Court File No.: 34884

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Appellants**
(Respondents in the Court below)

**- AND -**
**MOHAMED HARKAT**

**Respondent**
(Appellant in the Court below)

**- AND –**

**ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CANADIAN BAR ASSOCIATION, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, THE CANADIAN COUNCIL FOR REFUGEES AND INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP, THE CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AMNESTY INTERNATIONAL AND THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

**Interveners**

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**FACTUM OF THE INTERVENER**
**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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**AND BETWEEN:**

**MOHAMED HARKAT**

**Appellant**
(Appellant in the Court below)

**- AND -**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

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## PART I: STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association (the "BCCLA") accepts the facts as set out in the parties' facta. The BCCLA takes no position on disputed facts.

## PART II: THE BCCLA'S POSITION ON THE QUESTION IN ISSUE

2. The BCCLA's submissions flow from a basic principle that this Honourable Court has endorsed often and emphatically: The greater the jeopardy the individual faces, the greater the procedure required. Under s. 7 of the *Charter*,[1] where the potential infringement of one's liberty is significant, the procedural protections afforded to the individual must be proportionately high.

3. This proportionality principle underpins much of our s. 7 *Charter* case law, including this Court's two prior decisions on security certificates, *Charkaoui I*[2] and *Charkaoui II*.[3] It also informs the *Oakes* test under s. 1. The current security certificate regime fails to satisfy this principle.

4. Security certificates carry the risk of indefinite detention. Indefinite detention is the greatest jeopardy known to Canadian law. It follows that when the State initiates a legal process against an individual that carries the risk of indefinite detention, the individual must be afforded robust due process. Far from meeting this standard, the security certificate regime permits the indefinite detention of an individual based on secret evidence. The combination of indefinite detention and secret evidence has been anathema to our legal system since the end of the Star Chamber.

5. Countries with similar legal systems have understood that the proportionality principle required a recalibration of their responses to terrorism. The United Kingdom and United States have charted different paths, but each has developed a model that is superior to the Canadian approach.

6. The current U.K. regime under the *Terrorism Prevention and Investigation Measures Act 2011*[4] affords procedural protections similar to (and arguably greater than) the Canadian security certificate regime, but does not authorize detention. At most, the Government can impose a set of temporary, investigative measures that limit movement and permit Government surveillance.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 7.
[2] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 ("*Charkaoui I*").
[3] *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 ("*Charkaoui II*").
[4] *Terrorism Prevention and Investigation Measures Act 2011* (UK), c. 23.

7. The U.S. has gone in a different direction. The U.S. permits lengthy detention of those detainees held at the U.S. Naval Base in Guantanamo Bay. However, after the U.S. Supreme Court's 2008 decision in *Boumedienne v. Bush*,[5] those detainees now have access to the U.S. federal habeas courts with the attendant procedural rights. In the Guantanamo habeas context, the detainee's counsel generally has access to all of the Government's evidence and can communicate with the detainee, provided they do not violate the terms of judicially-crafted protective orders.

8. The Canadian security certificate regime, in some respects, is the worst of both worlds. It carries the possibility of indefinite detention but it lacks basic procedural protections afforded even to Guantanamo Bay detainees. The Canadian regime thus violates the principles of fundamental justice under s. 7 of the *Charter* and cannot be justified under s. 1. As the U.K. and U.S. models show, there are less rights-impairing ways of achieving national security.

## PART III: STATEMENT OF ARGUMENT

### I. SECURITY CERTIFICATES VIOLATE THE PROPORTIONALITY PRINCIPLE

9. In *Charkaoui I*, this Court struck down sections of the security certificate regime in the *Immigration and Refugee Protection Act* (the "*IRPA*").[6] It held that in light of the liberty interests at stake — removal from Canada or prolonged or indefinite detention — security certificate proceedings require a high degree of procedural fairness. Because the security certificate hearings involved secret evidence, the regime violated the "case-to-meet" principle under s. 7 of the *Charter*.[7] There were other less rights-impairing methods of accomplishing the Government's objectives, such as providing "special advocates" access to the secret evidence so that they could represent the detainee.[8] Parliament responded to *Charkaoui I* by amending the *IRPA* to create a special advocate system (the "Bill C-3 amendments").[9]

10. The revised security certificate regime, however, continues to fall short of the minimum constitutional standard because it violates the proportionality principle. It is a principle of fundamental justice that greater jeopardy requires greater procedural fairness.[10] Traditionally, the

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[5] 553 U.S. 723 (2008).
[6] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 77 *et seq.*
[7] *Charkaoui I, supra* at para. 64 (S.C.C.).
[8] See *Charkaoui I, supra* at paras. 70-84 (S.C.C.).
[9] *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3 ("Bill C-3").
[10] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 at para. 91; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 23; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653-659.

criminal process has afforded individuals the most expansive panoply of procedural rights because the stakes are so high. But it is not the label of "criminal" (or "immigration") that determines the scope of one's constitutional rights. Rather, as this Court held in *Charkaoui II,*

> [W]hether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the Court recognized in *Charkaoui.*[11]

11. Or as the Court wrote in *Charkaoui I*, "[i]t is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention."[12]

12. There is only one other area of Canadian law in which indefinite detention exists: the dangerous offender regime under Part XXIV of the *Criminal Code*. But indefinite detention is constitutionally justified in this narrow context only because the offender has been adjudged guilty of multiple criminal offences on a proof-beyond-a-reasonable-doubt standard based on evidence adduced in the offender's presence and, additionally, the offender "constitutes a threat to the life, safety or physical or mental well-being of other persons...."[13]

