

# United Kingdom: Pre-Charge Detention for Terrorist Suspects

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## UNITED KINGDOM

### Pre-Charge Detention for Terrorist Suspects

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*The United Kingdom has faced the issue of terrorism for several decades. It has more recently faced the issue of legislating against the terrorist threat whilst complying with the European Convention on Human Rights. One of the UK's anti-terrorism measures is the pre-charge detention of terrorist suspects for up to twenty eight days without charge. During the summer of 2008 the government attempted to further extend this period to forty two days, but were ultimately unsuccessful. The continued efforts of the government to protect the national security of the UK whilst protecting the civil liberties of its citizens is an ongoing struggle with no clear solution.*

*“We strive to achieve the appropriate balance between the measures necessary to deal with the very real threat to national security posed by terrorism and the need to avoid diminishing the civil and human rights of the population.” COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, ¶ 1 at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.*

#### Introduction

The United Kingdom (UK) has had lengthy experience with indefinitely detaining suspected terrorists without trial in Northern Ireland. Under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) <sup>1</sup>the Secretary of State for the Home Department (hereinafter, “Home Secretary”) could authorize the detention of a person for up to seven days. The use of these powers was controversial and in response to increasing violence. In 1988, the European Court of Human Rights ruled that the detention was a breach of article 5(3) of the European Convention on Human Rights [<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>] (ECHR) <sup>2</sup> unless the detention was judicially authorized. <sup>3</sup> This ruling resulted in the government derogating (exempting itself) from article 5(3) of the ECHR in order to lawfully retain this provision of the PTA. <sup>4</sup> The derogation was automatically renewable, but expired with the expiration of the PTA. The resulting internment of almost 2,000 predominantly Catholic men was stated to lead to greater civil disturbances and a “diminished respect for the rule of law in Northern Ireland.” <sup>5</sup> It was widely reported that the use of internment was “among the best recruiting tools the IRA [Irish Republican Army] ever had.” <sup>6</sup> It was against this experience and background that the government has had to determine the most effective, least controversial method to address individuals whom the government suspected of being terrorists that was also least likely to succumb to legal challenges.

This issue of how to detain terrorist suspects was tackled during the drafting of the Terrorism Act 2000 (Terrorism Act), [[http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1)], <sup>7</sup> which replaced the temporary provisions of the PTA. As part of this process, alternative options to derogation from the ECHR were considered. The Terrorism Act was enacted to modernize anti-terrorism legislation and apply it to the whole of the UK, rather than just Northern Ireland. The Terrorism Act attempted to address all forms of terrorism with an “appropriate and effective range of measures, which are

[sufficiently flexible and] proportionate to the reality of the threats that we face and are of practical operational benefit...[and] enable the UK to cooperate more fully in the international fight against terrorism.<sup>8</sup> It was finally decided that individuals could be detained for up to forty-eight hours after arrest without charge, and that the responsibility for extending detention for up to an additional fourteen days should rest with a judicial authority.<sup>9</sup> Critics of the Terrorism Act regarded this provision as providing for “incommunicado detention” and unnecessary, as individuals previously detained under similar provisions were rarely charged with a terrorist offense. Despite these criticisms, the period of detention has been extended by successive acts — from forty-eight hours to seven days by the Terrorism Act 2000; from seven days to fourteen days by the Criminal Justice Act 2003 [[http://www.opsi.gov.uk/acts/acts2003/ukpga\\_2003\\_0044\\_en\\_1](http://www.opsi.gov.uk/acts/acts2003/ukpga_2003_0044_en_1)];<sup>10</sup> and, from fourteen days to twenty-eight days by a highly contentious provision in the Terrorism Act 2006 [[http://www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060011\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_1)].<sup>11</sup>

## **The Current Law Governing Pre-Charge Detention of Terrorists**

The current counter terrorism laws of the UK allow the police, under certain specified circumstances, to arrest individuals without a warrant who are reasonably suspected of being terrorists.<sup>12</sup> Once arrested, these terrorist suspects may be detained, without charge, for up to twenty-eight days to allow the police to obtain, preserve, analyze or examine evidence for use in criminal proceedings. This power of the police to arrest and detain individuals based upon reasonable suspicion only has been described as one of “the most important powers available to the police in the fight against terrorism ... the principal usefulness of the power ... [is that] it allows arrests to be made at an earlier stage than if there was a requirement for suspicion of a specific offence.”<sup>13</sup> This may have both a disruptive and preventative impact on any terrorist plans that may be in process.

### **Requirements for Pre-Charge Detention**

Once a person has been arrested by the police, he may be detained without charge for an initial period of forty-eight hours. Additional periods of detention, in seven day increments, may then be granted by magistrates, up to a total of fourteen days. Detention from fourteen to twenty-eight days may then be granted by a High Court judge. Applications for the extensions of detention are made by the Crown Prosecution Services’ Counter Terrorism Division [[http://www.cps.gov.uk/legal/section1/chapter\\_c.html](http://www.cps.gov.uk/legal/section1/chapter_c.html)], rather than the police.

