Counter Terrorism Bill

Supplementary Briefing for House of Commons Report Stage

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For further information contact

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. This briefing is intended to supplement our earlier briefing on the Counter Terrorism Bill for Second Reading, setting out our view of the government's recently introduced 'additional safeguards' for the proposed extension of the maximum period of pre-charge detention to 42 days.

3. In our March briefing, we described the proposed extension as 'utterly unnecessary' and 'fundamentally flawed'. In particular, we noted that the proposal 'lacked credible safeguards'. Although the government has now tabled a number of further measures intended as checks against excessive detention, on inspection we find them no more credible than before. For instance:

    - Contrary to government claims, the statutory definition of 'grave exceptional terrorist threat' does not involve any increased threshold for extended detention. Indeed, it is low enough to be triggered by a normal terrorism investigation;

    - The reduction of the time limit from 30 days to 7 days for subsequent parliamentary approval would still allow a person to be detained for up to 36 days without charge, e.g. two weeks longer than the maximum period of pre-charge detention in Zimbabwe;

    - The provision for 'independent legal advice' is redundant. It is already open to the government to publish the legal advice it receives from government lawyers, the legal advice can be redacted if necessary and the legal requirements for approval are in any event so minimal that the legal advice would be meaningless.

    - No further judicial safeguards have been offered.

4. We repeat our earlier view that the government's proposals are inherently flawed. By definition, pre-charge detention is detention in circumstances where no evidence has been offered to charge a suspect with a criminal offence. No amount of additional parliamentary or judicial scrutiny can hope to overcome the fundamental lack of unfairness caused by detaining a suspect without charge for ever-increasing periods of time.

'Grave exceptional terror threat' **(NC20)**

5. Under the proposed measures, the Home Secretary would be required to lay before Parliament a statement that she is satisfied 'that a grave exceptional terrorist threat has occurred or is occurring'.[1]

6. However, amendment NC20 defines 'grave exceptional terrorist threat' in exceedingly broad terms, and appears to be closely modelled upon the similarly wide definition of 'emergency' in Part 2 of the Civil Contingencies Act 2004.[2] This definition was strongly criticised by both the Joint Committee on the Draft Civil Contingencies Bill and the House of Lords Constitution Committee as 'unduly broad'.[3] Despite subsequent amendment, the definition of 'emergency' enacted by Parliament in the Civil Contingencies Act 2004 remained deliberately broad and it is this definition that the government has used as its template for the definition of 'grave exceptional terrorist threat'.

7. It is also important to note that 'terrorism' in subclause (1) remains undefined. Accordingly, 'terrorism' would be interpreted under clause 86 of the Bill to follow the broad definition in the Terrorism Act 2000, which includes under section 1(4)(d) the use or threat of force against any government anywhere in the world.

8. Consequently, the statutory definition of 'grave exceptional terrorist threat' could be triggered by a variety of situations that most members of the public would not necessarily consider grave nor exceptional. For example:

    - A group of protesters who released an internet virus ('disruption of a system of communication' under subclause 2(e)) to make a political statement could qualify as 'serious damage to human welfare' (under subclause (1)(b)). Section 1(2)(e) of the Terrorism Act 2000 also includes actions 'designed seriously to interfere with or seriously disrupt an electronic system'. So long as the protesters released the internet virus with the intention of 'influencing the government' (section 1(1)(b) of the 2000 Act) and it was made with 'the purpose of advancing a political, religious or ideological cause' (section 1(1)(c)), it would qualify as a 'situation involving terrorism' under clause (1);

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[1] Notice of amendments given on Tuesday, 3rd June 2008. NC25: (2)(a).

[2] C.f. the structure of clause NC20 and section 17 of the 2004 Act.

[3] Report of the Joint Committee on the Draft Civil Contingencies Bill (November 2003; HL 184; HC 1074) para 32; Memorandum from the House of Lords Constitution Committee to the Joint Committee on the Draft Civil Contingencies Bill, ibid, Appendix 1, para 6.

- A group of Burmese rebels who plotted to overrun a local army base in order to obtain relief for cyclone victims and publicise their plight to the world at large would constitute a 'situation involving terrorism which causes or threats … serious loss of human life' (clause (1)(a)), on the basis that terrorism includes any act 'designed to influence the government' (section 1(1)(b) of the 2000 Act) and includes 'the government of …a country other than the United Kingdom (section 1(4)(d) of the 2000 Act).

9. However far-fetched these examples may seem in practical terms, they are not outside the scope of 'grave exceptional terrorist threat' as a court would construe them following the normal principles of statutory construction. It is not necessary to seek extreme examples, however. Two years ago, the then-Prime Minister Tony Blair said of the police in the Forest Gate incident:[4]

> I think if they have a reasonable piece of intelligence and they believe they have got to investigate — take action on — they should … You can only imagine if they fail to take action and something terrible happened what the outcry would be then.

10. Examples such as Forest Gate show that following 9/11, Madrid, and 7/7, the allegation of a threat involving serious loss of life is a common feature of terrorist investigations. Defining a 'grave exceptional terrorist threat' as an event 'which causes or threatens serious loss of human life' is essentially meaningless, therefore - measured against any other alleged threat of terrorism, it would be neither grave nor exceptional.

Power to declare reserve power exercisable **(NC21)**
Review of operational need for further extension of maximum period of detention **(NC22)**

11. Amendment NC21 requires that the Home Secretary cannot exercise the reserve power under clause 22 unless she has received a report complying with the requirements of amendment NC22.

12. However, the key requirements of the report under amendment NC22 are far from onerous. They simply require the relevant law officer (the DPP in England and Wales and Northern Ireland; the Crown Agent in Scotland) and a chief constable to give their view that 'there are reasonable grounds for believing' that detention of a suspect beyond 28 days will be necessary for one of the grounds set out in subclause (3), and that the investigations are being carried out 'diligently and expeditiously'. But for the seniority of those involved, these requirements are substantively the same as those for detention *up to* 28 days under the existing law in Schedule 8 of the 2000 Act.

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[4] 'Forest Gate raid police forced to act', *Times*, 7 June 2006.

13. In other words, the sole 'safeguard' offered by amendments NC21 and NC22 is a statement by the senior prosecutor and a senior policeman expressing their belief that the standard grounds for extended pre-charge detention under the Terrorism Act 2000 are made out. Far from providing a threshold for the use of exceptional powers, the proposed amendments in NC21 and 22 do not demand anything more from the police and CPS than they would have had to show a judge in order to detain a suspect for more than 48 hours.

Statement to be laid before Parliament **(NC25)**
Independent legal advice **(NC23)**
Notification of chairmen of certain committees **(NC 24)**

14. Amendment NC25 details the statement that the Home Secretary is required to lay before Parliament following the making of the order extending the pre-charge maximum to 42 days, including her view that 'a grave exceptional terrorist threat has occurred or is occurring' (clause (2)(b)).

15. However, as noted above, the legal definition of a 'grave exceptional terrorist threat' provided by amendment NC20 is so weak that it would be possible for the Home Secretary merely to rely upon the general level of threat declared to exist in the UK following 9/11 in order to justify 42 days detention.

16. Amendment NC23 would also require the Home Secretary to obtain 'independent legal advice' as to whether she 'can properly be satisfied' of the grounds set out in NC25, and that this legal advice must be disclosed to the chairs of the Home Affairs Committee, the Joint Committee on Human rights and the Intelligence and Security Committee (NC24) and, in redacted format if necessary, to Parliament as well (see amendment NC23, subclauses (6)-(7)).

17. However, it is difficult to see the benefit of the requirement to obtain independent legal advice for several reasons. First, it has always been open to government to publish the legal advice it receives from the Law Officers and the Home Office Legal Advisor's Branch. The government also regularly obtains advice from non-government lawyers in the form of Queen's counsel and the Attorney General's panel of treasury counsel. Accordingly, we think the odds of the government obtaining favourable legal advice are not diminished by the stipulation that the lawyer should be external to government. Secondly, since the government has yet to publish the legal advice it has received on the compatibility of the extension of pre-charge detention to 42 days, it is difficult to see how the provision of independent legal advice would be an improvement upon this state of affairs. Thirdly, subclause (7) allows the Home Secretary to redact the legal advice received so Parliament may not see the full advice. Lastly, as we have already explained in relation to amendment NC20, the specific legal grounds required of the

Secretary of State are so impoverished that even the most independent-minded legal advice would amount to little more than a rubber stamp. It would certainly not constitute an effective safeguard against excessive executive detention.

Parliamentary scrutiny **(NC26)**

18. Amendment NC26 shortens from 30 days to 7 days the amount of time within which Parliament must approve the Home Secretary's order extending the maximum period of pre-charge detention. While a shorter period is obviously preferable to a longer one, this would still allow a suspect to be detained without charge for up to 35 days without Parliament ever having the opportunity to debate the measure.

19. In any event, as we concluded in our Second Reading briefing, even parliamentary debate immediately following the Secretary of State's order would be a hopelessly inadequate check against unjustified extension of the maximum period beyond 28 days: the separation of powers means that Parliament is fundamentally ill-suited to authorising extensions of detention in what amounts to a debate on individual cases. We continue to share the view of the Joint Committee on Human Rights that the proposed parliamentary safeguards are 'a virtually meaningless safeguard against wrongful exercise of the power [to extend pre-charge detention]'.[5]

Independent review and report **(NC 29)**

20. Amendment NC29 provides for the government-appointed reviewer of terrorism legislation (currently Lord Carlile of Berriew QC) to carry out a review of the operation of the reserve power, including the case of every person detained beyond 28 days. The Home Secretary Jacqui Smith MP has described the prospect of review as a significant check on the exercise of the reserve power:[6]

> Trust me, as a minister and as a home secretary, one of the things that makes you think very carefully about the decision that we are making is not only the immediate explanation that you are going to need to give to parliament but the fact that, six months to a year down the line, an independent reviewer will go back over this decision.

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[5] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies* (June 2008: HL 116/HC 635), para 35.

[6] '42 day detention: Smith reveals details of new safeguards', *Guardian,* 3 June 2008.

21. However, there is little evidence to show that independent reviews have had much effect on the conduct of Home Secretaries, especially in the field of terrorism legislation. For instance, the December 2003 recommendations of the Newton Committee on the Anti-Terrorism Crime and Security Act 2001 – in particular, its recommendation that indefinite detention under Part 4 of the Act be 'replaced as a matter of urgency' – were rejected by the then-Home Secretary David Blunkett MP, and Part 4 was not replaced until after the judgment of the House of Lords in the Belmarsh case a year later. Similarly, we noted in our Second Reading briefing that the current Home Secretary has failed to implement all the recommendations made by Lord Carlile concerning the statutory definition of terrorism.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
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