13. The security certificate regime does not come close to satisfying the proportionality principle. Even setting aside the substantially lower standard on which indefinite detention can be authorized (*i.e.,* whether there are reasonable grounds to believe an individual is a danger to security), the regime continues to authorize the use of secret evidence. Section 83(1)(c) provides that the judge "shall, on each request of the Minister ... hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person." Section 83(1)(i) further provides that the judge may base a decision on such evidence. This combination of secret evidence and indefinite detention conjures the most ignominious precedents in our legal history. It is, as Lord Hope has noted, "the stuff of nightmares."[14]

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[11] *Charkaoui II, supra* at para. 53 (S.C.C.).
[12] *Charkaoui I, supra* at para. 60 (S.C.C.).
[13] *Criminal Code,* R.S.C. 1985, c. C-46, ss. 752, 753(1)(a). See also *R. v. Lyons,* [1987] 2 S.C.R. 309 at 327-334.
[14] *Secretary of State for the Home Department v. AF,* [2009] UKHL 28 at para. 83 per Hope L.J..

14. The introduction of the special advocate procedure was intended to fix this problem. But the Bill C-3 amendments make the secret evidence available *only* to the special advocate.[15] The special advocate is not permitted to communicate with the detainee after viewing the secret evidence except with prior consent of the Federal Court.[16] And the Court is prohibited from authorizing the communication of secret evidence to the detainee given its obligation to "ensure the confidentiality of information and other evidence" where its disclosure "could be injurious to national security or endanger the safety of any person".[17] Security and safety are the only criteria. Unlike s. 38 of the *Canada Evidence Act* or the analogous U.K. and U.S. regimes (see *infra* at paras. 21-24, 31), the security certificate regime does not allow the judge to conduct a broader assessment of whether disclosure would be in the public interest notwithstanding national security or safety concerns.[18]

15. Thus, the involvement of special advocates does not change the fact that there is a body of evidence — which may be necessary to make full answer and defence — that the detainee cannot access. In the U.K. House of Lords' decision in *Secretary of State for the Home Department v. AF*, Lord Phillips explained why special advocates alone do not provide an acceptable solution:

> [C]ross-examination by special advocates can usually deal with evidential reliability, possible alternative and innocent inferences, internal consistency or contradictions, the significance of pieces of evidence and the strength of the case overall. What they cannot do without instructions or evidence is to provide evidence or explanation which contradicts or explains the closed essential features of the case against him or offer alternative inferences which they are not aware of or lack any support for.
>
> The real value lies in the potential for a controlled person to provide evidence which shows a different picture or an innocent interpretation or explanation which counters the basis for the adverse inferences and does so beyond that which the special advocates may suggest. This would either be because there would now be an evidential basis for those suggestions or because the special advocate may not be able to anticipate or put together what the controlled person's position is. He may also be able to provide the special advocate with information or statements to be deployed as the special advocate sees fit, which the court and [special advocate] may never know of.[19]

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[15] *IRPA*, *supra*, s. 85.4(1).
[16] *Ibid.*, s. 85.4(2).
[17] *Ibid.*, s. 83(1)(d).
[18] *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 38.06(2).
[19] *Secretary of State for the Home Department v. AF*, *supra* at para. 54 per Phillips L.J. (UKHL) (quoting *Secretary of State for the Home Department v. Abu Rideh* [2008] EWHC 1993 (Admin) at paras. 21, 40 (Q.B.)).

## II. THE U.K. AND U.S. REGIMES ARE LESS IMPAIRING

16. Given that the Bill C-3 amendments continue to limit the detainee's ability to make full answer and defence, the question is whether the current regime is minimally impairing. In this regard, it is telling that both the U.K. and the U.S. do a better job at complying with the proportionality principle in their analogous regimes.

### A. The U.K. Regime: Less Jeopardy and More Process

17. The U.K. example is instructive because of the many similarities between the Canadian and U.K. regimes. The special advocate model that this Court described in *Charkaoui I* was based in part on the procedure used by the U.K. Special Immigration Appeals Commission,[20] and subsequently, under the U.K. *Prevention of Terrorism Act*.[21]

18. In its 2004 decision in *A and others v. Secretary of State for the Home Department*,[22] the House of Lords declared that the *Anti-terrorism, Crime and Security Act* 2001 (the "2001 Act")[23] was incompatible with the U.K.'s international human rights obligations under the *European Convention on Human Rights*. The 2001 Act shared many similarities with the security certificate regime prior to the Bill C-3 amendments.

19. The U.K. Parliament responded by enacting the *Prevention of Terrorism Act* (the "PTA").[24] The PTA was very similar to the current Canadian security certificate regime. As Lord Hoffmann noted in *MB*, the "Canadian model is precisely what has been adopted in the United Kingdom ... for the judicial supervision of control orders."[25] Like the Canadian regime, the PTA did not provide the controlee with full disclosure. And like the Canadian regime, the PTA dealt with the limitations on the controlee's ability to know the case to meet by using special advocates.[26]

20. Unlike the Canadian regime, however, the PTA did not authorize indefinite detention.[27] Rather, the PTA created a system of "control orders", which permitted the State to impose severe restrictions on the controlee's movements, such as limits on whom the controlee could meet,

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[20] *Charkaoui I*, *supra* at paras. 81-84 (S.C.C.)
[21] 2005 c. 2.
[22] [2004] UKHL 56.
[23] 2001 c. 24 (U.K.).
[24] *Prevention of Terrorism Act 2005* (UK), c. 2 ("PTA").
[25] *Secretary of State for the Home Department v. MB*, [2007] UKHL 46 at para. 54.
[26] PTA, *supra*, Schedule, s. 6.
[27] *Ibid.*, s. 9.

residency requirements, restrictions on telephone and Internet use and house arrest.[28] Detention, however, was justified only if the named person breached a control order.[29] In other words, although the U.K. control orders afforded the named person similar levels of procedural fairness as those received by detainees under the Canadian security certificate regime, the jeopardy under control orders was significantly *lower* than the jeopardy under security certificates. In this way, the PTA did a better job at respecting the proportionality principle than the current security certificate regime.

21. Still, both the European Court of Human Rights and the U.K. House of Lords declared the U.K. regime of control orders to be incompatible with the U.K.'s international obligations.[30] Under the PTA, disclosure that would be injurious to national security interests could only be disclosed to the special advocate and not to the controlee, who would receive only summaries of the evidence. In some cases, this procedure would be sufficient to enable the controlee to make full answer and defence, but in many others, it would not.[31] The House of Lords thus read in a requirement that the Government must provide disclosure to the detainee where doing so was necessary to the fairness of the trial even where it would be injurious to national security.[32]

22. In 2011, in response to the House of Lords' decision in *AF* and to international and domestic criticism,[33] the U.K. Parliament abolished the PTA and enacted the *Terrorism Prevention and Investigation Measures Act 2011* (the "TPIM Act").[34] The TPIM Act empowers the Secretary of State to impose prevention and investigation measures ("TPIMs") on an individual if certain conditions are met.[35] TPIMs restrict an individual's movement and associations, but do not authorize the custodial detention of an individual.[36] House arrest is permitted but only under exceptional circumstances, and in any case, must be limited to a 90-day period.[37] A TPIM order automatically expires after two years, and may be renewed only once.[38]

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[28] *Ibid.*, s. 1(4).
[29] *Ibid.*, s. 9(4).
[30] *A and Others v. United Kingdom*, Application No. 3455/05 (19 February 2009) (ECHR); *Secretary of State for the Home Department v. AF*, *supra* at para. 83 per Hope L.J. (UKHL) ("[A] denunciation on grounds that are not disclosed is the stuff of nightmares..."), at para. 63 per Phillips L.J. ("[A] trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him.") (UKHL).
[31] *A and Others v. United Kingdom*, Application No. 3455/05, *supra* at para. 220 (ECHR).
[32] *Secretary of State for the Home Department v. AF*, *supra* at para. 68 (UKHL)
[33] See UK, HC, "Review of Counter Terrorism and Security Powers", CM 8003 in Sessional Papers (2011-1) at 5.
[34] *Terrorism Prevention and Investigation Measures Act 2011* (UK), c. 23.
[35] *Ibid.*, s. 2(1).
[36] *Ibid.*, Schedule 1: Measures.
[37] *Ibid.*, s. 27(1)(b).
[38] *Ibid.*, s. 5.

23. Thus, the jeopardy under the TPIM Act is even less than that which existed under the PTA, and it is far less than that which exists under Canadian security certificates. Nevertheless, the U.K. regime still affords the individual more procedural fairness than the security certificate regime.[39] Most notably, TPIM Act proceedings must apply the disclosure obligation from *AF*. That is, even where disclosure would be contrary to national security interests, disclosure must be made if it is necessary to a fair trial.[40] Under the TPIM Act, if the Secretary wishes to continue to withhold sensitive information notwithstanding a court's ruling that trial fairness requires it, the Secretary may do so; but in such case, it cannot rely on that material in the TPIM proceedings.[41]

24. The existence of the TPIM Act makes it difficult to argue that the security certificate regime under the current *IRPA* is "minimally impairing." Yet, curiously, the Ministers argue in their reply factum that the Canadian security certificate regime provides more disclosure than its U.K. counterpart, and rely on Justice Mosley's observations in *Almrei* as support for that proposition.[42] Their contention is dated and false. First, post-*AF*, the U.K. Government cannot withhold classified information if doing so would affect trial fairness. Second, the U.K. disclosure regime must be understood in its proper context. The U.K. regime is no longer one in which the named person may be detained indefinitely or at all. As the jeopardy is lower, less procedural fairness is required.

**B. The U.S. Regime: Equal Jeopardy and More Process**

25. The analogous U.S. model is also more respecting of the proportionality principle than the Canadian security certificate regime. It is important to identify the right comparator. The Ministers refer in their factum to the Alien Terrorist Removal Court (the "ATRC") as an example of a regime in which the U.S.-equivalents of special advocates are used. But not only has the ATRC never been convened (as the Ministers concede),[43] it has never been convened despite having been on the books since 1996.[44] U.S. academics and lawmakers attribute this non-use to the ATRC's unconstitutionality.[45] As noted by the author of *National Security Law,* Prof. Stephen Dycus, "[i]t

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[39] The Ministers' suggestion (at para. 81 of their factum) that the Canadian security certificate regime is similar to the U.K. regime under the *Special Immigration Appeals Commission Act 1997* ignores the House of Lords' decision in *A and others*, *supra* at para. 97 (UKHL), in which the House of Lords held that an immigration regime that provided for indefinite detention was incompatible with the U.K.'s international human rights obligations.
[40] *CF v Secretary of State for the Home Department*, [2013] EWHC 843 at para. 27 (Q.B.).
[41] TPIM Act, Schedule, s. 4(3).
[42] Ministers' Reply Factum, para. 5 (citing *Almrei (Re)*, 2009 FC 1263 at paras. 484, 487-488).
[43] Ministers' Factum, para. 81.
[44] Stephanie Blum, "'Use It *And* Lose It': An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies" (2011), 16 Lewis & Clark Law Review 677 at 678.
[45] *Ibid.* at 709-710.

may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it."[46]

26. The Ministers also argue that U.S. immigration proceedings permit the use of secret evidence.[47] But this is also misleading. The only federal court that has heard a constitutional challenge to the current provisions authorizing the use of secret evidence in immigration cases has held that they are unconstitutional as applied to *detain* (rather than *remove*) a non-citizen.[48]

27. The most instructive U.S. comparator is the regime of executive detention at Guantanamo Bay, Cuba, which was set up to detain high-value detainees captured in the global War on Terror. This regime has drawn widespread criticism from every corner of the world.[49] Yet, in important respects, the Guantanamo Bay regime now provides greater procedural fairness than the Canadian security certificate regime. While indefinite detention is authorized, the U.S. regime affords detainees more disclosure and better access to counsel than the Canadian regime.

28. Since the U.S. Supreme Court's seminal decision in *Boumedienne v. Bush*, detainees held in Guantanamo Bay have had access to habeas corpus in U.S. federal courts.[50] *Boumedienne* gave the federal habeas courts significant discretion to craft protective orders that balance the need to protect classified information with the detainee's right to make full answer and defence.[51] The current Guantanamo regime is based on these protective orders and the case law modifying them.[52]

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[46] *Ibid.*, at 710.

[47] Ministers' Factum, para. 81.

[48] *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 at 413-14 (D.N.J. 1999). See also Jaya Ramji-Nogales, "A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System" (2008), 39 Colum. Hum. Rts L Rev 287 at 303-304.

[49] The BCCLA's submissions on Guantanamo Bay focus on the procedural rights afforded detainees in habeas proceedings. We appreciate that there are a many other problems with Guantanamo Bay detentions, which continue to undermine their fairness. These submissions should not be taken as an endorsement of the Guantanamo Bay regime.

[50] *Boumedienne v. Bush*, *supra* at 795 (U.S. Sup. Crt 2008).

[51] *Ibid.* at 796. See also *Al Odah v. United States*, 559 F.3d 539 at 548 (D.C. Cir. 2009); *Bensayah v. Obama*, 610 F.3d 718 at 721-725 (D.C. Cir. 2010).

[52] On August 27, 2008, Judge Leon issued the first case management order in the Guantanamo detainee habeas proceedings. *Boumedienne v. Bush*, No. 04-1166, 2008 U.S. Dist. LEXIS 116823 (D.D.C. Aug. 27, 2008). On November 6, 2008, Judge Hogan, who has coordinated 113 habeas cases involving over 200 detainees, issued a case management order that was similar to Judge Leon's order in many respects. *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 4858241 ("*Guantanamo Bay Detainee Litigation II*"). This factum focuses on Judge Hogan's case management order (the "CMO") as that order affects more detainees and has been subject to more judicial commentary. See also Baher Azmy, "Executive Detention, *Boumedienne*, and the New Common Law of Habeas" (2009-2010), 95 Iowa L. Rev. 445 at 526.

29. The Guantanamo regime does not use special advocates. Instead, counsel of choice is provided with classified materials, provided that they obtain the proper security clearance and credentials, and enter into a protective order governing the use and storage of the information.[53]

30. Both the detainee and his counsel are provided with relevant and material disclosure.[54] Where a document is classified (*i.e.,* designated "sensitive" or "secret" by the relevant intelligence agency), the detainee is generally not provided with the document, but is provided with a summary. His counsel, however, has access to the classified material. Counsel for the detainee is presumed to "need to know" *all* classified information and documents relating to her or his client.[55]

31. Where counsel wishes to share a classified document with her client, counsel can seek consent from the Privilege Review Team, a team of Government lawyers who have not been and will not be involved in the litigation of any habeas petitions brought by Guantanamo Bay detainees.[56] If the Privilege Review Team does not consent, counsel has the option of bringing a motion to the judge on the basis that disclosure to the detainee is necessary "to facilitate meaningful review" and make full answer and defence.[57] No such option exists under the Canadian security certificate regime. Information deemed injurious to national security or the safety of a person cannot be disclosed to the detainee.

32. In exceptional cases, the Government may apply to the Court to withhold or redact a classified document from the detainee's counsel. The burden is on the Government to prove that withholding that information will not impair the detainee's right to make full answer and defence.[58]

33. Unlike the Canadian regime, the Guantanamo regime imposes no restriction on counsel's communications with the detainee after viewing classified evidence. Counsel is trusted to respect the discovery order and its terms. The Guantanamo regime addresses the risk of inadvertent disclosure by allowing counsel to consult the Court Services Officer ("CSO") for guidance where counsel is unsure as to whether she is precluded from communicating certain information to her

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[53] *Guantanamo Bay Detainee Litigation II, supra* at s. F.
[54] *Guantanamo Bay Detainee Litigation II, supra* at ss. E.1, E.2
[55] *Al-Odah, supra* at 547-548 (D.C. Cir. 2009).
[56] *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143 (D.D.C. 2008) ("Guantanamo Protective Order"), s. D.29.
[57] *Ibid.*, s. E.39.
[58] *Al-Odah, supra* at 545 (D.C. Cir. 2009).

client under the protective order.[59] If the CSO is unable to assist, counsel can seek consent from the Privilege Review Team or *ex parte* direction from the Judge.[60]

34. That the U.S. Supreme Court has ordered that detainees at Guantanamo be given access to habeas courts, with their attendant procedural and constitutional protections, despite representations from the U.S. executive branch that Guantanamo detainees are the "worst of the worst",[61] speaks loudly: While the threat of terrorism is significant, the Constitution and the courts are up to the task. The U.S. approach is hardly ideal, and has been much criticized,[62] but the post-*Boumedienne* disclosure regime is superior to the current Canadian security certificate regime.

## PART IV: SUBMISSIONS ON COSTS

35. The BCCLA does not seek costs and asks that none be awarded against it.

## PART V: NATURE OF THE ORDER REQUESTED

36. The BCCLA respectfully requests leave to present oral argument for no more than 10 minutes at the hearing of this appeal.

All of which is respectfully submitted this 10th day of September, 2013.

**NADER R. HASAN / GERALD CHAN**
**Ruby Shiller Chan Hasan, Barristers**

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[59] Guantanamo Protective Order, *supra*, s. C.15.
[60] It is common in U.S. federal habeas proceedings for defence counsel to seek direction from the Judge *ex parte* where disclosing information to the other side could result in the disclosure of defence strategy or reveal attorney-client privileged material. See, e.g., *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177 at 187 (2d Cir. 2008) (upon *ex parte* motion, permitting petitioner to withdraw an affidavit based on religious belief); *Hurles v. Ryan*, 706 F.3d 1021 at 1042 (9th Cir. 2013) (*ex parte* motion for appointment of second counsel).
[61] Katharine Q. Seelye, "Threats and Responses: The Detainees," NY TIMES (Oct. 23, 2002), online: <http://www.nytimes.com/2002/10/23/world/threats-responses-detainees-some-guantanamo-prisoners-will-be-freed-rumsfeld.html>.
[62] See, e.g., James A. Cohen, "Lawyering In A Vacuum" (2011), 41 Seton Hall L. Rev. 1427 at 1441-1449; Lucas Tanglen, "Detained in the Dark: Secrecy in the D.C. District Court Habeas Corpus Proceedings" (2009-2010), 23 Geo. J. Legal Ethics 937 at 944-949.

## PART VI: TABLE OF AUTHORITIES

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| Stephanie Cooper, "'Use It *And* Lose It': An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies" (2011), 16 Lewis & Clark Law Review 677 | 25 |
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## PART VII: LEGISLATION CITED

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

***Canada Evidence Act*, R.S.C., 1985, c. C-5**

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements ou des faits visés au paragraphe 38.02(1), sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

38.06 (2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

38.06 (2) Si le juge conclut que la divulgation des renseignements ou des faits porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements ou des faits, d'un résumé des renseignements ou d'un aveu écrit des faits qui y sont liés.

***Criminal Code*, R.S.C. 1985, c. C-46**

753. (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and

753. (1) Sur demande faite, en vertu de la présente partie, postérieurement au dépôt du rapport d'évaluation visé au paragraphe 752.1(2), le tribunal doit déclarer qu'un délinquant est un délinquant dangereux s'il est convaincu que, selon le cas:

a) l'infraction commise constitue des sévices graves à la personne, aux termes de l'alinéa a) de la définition de cette expression à l'article 752, et que le délinquant qui l'a commise constitue un danger pour la vie, la sécurité ou le bien-être physique ou mental de qui que ce soit, en vertu de preuves établissant, selon le cas :

(i) que, par la répétition de ses actes, notamment celui qui est à l'origine de l'infraction dont il a été déclaré coupable, le délinquant démontre qu'il est incapable de contrôler ses actes et permet de croire qu'il causera vraisemblablement la mort de quelque autre personne ou causera des sévices ou des dommages psychologiques graves à d'autres personnes,

(ii) que, par la répétition continuelle de ses actes d'agression, notamment celui qui est à l'origine de l'infraction dont il a été déclaré coupable, le délinquant démontre une indifférence marquée quant aux conséquences raisonnablement prévisibles que ses actes peuvent avoir sur autrui,

(iii) un comportement, chez ce délinquant, associé à la perpétration de l'infraction dont il a été déclaré coupable, d'une nature si brutale que l'on ne peut s'empêcher de conclure qu'il y a peu de chance pour qu'à l'avenir ce comportement soit inhibé par les normes ordinaires de restriction du comportement;

b) l'infraction commise constitue des sévices graves à la personne, aux termes de l'alinéa b) de la définition de cette expression à l'article 752, et que la conduite antérieure du délinquant dans le

the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

domaine sexuel, y compris lors de la perpétration de l'infraction dont il a été déclaré coupable, démontre son incapacité à contrôler ses impulsions sexuelles et laisse prévoir que vraisemblablement il causera à l'avenir de ce fait des sévices ou autres maux à d'autres personnes.

***Immigration and Refugee Protection Act*, S.C. 2001, c 27**

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.

77. (2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

77. (2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.

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77. (3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.

77. (3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115.

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83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :

a) le juge procède, dans la mesure où les circonstances et les considérations d'équité et

(a) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

(c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;

b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

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85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.

85.4 (2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

85.4 (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.

85.4 (2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.

***Prevention of Terrorism Act 2005* (UK), c. 2**

1(4) Those obligations may include, in particular—

(a) a prohibition or restriction on his possession or use of specified articles or substances;

(b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;

(c) a restriction in respect of his work or other occupation, or in respect of his business;

(d) a restriction on his association or communications with specified persons or with other persons generally;

(e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;

(f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;

(g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;

(h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;

(i)a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;

(j)a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;

(k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;

(l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;

(m) a requirement on him to allow himself to be photographed;

(n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;

(o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;

(p) a requirement on him to report to a specified person at specified times and places.

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9 (1) A person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence.

(2) A person is guilty of an offence if—

(a) a control order by which he is bound at a time when he leaves the United Kingdom requires him, whenever he enters the United Kingdom, to report to a specified person that he is or has been the subject of such an order;

(b) he re-enters the United Kingdom after the order has ceased to have effect;

(c)the occasion on which he re-enters the United Kingdom is the first occasion on which he does so after leaving while the order was in force; and

(d)on that occasion he fails, without reasonable excuse, to report to the specified person in the manner that was required by the order.

(3)A person is guilty of an offence if he intentionally obstructs the exercise by any person of a power conferred by section 7(9).

(4)A person guilty of an offence under subsection (1) or (2) shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both;

(b)on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;

(c)on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

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**Schedule 6**

(1) In any control order proceedings the court may, if it thinks fit—

(a) call in aid one or more advisers appointed for the purpose by the Lord Chancellor; and

(b) hear and dispose of the proceedings with the assistance of the adviser or advisers.

(2) Rules of court may regulate the use of advisers in accordance with the power conferred by this paragraph.

(3) The Lord Chancellor may, out of money provided by Parliament, pay such remuneration, expenses and allowances to advisers appointed for the purposes of this paragraph as he may determine.

***Terrorism Prevention and Investigation Measures Act 2011* (UK), c. 23**

2(1) The Secretary of State may make a control order against an individual if he—

(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

**********

5(1)A TPIM notice—

(a) comes into force when the notice is served on the individual or, if later, at the time specified for this purpose in the notice; and

(b) is in force for the period of one year.

(2)The Secretary of State may by notice extend a TPIM notice for a period of one year beginning when the TPIM notice would otherwise expire.

(3)A TPIM notice—

(a) may be extended under subsection (2) only if conditions A, C and D are met; and

(b) may be so extended on only one occasion.

(4)This section is subject, in particular, to sections 13 (revocation and revival of TPIM notices) and 14 (replacement of TPIM notice that is quashed etc).

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27(1) A temporary enhanced TPIM order, except for designated transitional and saving provision, ceases to have effect—

(a) at the end of the period of 90 days beginning with the day on which the Secretary of State makes the order, or

(b) at such earlier time (if any) as is specified in the order.

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**Schedule: 1**

(1)The Secretary of State may impose restrictions on the individual in relation to the residence in which the individual resides.

(2)The Secretary of State may, in particular, impose any of the following—

(a) a requirement to reside at a specified residence;

(b) a requirement to give notice to the Secretary of State of the identity of any other individuals who reside (or will reside) at the specified residence;

(c) a requirement, applicable overnight between such hours as are specified, to remain at, or within, the specified residence.

(3) The specified residence must be—

(a) premises that are the individual's own residence, or

(b) other premises provided by or on behalf of the Secretary of State that are situated in an appropriate locality or an agreed locality.

(4) An "appropriate locality" is—

(a) a locality in the United Kingdom in which the individual has a residence;

(b) if the individual has no such residence, a locality in the United Kingdom with which the individual has a connection;

(c) if the individual has no such residence or connection, any locality in the United Kingdom that appears to the Secretary of State to be appropriate.

(5) An "agreed locality" is a locality in the United Kingdom which is agreed by the Secretary of State and the individual.

(6) If the specified residence is provided to the individual by or on behalf of the Secretary of State, the Secretary of State may require the individual to comply with any specified terms of occupancy of that residence (which may be specified by reference to a lease or other document).

(7) A requirement of the kind mentioned in sub-paragraph (2)(c) must include provision to enable the individual to apply for the permission of the Secretary of State to be away from the specified residence, for the whole or part of any applicable period, on one or more occasions.

(8) The Secretary of State may grant such permission subject to either or both of the following conditions—

(a)the condition that the individual remains overnight at other agreed premises between such hours as the Secretary of State may require;

(b)the condition that the individual complies with such other restrictions in relation to the individual's movements whilst away from the specified residence as are so required.

(9) "Agreed premises" are premises in the United Kingdom which are agreed by the Secretary of State and the individual.

(10) Sub-paragraph (8) is not to be read as limiting—

(a) the generality of sub-paragraph (7) of paragraph 13 (power to impose conditions when granting permission), or

(b) the power to impose further conditions under that sub-paragraph in connection with permission granted by virtue of sub-paragraph (7) of this paragraph.

(11) In sub-paragraph (7) "applicable period" means a period for which the individual is required to remain at the specified residence by virtue of a requirement of the kind mentioned in sub-paragraph (2)(c).

**Travel measure**

2(1) The Secretary of State may impose restrictions on the individual leaving a specified area or travelling outside that area.

(2) The specified area must be one of the following areas—

(a) the United Kingdom (in any case);

(b) Great Britain (if the individual's place of residence is in Great Britain);

(c) Northern Ireland (if the individual's place of residence is in Northern Ireland).

(3)The Secretary of State may, in particular, impose any of the following requirements—

(a) a requirement not to leave the specified area without the permission of the Secretary of State;

(b) a requirement to give notice to the Secretary of State before leaving that area;

(c) a requirement not to possess or otherwise control, or seek to obtain, any travel document without the permission of the Secretary of State;

(d) a requirement to surrender any travel document that is in the possession or control of the individual.

(4) "Travel document" means—

(a) the individual's passport, or

(b) any ticket or other document that permits the individual to make a journey by any means—

(i) from the specified area to a place outside that area, or

(ii ) between places outside the specified area.

(5)"Passport" means any of the following—

(a) a United Kingdom passport (within the meaning of the Immigration Act 1971);

(b) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom, or by or on behalf of an international organisation;

(c) a document that can be used (in some or all circumstances) instead of a passport.

**Exclusion measure**

3(1) The Secretary of State may impose restrictions on the individual entering—

(a) a specified area or place, or

(b) a place or area of a specified description.

(2)The Secretary of State may, in particular, impose any of the following requirements in respect of a specified area or place or a specified description of an area or place—

(a) a requirement not to enter without the permission of the Secretary of State;

(b) a requirement to give notice to the Secretary of State before entering;

(c) a requirement not to enter unless other specified conditions are met.

**Movement directions measure**

4(1) The Secretary of State may impose a requirement for the individual to comply with directions given by a constable in respect of the individual's movements (which may, in particular, include a restriction on movements).

(2) A constable may give such directions only for the purpose of securing compliance—

(a) with other specified measures, or

(b) with a condition imposed under this Act requiring the individual to be escorted by a constable.

(3) Directions may not remain in effect for a period that is any longer than the constable giving the directions considers necessary for the purpose mentioned in sub-paragraph (2); but that period may not in any event be a period of more than 24 hours.

Financial services measure

5(1)The Secretary of State may impose restrictions on the individual's use of, or access to, such descriptions of financial services as are specified.

(2) The Secretary of State may, in particular, impose any of the following requirements—

(a) a requirement not to hold any accounts, without the permission of the Secretary of State, other than the nominated account (see sub-paragraph (3));

(b) a requirement to close, or to cease to have an interest in, accounts;

(c) a requirement to comply with specified conditions in relation to the holding of any account (including the nominated account) or any other use of financial services;

(d) a requirement not to possess, or otherwise control, cash over a total specified value without the permission of the Secretary of State.

(3) The Secretary of State must allow the individual to hold (at least) one account (the "nominated account") if—

(a) the individual gives notice to the Secretary of State of the holding of the nominated account, and

(b) the account is held with a bank.

(4) In sub-paragraph (3) "bank" means an institution which is incorporated in, or formed under the law of, any part of the United Kingdom and which has permission under Part 4 of the Financial Services and Markets Act 2000 to carry on the regulated activity of accepting deposits (within the meaning of section 22 of that Act, taken with Schedule 2 to that Act and any order under section 22 of that Act).

(5) The reference in sub-paragraph (2)(d) to possessing or otherwise controlling cash does not include any cash that is held in an account with a person providing financial services (in accordance with any requirements imposed under this paragraph).

(6) In sub-paragraph (2)(d) "cash" means—

(a) coins and notes in any currency,

(b) postal orders,

(c) cheques of any kind, including travellers' cheques,

(d) bankers' drafts,

(e) bearer bonds and bearer shares, and

(f) such other kinds of monetary instrument as may be specified.

(7) A reference in this paragraph to the individual holding an account is a reference to an account held with a person providing financial services—

(a) that is in the individual's name or is held for the individual's benefit (whether held solely in the individual's name or jointly with one or more other persons); or

(b) in respect of which the individual has power of attorney or can otherwise exercise control.

(8) In this paragraph "financial services" means any service of a financial nature, including (but not limited to) banking and other financial services consisting of—

(a) accepting deposits and other repayable funds;

(b) lending (including consumer credit and mortgage credit);

(c) payment and money transmission services (including credit, charge and debit cards).

**Property measure**

6(1) The Secretary of State may impose either or both of the following—

(a) restrictions on the individual in relation to the transfer of property to, or by, the individual, or

(b) requirements on the individual in relation to the disclosure of property.

(2) The Secretary of State may, in particular, impose any of the following requirements—

(a) a requirement not to transfer money or other property to a person or place outside the United Kingdom without the permission of the Secretary of State;

(b) a requirement to give notice to the Secretary of State before transferring money or other property to a person or place outside the United Kingdom;

(c) a requirement to comply with any other specified conditions in relation to the transfer of property to, or by, the individual;

(d) a requirement to disclose to the Secretary of State such details as may be specified of any property that falls within sub-paragraph (3).

(3) Property falls within this sub-paragraph if it is property of a specified description—

(a) in which the individual has an interest of any kind, or

(b) over which, or in relation to which, the individual may exercise any right (including a right of use or a right to grant access).

(4) A reference in this paragraph to the transfer of property includes a reference to the arrangement of such a transfer.

(5) In this paragraph "property" includes rights over, or in relation to, property (including rights of use and rights to grant access); and a reference to the transfer of property includes a reference to the acquisition or disposal of such rights.

**Electronic communication device measure**

7(1) The Secretary of State may impose either or both of the following—

(a) restrictions on the individual's possession or use of electronic communication devices;

(b) requirements on the individual in relation to the possession or use of electronic communication devices by other persons in the individual's residence.

(2) The Secretary of State may, in particular, impose—

(a) a requirement not to possess or use any devices without the permission of the Secretary of State (subject to sub-paragraph (3));

(b) a requirement that a device may only be possessed or used subject to specified conditions.

(3) The Secretary of State must allow the individual to possess and use (at least) one of each of the following descriptions of device (subject to any conditions on such use as may be specified under sub-paragraph (2)(b))—

(a) a telephone operated by connection to a fixed line;

(b) a computer that provides access to the internet by connection to a fixed line (including any apparatus necessary for that purpose);

(c) a mobile telephone that does not provide access to the internet.

(4) The conditions specified under sub-paragraph (2)(b) may, in particular, include conditions in relation to—

(a) the type or make of a device (which may require the individual to use a device that is supplied or modified by the Secretary of State);

(b) the manner in which, or the times at which, a device is used;

(c) the monitoring of such use;

(d) the granting to a specified description of person of access to the individual's premises for the purpose of the inspection or modification of a device;

(e) the surrendering to a specified description of person of a device on a temporary basis for the purpose of its inspection or modification at another place.

(5) An "electronic communication device" means any of the following—

(a) a device that is capable of storing, transmitting or receiving images, sounds or information by electronic means;

(b) a component part of such a device;

(c) an article designed or adapted for use with such a device (including any disc, memory stick, film or other separate article on which images, sound or information may be recorded).

(6) The devices within sub-paragraph (5)(a) include (but are not limited to)—

(a) computers,

(b) telephones (whether mobile telephones or telephones operated by connection to a fixed line),

(c) equipment (not within paragraph (a) or (b)) designed or adapted for the purpose of connecting to the internet, and

(d) equipment designed or adapted for the purposes of sending or receiving facsimile transmissions.

**Association measure**

8(1) The Secretary of State may impose restrictions on the individual's association or communication with other persons.

(2) The Secretary of State may, in particular, impose any of the following requirements—

(a) a requirement not to associate or communicate with specified persons, or specified descriptions of persons, without the permission of the Secretary of State;

(b) a requirement to give notice to the Secretary of State before associating or communicating with other persons (whether at all or in specified circumstances);

(c) a requirement to comply with any other specified conditions in connection with associating or communicating with other persons.

(3) An individual associates or communicates with another person if the individual associates or communicates with that person by any means (and for this purpose it is immaterial whether the association or communication is carried out by the individual in person or by or through another individual or means).

**Work or studies measure**

9(1) The Secretary of State may impose restrictions on the individual in relation to the individual's work or studies.

(2) The Secretary of State may, in particular, impose any of the following requirements—

(a) a requirement not to carry out without the permission of the Secretary of State—

(i) specified work or work of a specified description, or

(ii) specified studies or studies of a specified description;

(b) a requirement to give notice to the Secretary of State before carrying out any work or studies;

(c) a requirement to comply with any other specified conditions in connection with any work or studies.

(3) In this paragraph—
"work" includes any business or occupation (whether paid or unpaid);
"studies" includes any course of education or training.

**Reporting measure**

10(1) The Secretary of State may impose a requirement for the individual—

(a) to report to such a police station, at such times and in such manner, as the Secretary of State may by notice require, and

(b) to comply with any directions given by a constable in relation to such reporting.

(2) Such a notice may, in particular, provide that a requirement to report to a police station is not to apply if conditions specified in the notice are met.

**Photography measure**

11 The Secretary of State may impose a requirement for the individual to allow photographs to be taken of the individual at such locations and at such times as the Secretary of State may by notice require.

**Monitoring measure**

12(1) The Secretary of State may impose requirements for the individual to co-operate with specified arrangements for enabling the individual's movements, communications or other activities to be monitored by electronic or other means.

(2) The Secretary of State may, in particular, impose any of the following requirements for co-operation with the specified arrangements—

(a) a requirement to submit to procedures required by the arrangements;

(b) a requirement to wear or otherwise use apparatus approved by or in accordance with the arrangements;

(c) a requirement to maintain such apparatus in a specified manner;

(d) a requirement to comply with directions given by persons carrying out functions for the purposes of the arrangements.

(3) Directions under sub-paragraph (2)(d) may include directions requiring the individual to grant access to the individual's residence for the purpose of the inspection or modification of any apparatus used or maintained under the arrangements.

**PART 2: PERMISSION AND NOTICES**

**Permission**

13(1) Any application by an individual for permission must be made in writing.

(2) The Secretary of State may by notice specify—

(a) the information to be supplied on an application, and

(b) the time by which the application is to be made.

(3) A notice under sub-paragraph (2) may make different provision for different measures.

(4) The Secretary of State may by notice request the provision, within such period of time as the notice may specify, of further information from the individual in connection with an application received under sub-paragraph (1).

(5) The Secretary of State is not required to consider an application further unless any information requested under sub-paragraph (4) is provided in accordance with the notice mentioned in that sub-paragraph.

(6) Permission on an application is granted by the Secretary of State giving notice to the individual.

(7) Permission may be granted subject to such conditions as the Secretary of State may by notice specify.

(8) In this paragraph "permission" means permission in connection with a requirement or restriction imposed under Part 1 of this Schedule.

**Notices**

14(1) This paragraph applies for the purposes of any notice given by the individual to the Secretary of State in connection with measures imposed under Part 1 of this Schedule ("a Part 1 notice").

(2) The Secretary of State may by notice specify—

(a) the information to be supplied in a Part 1 notice, and

(b) the time by which a Part 1 notice is to be given.

(3) A notice under sub-paragraph (2) may make different provision for different measures.

(4) The Secretary of State may by notice request the provision, within such period of time as the notice may specify, of further information from the individual in connection with a Part 1 notice received from the individual.

(5) A requirement on the individual to give a Part 1 notice is not complied with unless and until the individual has received notice from the Secretary of State—

(a) that the Part 1 notice has been received, and

(b) that no (or no further) information is required under sub-paragraph (4) in relation to the Part 1 notice.

**Power of Secretary of State to vary or revoke notices**

15 The Secretary of State may vary or revoke a notice given by the Secretary of State under this Schedule.

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**Schedule:**

4(3) The relevant court must be authorised—

(a) if it considers that the material or anything that is required to be summarised might adversely affect the Secretary of State's case or support the case of a party to the proceedings, to direct that the Secretary of State—

(i) is not to rely on such points in the Secretary of State's case, or

(ii) is to make such concessions or take such other steps as the court may specify, or

(b) in any other case, to ensure that the Secretary of State does not rely on the material or (as the case may be) on that which is required to be summarised.