While the main impetus of the arrest may “have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, legislation does not allow continued detention on this basis.”<sup>14</sup> The detention may only be extended if a judicial authority is satisfied that the extension is necessary to:

- obtain or preserve relevant evidence;
- permit the completion of an examination or analysis of any relevant matter with a view to obtaining evidence; and
- the investigation connected with the detention is being conducted diligently and expeditiously.<sup>15</sup>

The first two requirements require the police or prosecutors to inform the court of the precise details of the investigation, the expected date of completion, what the investigation will achieve and what difference any evidence obtained as a result of the investigation will make to any charging decision. To be satisfied

that the investigation is being conducted diligently and expeditiously the court must be shown that the investigation has been carried out as quickly as reasonably possible.<sup>16</sup>

These issues can be proven both with non-sensitive material presented in the presence of the defense attorney and with sensitive material that is presented in the absence of the defense attorney. The government maintains that public interest immunity issues do not arise as, whilst the individual is being deprived of his liberty, it is for a short, defined time and not in the same venue as a criminal trial.<sup>17</sup>

The requirements for applications for the extension of pre-charge detentions are extensive and the courts are careful in considering the application, given the result is the deprivation of an individual's liberty. In Operation Gamble in Birmingham, applications to detain nine men for seven to fourteen days were refused for two suspects, who were subsequently released, and were not granted for seven days for the remaining seven suspects, who were subsequently charged.<sup>18</sup>

The period of detention under the Terrorism Act 2006 is subject to a sunset provision, requiring that Parliament approve the extension of detention from fourteen to twenty-eight days annually by an affirmative resolution debate in both Houses of Parliament.<sup>19</sup> This was recently renewed by Terrorism Act 2006 (Disapplication of Section 25) Order 2008 [[http://www.opsi.gov.uk/si/si2008/uksi\\_20081745\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20081745_en_1)] on July 25 2008.<sup>20</sup>

### **Extension of Pre-Charge Detention to Forty-Two Days**

On June 11, 2008 the House of Commons, by a narrow majority of nine, passed a Counter-Terrorism Bill [<http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>],<sup>21</sup> to further increase the pre-charge detention period from twenty eight to forty-two days. The passage of the bill through the House of Commons was highly contentious, and rumors, which were strongly denied, surfaced that the government had entered into an improper agreement with the Democratic Unionist Party (DUP) in return for their votes on the bill.<sup>22</sup> The provisions of the bill extending pre-charge detention were defeated in the House of Lords by a majority of 309 votes to 118. The provisions have been completely removed from the bill, rather than amended. Newspapers reported that this heavy defeat was humiliating for Prime Minister Gordon Brown who had attempted to garner cross-party support for the measure.<sup>23</sup> The government immediately prepared a new Counter Terrorism (Temporary Provisions) Bill [<http://www.homeoffice.gov.uk/documents/draft-counter-terrorism.pdf?view=Binary>] to be introduced "if and when the need arises."<sup>24</sup> The bill is significantly shorter than the rejected provisions and intends to "enable the police and prosecutors to do their work – should the worst happen, should a terrorist plot overtake us and threaten our current investigatory capabilities."<sup>25</sup> The bill amends the Terrorism Act 2000 and permits the Director of Public Prosecutions to apply to the courts to detain a suspect already for up to forty two days. The use of the powers would be reviewed and reported upon by the independent reviewer of the terrorism legislation within six months of the use of the power and the report is to be laid before Parliament. A sunset provision is included in the bill, causing the provisions to cease to have effect after a period of sixty days.

To place the new bill in context and show the struggles faced by both the government and Parliament in balancing the right of civil liberties against national security, the original provisions of the Counter-Terrorism Bill are discussed below.

### **Provisions of the Counter-Terrorism Bill**

If enacted, the Counter-Terrorism Bill will amend the pre-charge detention provisions of the Terrorism Act 2000.<sup>26</sup> The bill introduces a 'reserve power' which enables senior prosecutors to apply to senior judges for an extension of an individual's detention for up to forty two days, in seven day increments,

after the current maximum of twenty eight days expires, when an order issued by the Home Secretary is in force. Thus the bill does not extend the pre-charge detention limit beyond twenty eight days now, but allows it to be extended in the future if there is a clear and exceptional need to do so, through the issuance of an order which allows the reserve power to be used.<sup>27</sup>

The bill aims to introduce a large number of safeguards to prevent an individual from being arbitrarily deprived of their liberty for such a long period without charge. It provides for a “triple layer of authorizations for extended detention.”<sup>28</sup> This process consists of the following:

- the Home Secretary issues an order;
- Parliament approves or rejects the order of the Home Secretary;
- a judge(who has the ultimate authority on whether to detain a person for up to forty two days) hears an application made under the order by the Crown Prosecution Service (CPS) for detention of the individual for up to forty-two days, in seven day increments;
- The designated reviewer of the anti-terrorism legislation reviews each instance of use of the reserve power, and issues a report; and
- Parliament debates the report to consider whether the reserve power was appropriately used.<sup>29</sup>

The Home Secretary may only issue an order under the Counter-Terrorism Bill if an individual is being detained for twenty eight days through the provisions of the Terrorism Act 2006 and he has received the reports required by the bill in support of the necessity for the order.<sup>30</sup>

Prior to issuing the order, the Home Secretary must receive a joint “report on the operational need for the further extension of the maximum period required from the Director of Public Prosecutions (or equivalent in Scotland or Northern Ireland) and [a senior police official].”<sup>31</sup> This report is required to include:

- A statement from the individuals compiling the report that there are reasonable grounds to believe that the detention of the person beyond twenty eight days is necessary for the purposes of obtaining, preserving or analyzing evidence that relates to the commission of a serious terrorist offence by the detained person<sup>32</sup>;
- Details of the grounds for the belief;
- A statement from the individuals making the report that the investigation in connection with the detained person is being “conducted diligently and expeditiously.”<sup>33</sup>

In addition to seeking legal advice through the usual government channels, prior to issuing an order, the Home Secretary must obtain independent legal advice from a non-government lawyer on the following issues:

- whether a grave exceptional terrorist threat has occurred or is occurring;<sup>34</sup>
- whether the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible;
- whether or not the need for that power is urgent; and

- whether the provisions in the order are compatible with the European Convention on Human Rights.<sup>35</sup>

Once the order is issued, each of the above grounds “must be proved to the court to obtain a further extension of detention beyond 28 days.”<sup>36</sup>

The order issued, as well as the legal advice obtained, is presented to Parliament (upon which it becomes public information) unless it appears to the Home Secretary that the advice “... contains material that the disclosure [of] would be damaging to the public interest, or might prejudice the prosecution of any person.”<sup>37</sup> If the advice contains this type of sensitive material the Home Secretary may lay (present) before Parliament a redacted version, in agreement with the independent legal adviser before Parliament.

### **Parliamentary Oversight**

Once an order has issued, and prior to Parliamentary debate, the Home Secretary is required to notify the chairs of the Home Affairs Select Committee, the Joint Committee on Human Rights and the Cabinet Office’s Intelligence and Security Committee, and provide them with a copy of the full legal advice and reports. The purpose of the notification is to make these individuals aware of the circumstances of the Home Secretary’s decision and enable them to “participate fully in the subsequent debates on the issue.”<sup>38</sup> The Home Secretary must also lay a statement before Parliament within two days of issuing the order, or as soon as practicable that he/she is satisfied the points on which legal advice was sought are met, and may also include any other information he/she believes to be appropriate, such as the terrorist threat level facing the UK.<sup>39</sup> The statement must not include “the name of any person then detained under section 41 of the Terrorism Act 2000 or any material that might prejudice the prosecution of any person.”<sup>40</sup>

Once the order is placed before Parliament, it continues in force for seven days, after which period it lapses unless it is approved by resolution by each House of Parliament. If Parliament is not sitting at the time the order is made, the bill provides for Parliament to be recalled in order to consider the order.<sup>41</sup>

### **Judicial Oversight**

If the order is approved, it continues in force for up to thirty days, during which period senior prosecutors are allowed to exercise their “reserve power” to apply to senior judges to extend the pre-charge detention of individuals for up to forty-two days in seven day increments.<sup>42</sup>

### **Lapsing of the Order**

Any individual that has been detained for longer than twenty eight days by the ‘reserve power’ and not otherwise legally detained must be released immediately when the order lapses. The lapsing of the order does not “render unlawful any application made or granted for detention beyond 28 days before the order lapsed.”<sup>43</sup> It also does not preclude the making of another order, although a new report must be made by the police and the Director of Public Prosecutions.<sup>44</sup> If a person is detained for longer than 28 days, the Home Secretary must lay a further statement before Parliament as soon as reasonably practicable specifying the details of the extension, including the total number of days for which the person’s detention has been authorized.<sup>45</sup>

### **Review of the Reserve Power**

The independent reviewer of the terrorism legislation<sup>46</sup> must complete a report and send it to the Home Secretary within six months of the exercise of the reserve power. The report must then be laid before

Parliament for debate within a reasonably practicable period. The reviewer is required to consider whether the legal requirements contained in the bill, such as including the required information in the statement before Parliament and receiving a report from the Director of Public Prosecutions and Police, were met. The reviewer must then determine whether in their “opinion the Home Secretary’s decision to make the reserve power exercisable was reasonable in all the circumstances.”<sup>47</sup>

The reviewer then considers the case of individuals detained “in pursuance of a warrant of further detention in which the specified period was extended beyond 28 days ... [and] must state with respect to each case whether in the opinion of the person carrying out the review the procedures applicable to the making of an application to extend beyond 28 days the period specified in a warrant of further detention were properly followed.”<sup>48</sup>

### **Reasons for the Extension of Pre-Charge Detention**

The extension of pre-charge detention, as noted above, is not a new issue and has presented itself with some regularity over the past several years to controversy each time legislation has been introduced. The struggle the government faces of how to balance protecting its citizens from the risk of a terrorist attack without undermining the basic human rights of individuals and their right to liberty, while acting within the limits of the law<sup>49</sup> can be demonstrated by the fact that pre-charge detention has reportedly been “debated more than any other legal procedural issue in recent years.”<sup>50</sup>

The government noted the need in terrorism investigations for a separate power of arrest from the normal criminal law in its anti-terrorism legislation. In 1998, prior to the introduction of the Terrorism Act 2000, it stated:

Terrorist groups are frequently highly organised with well practised procedures for thwarting police actions against them. Many of those who have operated in the UK (including non-Irish terrorist groups) have been trained to evade surveillance and their operations have been meticulously planned both to minimise the risk of arousing suspicion before the terrorist act is undertaken and to minimise the chance of leaving forensic evidence.<sup>51</sup>

When arguing for the extension of pre-charge detention from fourteen to twenty eight days, the government claimed that “any proposal to extend the maximum period of pre-charge detention is going to be based on professional judgment and experience rather than exact science,”<sup>52</sup> and the reviewer of terrorism legislation has claimed that there is no logical answer for the maximum number of days of detention, that rather it is a political decision.<sup>53</sup> The government has noted that the terrorist threat is rapidly changing in nature and that:

The primary responsibility of any government must be to ensure the safety of its citizens. This must include looking at what powers the law enforcement agencies may need in future instead of waiting until current powers have been proved inadequate ... the scale and nature of the current terrorist threat and the increasing complexity of cases lead the Government to believe that we need to look again at the time limit on pre-charge detention.<sup>54</sup>

The complex cases presented by terrorists include the use of encrypted data; voluminous quantities of material; data from cellular telephones; multiple false identities; forensic science delays; language problems; difficulties when large numbers of suspects are held together; problems if the suspect is injured at the time of arrest and unfit for interview for a prolonged period of time; and the cumulative impact of all the above issues.

The progression in the complexity of cases has been evidenced over the past two years with the array of cases faced by the police. In a single case in 2004, 8,224 exhibits were seized and the operation surrounding the individual detained without charge was extensive, involving seven co-conspirators and investigations in eight countries across three continents.<sup>55</sup> In the August 2006 alleged airline plot, in which twenty one people were arrested after intelligence showed there was a plan to detonate bombs on up to ten airplanes in flight from the UK to the US, over 25,000 exhibits were seized.<sup>56</sup> Sir Ian Blair, the Chief of the Metropolitan Police, has given evidence to a government committee that:

The number of the conspiracies, the number of conspirators within those conspiracies and the magnitude of the ambition in terms of destruction and the loss of life is mounting, has continued to mount, is increasing year by year and a pragmatic inference can be drawn that at some stage 28 days is not going to be sufficient ... when that happens we should be in a position that Parliament has discussed this and made its own conclusions before we face an atrocity.<sup>57</sup>

The complex nature of evidence presented from multiple sources, combined with the need to arrest individuals earlier to protect the public by disrupting what could be a catastrophic terrorist attack,<sup>58</sup> appear to be the most compelling arguments presented by the government to extend pre-charge detention -to protect the public from the threat posed by terrorist attacks while investigations continue. In the 2004 case, the police noted that at the time of arrest of the terrorist suspect “there was not one shred of admissible evidence.”<sup>59</sup> The individual in the case was later convicted and sentenced to forty years imprisonment. Critics of the provisions have noted that this example serves to justify maintaining the pre-charge detention period at its current maximum of twenty eight days, noting that the case cited above was challenging and complex but that charges were brought against the suspect within fourteen days, well within the current time period for pre-charge detention.<sup>60</sup>

The government has asserted that pre-charge detention for over twenty eight days will only be used in exceptional circumstances in cases that involve “multiple plots, or links with multiple countries, or where the investigation is highly complex.”<sup>61</sup> It has attempted to balance individual rights by “strengthening the judicial oversight and Parliamentary accountability”<sup>62</sup> of the proposed measures. It claims that the twenty eight day limit is already being tested and that “one person had been charged after fifteen days, four were charged after nineteen and twenty days, and six were held for between twenty-seven and twenty-eight days, three of whom were charged.”<sup>63</sup> A government report, reviewing the use of pre-charge detention, opined that while no recent investigations have justified the extension of pre charge detention beyond twenty eight days, the “growing number of cases and the increase in suspects monitored by the police and the security services make it entirely possible, and perhaps increasingly likely, that there will be cases that do provide that justification ... the twenty-eight day limit may well prove inadequate in the future.”<sup>64</sup>

The Director General of the Security Services has recently stated that the police and Security Services are currently working on thirty known plots that include over two hundred groups or networks comprised of approximately two thousand individuals.<sup>65</sup> The government claims that this:

is not a spike, but a new and sustained level of activity as evidenced by the fact that there have been 16 plots primarily targeting the UK since 2000 ... [and in 2007] alone a total of 42 individuals have been convicted of terrorist offences in 16 cases. The number of people charged with an offence after arrest under the terrorist legislation grew from just over 50 in 2004 to around 80 in 2006.<sup>66</sup>

The reviewer of terrorist legislation, Lord Carlile, has reported that there have been no instances in which detaining a suspect for longer than twenty-eight days would be more likely to result in charges. However,

Lord Carlile notes that he shares the view of the police that there “may well arise in the future a very small number of extremely important cases in which twenty-eight days would prove insufficient.”<sup>67</sup> He opines that the system proposed by the Counter-Terrorism Bill may serve to “ensure fairness, and would be likely to reduce the period of detention of some suspects compared with the present position.”<sup>68</sup>

### **Pre-Charge Detention as a form of Preventive Detention**

References to pre-charge detention as solely for preventive purposes have been shunned by the government in somewhat contradictory statements that indicate the initial use of pre-charge detention may be for preventive purposes, but that its continued use is not permitted on this basis. The government claims the use of pre-charge detention for preventive purposes is misleading and that “while an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, the legislation does not allow the continued detention on this basis.”<sup>69</sup> The primary purpose of pre-charge detentions is to “secure sufficient admissible evidence for use in criminal proceedings.” However, as indicated in the previous statement, pre-charge detention may, in its initial use, be used for preventive purposes and the government further continues that: “there is no legal basis in making an arrest on the grounds of protecting the public, but it is evident that the police have a duty to act where it is necessary for them to do so.”<sup>70</sup>

### **Criticisms of the Extension of Pre-Charge Detention**

There has been extensive criticism of the provisions to extend pre-charge detention, both within and outside of Parliament. A number of Parliamentary reports are strongly critical of the pre-charge detention provisions in the bill and many members have been outspoken about their dislike of its inclusion in the bill, claiming that the government has become fixated on extending the pre-charge detention period for political reasons.<sup>71</sup>

Several high profile members of the House of Lords have spoken out against the bill, including the former Labour Lord Chancellor, Lord Falconer, the former Director General of the Security Service Baroness Manning Buller, the former Metropolitan Police Commissioner and two former Law Lords, Lord Steyn and Lord Llyod of Berwick.

Baroness Manning Buller noted that the bill:

...represents yet another attempt on the part of the Government to abridge, without sufficient justification, fundamental democratic rights and freedom that have underpinned our society for centuries and which we have defended against tyranny on so many occasions. The Government are putting those rights and freedoms at risk in a reactionary fashion. Terrorists want to undermine our freedoms and way of life by provoking the state into putting in place repressive measures. We therefore risk, in effect, doing their job for them.<sup>72</sup>

Despite the increases in the number of people being charged with terrorist offenses, opponents of the bill maintain that the increase in the number of people being charged is not evidence of the growing threat of terrorism to the nation, rather that it is indicative that the current laws are working.<sup>73</sup> The Joint Committee on Human Rights has stated that without a qualitative analysis of the seriousness of the charges brought, it is not “satisfactory to infer an increase in the level of the threat from bare statistics about the number of convictions or the number of people charged with terrorism offenses ... nor is it satisfactory to draw inferences about the level of the threat from the number of active investigations, the number of suspects, nor the number of prosecutions.”<sup>74</sup>

The order issued by the Home Secretary which enables the ‘reserve power’ to be used has been criticized as limited in many ways. The order under which the extension of pre-charge detention to forty two days is authorized has been described as essentially an executive order that is not subject to any “meaningful opportunity for that assertion to be tested by independent scrutineers”<sup>75</sup> and over which Parliament may only operate as safeguard to a limited extent<sup>76</sup>. Critics have noted that “by the time [it] expresses a view on whether the reserve power should be made available it is likely that the full forty-two day period will have expired,”<sup>77</sup> thus allowing individuals to be detained for forty two days at the “subjective unfettered discretion of the Home Secretary.”<sup>78</sup>

## **A Blurring of Roles**

Critics have further argued that when the order reaches Parliament for debate, the bill places Parliament in a quasi-judicial capacity, and requires it to make decisions that it is “institutionally ill-equipped to determine.”<sup>79</sup> While the role of Parliament is included to ensure democratic accountability, concern has been raised that this “risks conflating the roles of Parliament and the Judiciary,”<sup>80</sup> as Parliamentary debate would obviously have political overtones and the judiciary would have to consider an application within a short period of time after this debate. Critics argue that this would lead to the debate having to be severely restricted and thus defeat the purpose of an open debate to ensure democratic accountability.<sup>81</sup> If the debate were not restricted, it could serve to prejudice any future trials and, at the least, lead to the appearance that the independence of the judiciary is being undermined.<sup>82</sup>

## **Compliance with the European Convention on Human Rights**

A government report has criticized the provisions, claiming that they are contrary to the ECHR. The highly critical report from the Joint Committee on Human Rights has stated that, in its opinion, the lack of judicial safeguards would be in breach of the right to liberty contained in article five of the ECHR and thus require a derogation in order for it to be lawful.<sup>83</sup> A separate report has noted that charging suspects after detaining them for longer than twenty-eight days is likely to contravene article 5(2) that requires a suspect be informed promptly of any charges against them and that even with additional judicial safeguards, pre-charge detention for forty two days would not be “compatible with the right to liberty in Article 5 of the ECHR ... such provision inevitably [requires a] derogation.”<sup>84</sup> The report argues that the pre-charge detention for forty-two days is disproportionate and that “the legal framework does not provide sufficient safeguards against arbitrariness and is incompatible with ... [the ECHR] for that reason alone.”<sup>85</sup>

The government argues that the extension of pre-charge detention is compatible with the ECHR as jurisprudence from the European Court of Human Rights has not set a specific time period for which a person can be detained without charge. It has rather, established an “overarching principle that detention under Article 5 must not be arbitrary.”<sup>86</sup> The government argues that pre-charge detention as provided for in the bill is not arbitrary as it is reviewed by the court at least every seven days, which it considers to be in compliance with the ECHR. The government further argues that article 5(4) of the ECHR is met as the “detainee may challenge the lawfulness of his detention at the hearings for extending his detention and may also issue habeas corpus proceedings if appropriate.”<sup>87</sup> The Joint Committee on Human Rights has argued that while there is not exact jurisprudence surrounding the time period in which a suspect must be informed of charges against them parallels can be drawn from a recent case [<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=788396&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>] in which the European Court of Human Rights unanimously found that a delay of seventy two hours before the reason for detention was provided was not ‘prompt’ and thus not compatible with article 5(2) of the ECHR.<sup>88</sup>

## **Alternatives to Pre-Charge Detention**

The use of pre-charge detention to disrupt terrorist plots and protect the public has not been considered in isolation, but along with a number of alternatives also being considered. These include:

- The continued use of the CPS threshold test;
- Charging suspects with lesser crimes;
- Providing more financial and human resources to tackle terrorist cases;
- Providing framework legislation for future derogation from Article 5 of the ECHR to allow for extensive pre-charge detention when an emergency arises;<sup>89</sup> or
- The use of intercept evidence to facilitate prosecution at an earlier stage.

### **The Threshold Test**

Since 2004 the CPS has utilized a test known as the threshold test in both criminal and terrorist cases.<sup>90</sup> This test allows the CPS to charge suspects where evidence that shows there is a realistic prospect of conviction is not yet available, but reasonable grounds exist to believe that evidence will become available, but not within the typical pre charge detention time limits. In order to apply the threshold test, the suspect must also pose a danger to individuals or the community at large if he were released on bail.<sup>91</sup> The evidence that the CPS has reasonable grounds to believe will become available must meet evidentiary laws, thus inadmissible evidence, such as intelligence or intercept materials cannot be relied upon.

The government argues that the test is compliant with the ECHR as it brings the suspect promptly before a court. The court and defense attorney are presented with “an outline of the case and the reasons why the prosecution [are] seeking remand into custody.”<sup>92</sup> The defense attorney receives a copy of the evidence or a summary of the evidence. The court then determines whether the suspect is released on bail or remanded into custody. The CPS is required to review the cases submitted using the threshold test within a reasonable period of time.

The Director of Public Prosecutions has noted that there is no specific data on cases to which this test has been applied, but has stated that the test was applied to four of the eight individuals charged after being detained for more than fourteen days.<sup>93</sup>

### **Lesser Criminal Charges**

Charging suspected terrorists with lesser criminal offences has been met with a number of objections on practical and moral grounds, with the wide ranging view that it “is not appropriate to bring lesser charges purely to enable suspects to be held while more serious charges were investigated.”<sup>94</sup>

### **Framework for Future Derogation**

The Joint Committee on Human Rights has recommended that the government should establish a framework for future derogation from the ECHR rather than extending pre-charge detention. Derogation could occur under Article 15 of the ECHR, which permits derogation where there is a public emergency that threatens the life of the nation and would allow for measures “to the extent strictly required by exigencies of the situation.”<sup>95</sup> The report of the Joint Committee notes that this approach “both

recognizes that human rights law can accommodate a wholly exceptional power to extend the pre-charge detention limit in a case of genuine public emergency, and at the same time ensures that the scope of any such future derogation will be strictly confined to that which is permitted by the ECHR.”<sup>96</sup>

## **More Human and Financial Resources**

The effectiveness of increasing both human and financial resources to reduce the amount of time investigations take has been considered. This approach was viewed as untenable and not the best solution, particularly given the cross border dimension of many terrorist investigations resulting in there being differences in the procedures used in other jurisdictions that would delay the investigation in the UK.<sup>97</sup>

## **The Use of Intercept Evidence**

There is currently a statutory ban on the use of intercept evidence in the courts by the Regulation of Investigatory Powers Act 2000 [[http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000023\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en_1)].<sup>98</sup> Debates over the use of intercept evidence have occurred almost simultaneously with those for the extension of pre-charge detention as many argue that the use of intercept evidence in the courts could be used to secure more convictions against terrorists.<sup>99</sup> A government committee has considered that the use of intercept evidence in courts should be seriously considered and has near universal support outside the government.<sup>100</sup> The government has conducted an extensive review on this issue and continues to view the concept with reluctance, stating that it wishes to wait to see the impact of new technologies before it makes a decision.<sup>101</sup>

Individuals have criticized the structure of the British legal system, and questioned why the government does not remove the legal constraints that prevent the prosecution of individuals for existing criminal and terrorist offenses in the courts in the first instance, such as the prohibition on the use of intercepted evidence in court.<sup>102</sup> This approach was further supported by members of the Conservative Party, who argued that the evidence could be protected through a vetted judge to view the intelligence and intercept evidence before it is heard in open court, with the intention of bringing suspects to trial.<sup>103</sup>

The government responded to these suggestions by stating an extensive review has concluded that the use of intercepted evidence would only produce a “modest” increase in the number of prosecutions for serious criminal offenses but none for terrorists. It has further argued:

There is a widespread misconception that if we could only adduce intercepted evidence, we would be able to prosecute those detained. However, the review of intercepted evidence found no evidence to support this ... Government does not intend to change the existing arrangements. Intercept provides only part of the intelligence against individuals, and sometimes a small part; it does not stand alone. Some of the material that we have in these cases is inadmissible, and other material, while technically admissible, could not be adduced without compromising national security, damaging relationships with foreign powers or intelligence agencies, or putting the lives of sources at risk. So there are cases in which we remain unable to prosecute.<sup>104</sup>

The former Director General of the Security Service (MI5) publicly announced his reluctance for the use of intercepted evidence in court:

I have reluctantly come to the conclusion that due to the changing nature of telephone technology and the importance, during a period of change, of not sensitising terrorists and

serious criminals to particular capabilities that will be important for the future, there are indeed good reasons not to remove the bar on the use of intercept in our courts.<sup>105</sup>

Despite the arguments that the repeal of this rule would enable terrorist suspects to be charged more promptly, there remains no momentum for this restriction to be removed.

## Concluding Remarks

The Joint Committee on Human Rights has noted that “whilst anti-terrorist legislation is not new, each incremental installment, generated by concerns about public safety, must be considered not only on its merits but also in relation to the totality of such legislation.”<sup>106</sup> The large volume of anti-terrorism legislation in the UK appears to have caused much controversy about the pre-charge detention provisions in the context of its cumulative effect. Additionally, much controversy exists regarding the potential injustice that an individual could face by being detained for up to forty two days without being charged with a crime to only later be determined to not pose a threat. The government’s concerns regarding the challenges that it faces and the consequences of not having powers to enable police to effectively tackle the terrorist threat are unenviable and not open to an easy solution. The final resolution of the controversy surrounding the issue of pre charge detention is dependent upon the social and political climate to determine whether the chosen measures are proportionate to the challenges faced.

The reception that the provisions in the bill relating to pre-charge detention have met in the House of Lords indicates that the provisions would likely not be enacted.<sup>107</sup>

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<sup>1</sup> Prevention of Terrorism (Temporary Provisions) Act 1984, c. 8.

<sup>2</sup> The ECHR was incorporated into the domestic law of the United Kingdom by the Human Rights Act 1998, c. 42, at [http://www.opsi.gov.uk/ACTS/acts1998/ukpga\\_19980042\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1) (official source). See further The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 222, at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>3</sup> Brogan and others v UK, (1989) 11 EHRR 117.

<sup>4</sup> Brogan and others v UK, (1989) 11 EHRR 117. This derogation was later withdrawn by the Human Rights Act (Amendment) Order 2001, SI 2001/1216 at <http://www.opsi.gov.uk/si/si2001/20011216.htm>.

<sup>5</sup> MARY O’RAWE, OPEN SOCIETY JUSTICE INITIATIVE, ETHNIC PROFILING, POLICING, AND SUSPECT COMMUNITIES: LESSONS FROM NORTHERN IRELAND 92 (2005) at 92, at [http://www.justiceinitiative.org/db/resource2?res\\_id=102731](http://www.justiceinitiative.org/db/resource2?res_id=102731).

<sup>6</sup> Former IRA Commander Jim McVeigh, *quoted in* M. O’Connor and C. Rumann, Into the Fire: How to avoid getting burned by the same mistakes made fighting Terrorism in Northern Ireland, 24 Cardozo L. Rev. 1657, 1662 (2005).

<sup>7</sup> Terrorism Act 2000 c. 11 (as amended) at [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1) (official source).

<sup>8</sup> BBC News, *Head to Head: New Terrorism Act*, Feb. 11, 2001 at [http://news.bbc.co.uk/1/hi/uk\\_politics/talking\\_politics/1178705.stm](http://news.bbc.co.uk/1/hi/uk_politics/talking_politics/1178705.stm).

<sup>9</sup> Terrorism Act 2000, c. 11, sch. 8, (as amended) at [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000011\\_en\\_21#sch8-pt3](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_21#sch8-pt3) (official source). Part III permits a judicial authority to extend detention for up to seven days, later extended to fourteen days by the Criminal Justice Act 2003, c.44, § 306 at [http://www.opsi.gov.uk/acts/acts2003/ukpga\\_20030044\\_en\\_22#pt13-pb1-11g306](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_22#pt13-pb1-11g306) (official source).

<sup>10</sup> Criminal Justice Act 2003, c.44, § 306 at [http://www.opsi.gov.uk/acts/acts2003/ukpga\\_20030044\\_en\\_22#pt13-pb1-11g306](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_22#pt13-pb1-11g306) (official source).

<sup>11</sup> Terrorism Act 2006, c. 11, § 23 at [http://www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060011\\_en\\_4#pt2-pb2-11g23](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_4#pt2-pb2-11g23)

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(official source).

<sup>12</sup> Terrorism Act 2000 c. 11, § 41 (as amended) at [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1) (official source).

<sup>13</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-6, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm. 6906, ¶ 22, at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

<sup>14</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

<sup>15</sup> Terrorism Act 2000 c. 11, sch. 8 part 3 (as amended) at [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1) (official source)

<sup>16</sup> Home Office, *Scrutiny of Pre-charge Detention in Terrorist Cases*, at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/cps-pre-charge-detention.pdf?view=Binary> (last visited Aug. 27, 2008).

<sup>17</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

<sup>18</sup> Home Office, *Scrutiny of Pre-charge Detention in Terrorist Cases*, at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/cps-pre-charge-detention.pdf?view=Binary> (last visited Aug. 27, 2008).

<sup>19</sup> Terrorism Act 2006, c. 11, § 25 at [http://www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060011\\_en\\_4#pt2-pb2-11g23](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_4#pt2-pb2-11g23) (official source).

<sup>20</sup> The Terrorism Act 2006 (Disapplication of Section 25) Order 2008, SI 2008/1745, at [http://www.opsi.gov.uk/si/si2008/uksi\\_20081745\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20081745_en_1).

<sup>21</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, as brought from the Commons including the pre-charge detention provisions at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>. The most current version of the Bill is the Counter-terrorism Bill, [HL Bill 82], 2007-08 at <http://www.publications.parliament.uk/pa/ld200708/ldbills/082/2008082.pdf>.

<sup>22</sup> Phillipe Naughton, *Gordon Brown denies 42-day terror deal with DUP*, June 12, 2008, TIMES (London) at <http://www.timesonline.co.uk/tol/news/politics/article4119881.ece>.

<sup>23</sup> Nico Hines and David Byersordon, *Brown's last-ditch appeal fails as Lords reject 42-day Bill*, THE TIMES (London) Oct. 13, 2008, <http://www.timesonline.co.uk/tol/news/politics/article4935478.ece>.

<sup>24</sup> Home Office, *Home Secretary's statement on the counter-terrorism bill*, 13 October 2008 at <http://security.homeoffice.gov.uk/news-publications/news-speeches/counter-terrorism-bill-statement>.

<sup>25</sup> Home Office, *Home Secretary's statement on the counter-terrorism bill*, 13 October 2008 at <http://security.homeoffice.gov.uk/news-publications/news-speeches/counter-terrorism-bill-statement>.

<sup>26</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, sch. 2 at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>27</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 23(1) at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>28</sup> House of Lords Select Committee on the Constitution, *10th Report of Session 2007-08: Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 18 at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>29</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 31, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>30</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 23(2) at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>31</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 24, at <http://www.publications.parliament.uk/pa/ld200708/>

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[ldbills/065/2008065.pdf](http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf) and Explanatory Notes to the Counter-Terrorism Bill [HL Bill 65] 2007-8, as brought from the House of Commons on 12th June 2008, ¶ 69, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf>.

<sup>32</sup> “Serious terrorist threat” is defined in the Act as being an offence under the Terrorism Act 2000, the Terrorism Act 2006, or any offence that has a terrorist connection and is punishable upon conviction by life imprisonment.

<sup>33</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 24, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>34</sup> