 7367/76) 6 November 1980 at § 92-93; *De Tommaso v. Italy* (Application no. 43395/09); *Stanev v. Bulgaria* (Application no. 36760/06).

81 *Guzzardi v. Italy* (Application no. 7367/76) 6 November 1980 at § 92; *Creangă v. Romania* (Application no. 29226/03) 23 February 2012 at § 91. The requirement to take account of the "type" and "manner of implementation" of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction.

82 *Storck v. Germany* (Application no. 61603/00) 16 June 2005 at § 74.

83 *Guzzardi v. Italy* (Application no. 7367/76) 6 November 1980 at § 95; *Storck v. Germany* (Application no. 61603/00) 16 June 2005 at § 73.

otherwise physically restrained is not decisive as to whether there has been a deprivation of liberty under Article 5.[84]

71. The question of whether certain measures other than imprisonment result in a *prima facie* infringement of Article 5 has arisen in a variety of circumstances considered by the ECtHR as well as the UK courts. Relevant cases, which consider measures comparable to the conditions which may be imposed under a Behavioural Control Order, are discussed below:

71.1 Stop and search. In *Gillan and Quinton v. United Kingdom*, the ECtHR found that the use of stop and search powers by the police constituted a deprivation of liberty and violated Article 5. It concluded that: "although the length of time during which each applicant was stopped and searched did not in either case exceed thirty minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1."[85]

71.2 Crowd control by the police on public order grounds. In *Austin and Others v. United Kingdom*, a majority of the ECtHR court confirmed that in modern society the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good.[86] Such restrictions, so long as they are unavoidable as a result of circumstances beyond the control of the authorities, are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, cannot properly be described as "deprivations of liberty" within the meaning of Article 5. However, the use of containment and crowd-control techniques may give rise to an unjustified deprivation of liberty. In each case, Article 5 must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public, as they are required to do under both national and Convention law. On the facts of the case, the majority decided there was

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84 *M.A. v. Cyprus* (Application no. 41872/10) 23 July 2013.

85 *Gillan and Quinton v. the United Kingdom* (Application no. 4158/05) 12 January 2010 at § 57.

86 *Austin and Others v. United Kingdom* (Applications nos. 39692/09, 40713/09 and 41008/09) 15 March 2012. For example, the court noted that the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match.

no deprivation of liberty.[87] However, Judges Tulkens, Spielmann and Garlicki disagreed in a joint dissenting opinion, finding that there had been a deprivation of liberty in terms of Article 5.[88] They noted that the police had used their powers indiscriminately and coercively in erecting a cordon and preventing people from leaving a confined area.[89]

71.3 Control orders. The UK House of Lords and Supreme Court have considered on several occasions whether specific control orders issued under the Prevention of Terrorism Act 2005 breach Article 5, coming to different conclusions based on the terms of the control order in question.

71.3.1 In *Secretary of State for the Home Department v. JJ* [2007] UKHL 45, the control orders imposed an 18-hour curfew, provided for electronic tagging and prohibited social contact with anybody who was not directly authorised by the Home Office. The orders allowed spot police searches and prohibited the subjects from using or possessing any communications equipment except a fixed telephone line. The House of Lords held that the control orders amounted to a deprivation of liberty and violated Article 5 taking into account the length of the curfew period, the extent of the obligations and their impact on the recipients' ability to lead a normal life.[90] The House of Lords likened the control orders to solitary confinement for an indefinite duration.

71.3.2 In *Secretary of State for the Home Department v. E* [2007] UKHL 47, the control order subjected the defendant to a curfew of 12 hours in his own home, where he had access to his garden and lived with his wife and family, had several approved visitors, was not subject to any restriction outside of the curfew hours, was free to attend mosque and was not prohibited from

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87 The applicants had been detained in a police cordon on Oxford Street, London on 1 May 2001. The cordon was imposed over the entire street from around 2 pm to 9 pm due to a protest but was applied indiscriminately to all people on the street regardless of whether they were protesting or not.

88 The minority in their dissenting opinion that the measure had been applied indiscriminately and was also imposed against people taking no part in the demonstration. In this regard, the police could have been expected to apply less intrusive means. As it was, "*all people who happened to be at Oxford Circus at around 2 p.m. were treated like objects and were forced to remain there as long as the police had not solved other problems around the city*."

89 *Austin and Others v. United Kingdom* (Applications nos. 39692/09, 40713/09 and 41008/09) 15 March 2012, Dissenting Opinion at § 14.

90 The House of Lords cited the ECtHR decisions of *Guzzardi v. Italy* (Application no. 7367/76) 6 November 1980 and *Engel v. Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 1976 in its decision.

associating with named individuals. The court considered these measures to merely restrict rather than deprive the defendant of liberty – distinguishing the decision and more stringent control orders considered in *Secretary of State for the Home Department v JJ* (*see* above).

71.3.3 In *Secretary of State for the Home Department v. AP* [2010] UKSC 24, the Supreme Court stated that, in respect of control orders imposing a curfew of between 14 and 18 hours, restrictions other than confinement could tip the balance in deciding whether the order breached Article 5. However, where the order imposed a curfew of less than 16 hours, the other conditions would need to be "unusually destructive of the life the controlee might otherwise have been living" to constitute a deprivation of liberty.

72. Article 5 states that no one shall be deprived of liberty save in the cases listed in Article 5(1)(a) to (f). These include "(a) the lawful detention of a person after conviction by a competent court," "(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court to secure the fulfilment of any obligation prescribed by law," and "(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."[91]

73. Any deprivation of liberty must also be "in accordance with a procedure prescribed by law." This provision ensures that any deprivation of liberty is lawful, *i.e.*, it complies with the procedural and substantive rules of national law, and international law where appropriate.[92] The Convention also implies general principles of the rule of law, including legal certainty, proportionality and protection against arbitrariness (which is the very purpose of Article 5).[93] In terms of certainty, the ECtHR has held that it is essential that the conditions for deprivation

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91 Convention Article 5(1)(a)-(c). See also (d) to (f): "(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

92 *Del Rio Prada v. Spain* (Application no. 42750/09) 21 October 2013; *Medvedyev and Others v. France* (Application no. 3394/03) 29 March 2010.

93 *Simons v. Belgium* (Application no. 71407/10) 28 August 2012.

of liberty under domestic law are clearly defined and that the law itself be foreseeable in its application.[94]

(2) Application to Behavioural Control Orders

74. While many conditions made under Behavioural Control Orders would not meet the confinement and coercion criteria (see paragraph 70) such as to amount to a *prima facie* deprivation of liberty under Article 5, certain conditions (or combinations of conditions) might do so in certain circumstances. For example, as set out in *Secretary of State for the Home Department v. JJ* [2007] UKHL 45 and *Secretary of State for the Home Department v. AP* [2010] UKSC 24, a lengthy curfew coupled with other intrusive measures which are considered so severe as to be destructive of a person's liberty, is likely to engage Article 5.

75. In circumstances where the high threshold for a "deprivation of liberty" under Article 5 is met, such a deprivation may be justified in the following cases:

75.1 A post-conviction order would fall within the scope of Article 5(1)(a), where the deprivation of liberty constitutes lawful detention after conviction by a competent court.

75.2 A pre-conviction order would potentially fall under Article 5(1)(c) where the deprivation of liberty could reasonably be considered "necessary to prevent [the recipient] committing an offence or fleeing after having done so." However, there is a potential lacuna in respect of pre-conviction Behavioural Control Orders that amount to a deprivation of liberty which cannot reasonably be considered "necessary to prevent [the recipient] committing an offence or fleeing after having done so", *i.e.*, where the conduct sought to be restricted is not per se criminal in nature. In such cases, a Behavioural Control Order would likely amount to an unjustified breach of Article 5 as it does not fall under one of the "cases" in Article 5(1).

76. Assuming that the Behavioural Control Order falls within one of these cases, it would still be necessary for the State to show that the deprivation was in accordance with a "procedure prescribed by law." In all cases, there is legislation setting out the process that must be followed in making Behavioural Control Orders. However, the Convention also requires

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[94] *Del Rio Prada v. Spain* (Application no. 42750/09) 21 October 2013; *Medvedyev and Others v. France* (Application no. 3394/03) 29 March 2010.

Behavioural Control Orders to adhere to general principles of the rule of law, including certainty, proportionality and protection against arbitrariness. Where the conditions or requirements are overly harsh or restrictive, unclear, unforeseeable and insufficiently linked to the purpose of the particular order, they may fall foul of these requirements (see discussion above under Article 7 at paragraph 47 *et seq* and below in relation to Articles 8, 9, 10 and 11 at paragraph 101 *et seq*).

B. Article 8

77. Article 8 protects the right to respect for private life, family life, home and correspondence. These rights are interpreted broadly:

77.1 Private life. This encompasses the right of each individual to approach others in order to establish and develop relationships with them and with the outside world. It covers the physical and psychological integrity of a person and may "embrace multiple aspects of the person's physical and social identity."[95] The right to private life also extends to e.g., living conditions,[96] relations with human beings,[97] and protection of personal data.[98]

77.2 Family life. The essential ingredient of this right is the ability to live together so that family relationships may develop normally, and members of the family may enjoy each other's company.[99]

77.3 Home. The notion of "home" is an autonomous, flexible concept that does not depend on domestic law. All persons have the right to respect for one's home and peaceful enjoyment without State interference.[100]

77.4 Correspondence. This right protects the confidentiality of communications in a wide range of situations, including letters of a private or professional nature and telephone

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95 *Denisov v. Ukraine* (Application no. 76639/11) 25 September 2018 at §§ 95-96.
96 *Hudorovič and Others v. Slovenia* (Applications nos. 24816/14 and 25140/14) 10 March 2020 at §§ 112-116.
97 *Paradiso and Campanelli v. Italy* (Application no. 25358/12) 24 January 2017 at § 159.
98 *M.L. and W.W. v. Germany* (Applications nos. 60798/10 and 65599/10) 28 September 2018 at § 87.
99 *Marckx v. Belgium* (Application no. 6833/74) 13 June 2979 at § 31; *Olsson v. Sweden* (no. 1) (Application no. 10465/83) 24 March 1988 at § 59.
100 *Cvijetić v. Croatia* (Application no. 71549/01) 26 February 2004 at §§ 51-53.

conversations.[101] Data, electronic messages, internet use and paper messages all fall under Article 8 protection.[102]

78. The State may only interfere with the enjoyment of Article 8(1) protected rights on the grounds set out in Article 8(2). In terms of whether any restrictive measure furthers a legitimate aim in Article 8, the State must demonstrate how this aim is fulfilled, and also that it had the aim in mind when adopting the measure.[103] Further, in determining whether an interference is "necessary in a democratic society" the ECtHR has confirmed that there must be a pressing social need for the measures, the reasons adduced by the State are relevant and sufficient, and the measures were proportionate to the legitimate aims pursued.[104]

79. Article 8 is aimed at protecting the individual against arbitrary State interference, which is a negative obligation. However, the State may also have a positive obligation to take measures to secure respect for private life even in the sphere of relations between individuals.[105] A fair balance must be struck between the competing interests of the individual and the community as a whole.[106]

80. States enjoy a wide margin of appreciation in respect of Article 8, especially when balancing competing private and public interests and Convention rights,[107] although the margin may be restricted where an important facet of a person's existence or identity is at stake.[108]

81. As with other qualified rights, any interference with Article 8 rights must be in accordance with the law. This necessitates compliance with the terms of any law as well relating to the quality of the law, requiring it to be compatible with the rule of law, *i.e.*, clear, foreseeable and adequately accessible.[109] Further, any discretion afforded to public authorities to interfere

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101 *See e.g., Niemietz v. Germany* (Application no. 13710/88) 16 December 1992; *Margareta and Roger Andersson v. Sweden.*

102 *See e.g., Copland v. United Kingdom* (Application no. 62617/00) 3 April 2007; *Bărbulescu v. Romania* (Application no. 61496/08) 5 September 2017.

103 *Mozer v. the Republic of Moldova and Russia* (Application no. 11138/10) 23 February 2016 at § 194.

104 *Z v. Finland* (Application no. 22009/93) 25 February 1997 at § 94.

105 *See Evans v. United Kingdom* (Application no. 6399/05) 10 April 2007.

106 *Fernández Martínez v. Spain* (Application no. 56030/07) 12 June 2014 at § 147; *Gaskin v. United Kingdom* (Application no. 10454/83) 7 July 1989 at § 42.

107 *Evans v. United Kingdom* (Application no. 6399/05) 10 April 2007 at § 77; *Frette v. France* (Application no. 36515/97) 26 February 2002 at § 42.

108 *X and Y v. The Netherlands* (Application no. 8978/80) 26 March 1985 at §§ 24 and 27; *Christine Goodwin v. the United Kingdom* (Application no. 28957/95) 11 July 2002 at § 90 *("Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.").*

109 *Silver and Others v. the United Kingdom* (Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) 25 March 1983 § 97.

with the rights in Article 8 must be defined with reasonable clarity as to the scope and manner of exercise of the relevant discretion to ensure individuals are afforded protection of the rule of law in a democratic society.[110]

82. The ECtHR has considered Article 8 in the context of certain, specific issues which are of potential relevance to the Behavioural Control Orders under consideration, finding that:

82.1 Article 8 cannot be relied on in order to complain of personal, social, psychological and economic suffering which is a foreseeable consequence of one's own actions, such as the commission of a criminal offence or similar misconduct.[111]

82.2 GPS surveillance of a suspected terrorist and processing of this data did not violate Article 8.[112] However, systemic surveillance and recording of the communications of prisoners, including with their lawyers and family members, was found to be a violation of Article 8.[113]

82.3 The use of coercive powers conferred by the legislation requiring an individual to submit, anywhere and at any time, to an identity check and a detailed search of his person, his clothing and his personal belongings amounts to an interference with the right to respect for private life.[114]

83. In terms of domestic case law, the UK Courts have considered Article 8 in the context of conditions or restrictions imposed on individuals in terms of, *inter alia*, various control or permit orders as well as wide-reaching prohibitions on public spaces.

84. In *QX v. Secretary of State for the Home Department* [2020] EWHC 1221 (Admin), X was deported from Turkey to the UK and served with notice of obligations in terms of Section 9 of the Counter-Terrorism and Security Act 2015, including the obligation to: (a) report daily to a named police station within specified hours; and (b) attend a two-hour appointment with a theologian each week. X sought review of these obligations on the basis of Article 8 of the Convention. The Court found that the combination of the obligations amounted to

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110 *Lia v. Malta* (Application no. 8709/20) 5 May 2022 at §§ 56-57.

111 *Denisov v. Ukraine* (Application no. 76639/11) 25 September 2018 at §§ 95-96.

112 *Uzun v. Germany* (Application no. 35623/05) 2 September 2010 at § 81.

113 *Folzonaro v. Italy* (Application no. 73357/14) 15 June 2021; *Wisse v. France* (Application no. 71611/01) 20 December 2005; *Altay v. Turkey* (no. 2) (Application no. 11236/09) 9 April 2019.

114 *Gillan and Quinton v. the United Kingdom* (Application no. 4158/05) 12 January 2010 at § 87; *Vig v. Hungary* (Application no. 59648/13) 14 January 2021 at § 49, 62.

interference with X's Article 8 rights as they had the effect of circumscribing his movements and preventing him from living freely in the general population, on pain of criminal sanction. The extent of the interference was also "direct and material" rather than incidental.

85. In the decision of *R (on the application of F) v. Secretary of State for the Home Department* [2010] UKSC 17, the Supreme Court found that the Sexual Offences Act was incompatible with Article 8 in that it subjected sex offenders (sentenced for 30 months or more) to notification requirements for the rest of their lives without the opportunity of review. The Court found that this regime was disproportionate to the extent that it did not provide for review, as it was realistic to assume that some offenders may be able to show that they no longer posed any significant risk in future.

86. A different conclusion was reached in respect of terrorism-related notification requirements in *R. (on the application of Irfan) v. Secretary of State for the Home Department* [2013] EWCA Civ 1471. In that case, a 10-year notification requirement was imposed on an offender convicted of a terrorism offence, without any right of review under the Terrorism Act 2006. He appealed against the decision on the basis of Article 8. The Court of Appeal found, however, that the notification requirements were "light touch" and not disproportionate given the unique threat of even a single act of terrorism, even without the opportunity for review. The Court also found that the notification requirements were not comparable to the strict requirements imposed in many control orders.

C. Articles 9, 10 and 11

87. Articles 9, 10 and 11 enshrine the rights to freedom of thought, conscience and religion, freedom of expression and the freedom to peaceful assembly and association, respectively. Like Article 8, they are all qualified rights, requiring that the measure is lawful, necessary and proportionate.

88. **Article 9**(1) provides that "[e]veryone has the right to freedom of thought, conscience and religion" alone or in community with others and in public or private while Article 9(2) confirms that "[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

89. "Interference" with Article 9 can manifest in the form of a criminal or administrative penalty,[115] disciplinary sanction[116] and/or a physical obstacle preventing a person from exercising their rights under Article 9, including regular attendance at religious services or a specific place of worship.[117]

90. The legitimate aims in Article 9(2) liable to justify interference in an individual's manifestation of his religion or beliefs are exhaustive, and the aims are construed restrictively.[118] As with any interference with a qualified right, any measures taken at the national level must be justified in principle, and proportionate.[119] That means that there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[120]

91. **Article 10**(1) provides that "[e]veryone has the right to freedom of expression" including the right to hold opinions and receive and impart information and ideas without interference by public authority. Article 10(2) confirms that the exercise of the freedoms in Article 10(1) "carries with it duties and responsibilities" and "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

92. In several cases where the State had penalized persons for participating in public protests and engaging in hooliganism, the ECtHR has held that State must weigh up the importance of the right to freedom of expression and peaceful assembly as well as the protection of the public and any penalties imposed by the State should be the least restrictive measures possible.[121]

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115 *Kokkinakis v. Greece* (Application no. 14307/88) 25 May 1993.

116 *Korostelev v. Russia* (Application no. 29290/10) 12 May 2020.

117 *Boychev and Others v. Bulgaria* (Application no. 77185/01) 27 January 2011; *Süveges v. Hungary* (Application no. 50255/12) 5 January 2016 at §§ 147-157.

118 *Svyato-Mykhaylivska Parafiya v. Ukraine* (Application no. 77703/01) 14 June 2007 at §§ 132 and 137; *S.A.S. v. France [GC] (Application no. 43835/11)* 1 July 2014 at § 113.

119 *Leyla Şahin v. Turkey* [GC] (Application no. 44774/98) 10 November 2005 at § 110.

120 *Biblical Centre of the Chuvash Republic v. Russia* (Application no. 33203/08) 12 June 2014 at § 58.

121 *Fáber v. Hungary* (Application no. 40721/08) 24 July 2012; *Handzhiyski v. Bulgaria* (Application no. 10783/14) 6 April 2021.

In principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence.[122]

93. The ECtHR has also considered whether restrictions on use of the internet engages Article 10. In the context of prisons, in circumstances where internet use had been prevented but: (a) the applicant needed internet access to protect his rights in terms of court proceedings and the State had failed to carry out a sufficient examination of the prisoners' individual situations;[123] and (b) the information available online was relevant to the applicant's education and rehabilitation,[124] the ECtHR found that there had been an interference with Article 10.

94. **Article 11**(1) provides that "[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others." Article 11(2) confirms that "[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

95. The ECtHR has confirmed that Article 11 is a fundamental right and one of the foundations of a democratic society – closely linked to freedom of expression and Article 10 as well as, in religious contexts, Article 9.[125]

96. The right of "assembly" covers private meetings and those in public places, whether static or in motion and can be exercised by individual participants as well as the persons organizing the gathering.[126] Article 11 protects the right to "peaceful assembly" which covers all gatherings except where the organisers and participants have violent intentions, incite violence or otherwise reject the foundations of democratic society.[127] Freedom of "association" is concerned with the right to form or be affiliated with a group or organization pursuing particular aims (rather than the right to mix socially or share the company of others).[128]

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122 *Murat Vural v. Turkey* (Application no. 9540/07) 21 October 2014 at § 66.
123 *Kalda v. Estonia* (Application no. 17429/10) 19 January 2016 at § 50.
124 *Jankovskis v. Lithuania* (Application no. 21575/08) 17 January 2017 at § 59.
125 *Djavit An v. Turkey* (Application no. 20652/92) 20 February 2003 at § 56; *Freedom and Democracy Party (ÖZDEP) v. Turkey* (Application no. 23885/94) 8 December 1999 at § 37.
126 *Kudrevičius and Others v. Lithuania* (Application no. 37553/05) 15 October 2015 at § 91.
127 *Kudrevičius and Others v. Lithuania* (Application no. 37553/05) 15 October 2015 at § 91.
128 *McFeeley v. the United Kingdom*, Commission decision, 15 May 1980 at § 114; *Bollan v. the United Kingdom* (Application no. 42117/98) 4 May 2000.

97. Notably, the ECtHR has stated that obstructing traffic arteries as part of a demonstration is conduct which, by itself, is considered peaceful – although the deliberate obstruction of traffic to seriously disrupt activities of others is not at the core of Article 11 (and will be taken into account when assessing justification for any State interference, *i.e.*, the State has a wider margin of appreciation in such situations).[129] The occupation of public buildings is also considered peaceful, despite the unlawfulness and disruptions this may case.[130]

98. The ECtHR has held that States do not have unlimited discretion to take measures or impose sanctions which impinge on Article 11 rights and the Court will assess the nature and severity of any penalties on the basis of proportionality and the aim being pursued.[131] Criminal sanctions require particular justification.[132]

99. In terms of domestic case law, Articles 9, 10 and 11 have been considered in the context of various protests and the State's response:

    99.1 *Dulgheriu v. Ealing LBC* [2019] EWCA Civ 1490, the Court of Appeal considered a Public Spaces Protection Order (PSPO) around a women's health clinic imposed by a local authority banning pro-life protestors from gathering, displaying posters or handing out leaflets at the clinic. The Court found that the protestors' Article 9, 10 and 11 rights were engaged – but that these were outweighed by the Article 8 rights of the women wishing to access the clinic, and that the terms of the PSPO were proportionate and not vague or excessive.

    99.2 In *Thurrock Council v. Adams* [2022] EWHC 1324 (QB) the Court considered whether an injunction against "persons unknown" to restrain protestors from obstructing fuel tankers and terminals on a highway would violate Articles 10 and 11 of the ECHR. The Court confirmed that defendants had acted in exercise of those rights, that the public

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129 *Kudrevičius and Others v. Lithuania* (Application no. 37553/05) 15 October 2015 at § 91. However, authorities must still apply standards which are in conformity with the principles embodied in Article 11 and base their decisions on an acceptable assessment of the relevant facts.

130 *Cisse v. France* (Application no. 51346/99) 9 July 2002 at §§ 39-40.

131 *Ekrem Can and Others v. Turkey* (Application no. 10613/10) 8 March 2022 at § 91.

132 *Rai and Evans v. the United Kingdom* (Applications nos. 26258/07 and 26255/07) 2009. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (*Akgöl and Göl v. Turkey* (Application nos. 28495/06 and 28516/06) 17 May 2011 at § 43), and notably to deprivation of liberty (*Gün and Others v. Turkey* (Application no. 8029/07) 18 June 2013 at § 83).

authority had lawfully interfered with those rights in pursuit of a legitimate aim and that the interference was necessary to achieve that aim.[133]

D. Application of Articles 8, 9, 10 and 11 to Behavioural Control Orders

100. Behavioural Control Orders may impose a wide range of conditions and requirements which give rise to a *prima facie* infringement on one or more of a recipient's rights under Articles 8, 9, 10 and / or 11. For example:

100.1 Restrictions on a recipient's movements such as curfews and prohibitions on being in a particular location at a particular time[134] may prevent an individual from establishing and developing relationships with the outside world, in breach of their right to private life under Article 8;

100.2 Restrictions on a recipient's ability to see friends, family and other people may also infringe their right to a private life, as well as family life under Article 8 and their right to freedom of association under Article 11;[135]

100.3 Restrictions on a recipient's use of the internet[136] may infringe their right to respect for correspondence under Article 8 as well as their right to receive and impart information under Article 10;

100.4 Notification or reporting requirements, [137] including in relation to the intimate details of a recipient's sexual relationships, may infringe their rights to privacy and family life; and

100.5 Where notification requirements, or prohibitions on going to certain geographical locations, prevent an individual from regular attendance at religious ceremonies or a specific place of worship, this may amount to an infringement on their rights under Article 9.

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133 *DPP v. Ziegler* [2021] UKSC 23 followed. The Court also stated that the protestors' rights could not extend to imperilling the lives of others, the emergency services of the general public, and the injunctive measures were necessary and proportionate interferences.

134 *See* KCPO Practitioners' Guidance, pp. 17-18

135 *See* KCPO Practitioners' Guidance, pp. 17-18. *See also* Public Order Act, Section 22(4)(d) and (e).

136 *See* KCPO Practitioners' Guidance, pp. 17-18. *See also* CPS Guidance on Rape and Sexual Offences – Chapter 15: Sexual Harm Prevention Orders (SHPOs), 21 May 2021 ("***SHPO Guidance***"), available online at https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-15-sexual-harm-prevention-orders-shpos.

137 *See* KCPO Practitioners' Guidance, pp. 17-18. *See also* Public Order Act, Section 24.

101. Where this is the case, in order for the order to be compatible with the recipient's Convention rights, the authority or court imposing the order must be satisfied that the conditions are necessary and proportionate.

102. Logically, this entails that, as a preliminary step, there should be an assessment of the specific harm that an individual's behaviour poses to another individual or to society at large. To take an extreme example, the measures which are necessary and proportionate to prevent a high risk of serious sexual harm to a minor will be different from those measures which are necessary and proportionate to prevent dog fouling.

103. The SRO Guidance provides some direction in this respect, setting out a list of factors which should be considered when assessing the gravity of the "risk" posed by an individual. These factors will then be considered by the Court before issuing an SRO.[138] However, this is not something required by statute. Further, while statutory guidance for other Behavioural Control Orders states the need to ensure that conditions are necessary and proportionate, there is no equivalent guidance on assessing harm or documenting the relevant factors.

104. In any event, risk of harm is one relevant factor in evaluating necessity and proportionality. However, it is not the only factor. Additionally, relevant factors include:

104.1 the nexus between that harm and the proposed condition;

104.2 the likely effectiveness of the measure;

104.3 the availability of other, less intrusive measures; and

104.4 the gravity and scope of the infringement on the recipient's Convention rights.

105. Only after considering all of these factors can an authority or court safely reach a conclusion about the necessity and proportionality of such a measure. However, there is no express requirement to consider these factors, still less to collect evidence in relation thereto. This gives rise to concern about the adequacy and consistency of the evaluation of necessity and proportionality which is carried out before imposing a condition which may infringe a qualified right.

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138 *See* Guidance on Part 2 of the Sexual Offences Act 2003, March 2023, p. 56.

106. This is a particular concern in relation to those orders: which can be issued by an executive authority without a court order (such as a CPN); and interim orders (such as interim KCPOs and SROs) that can be granted by a court without notice. While the recipient of such an order may ultimately have recourse to challenge the order at the final hearing, until such time, they may face very serious (and potentially irremediable) infringements on their enjoyment of Convention rights without having an opportunity to challenge the measures. In such circumstances, it is particularly important that the authorities seeking to impose an order carefully consider and document factors relevant to the necessity and proportionality of that order. At a minimum, this may provide the recipient with a basis on which to contest the measures imposed against them.

107. The fact that Behavioural Control Orders may be imposed on an indefinite basis is also relevant to an assessment of necessity and proportionality. As the Supreme Court determined in *R (on the application of F) v. Secretary of State for the Home Department* (see paragraph 85), conditions which are imposed on an indefinite basis and which infringe a qualified right are liable to be disproportionate as they do not allow a recipient to demonstrate that they no longer pose a risk of harm. This could be addressed by: imposing strict time limits on conditions; and / or making it a requirement of any condition which lasts for over a certain period of time to be subject to mandatory review and renewal on a periodic basis.

King & Spalding International LLP

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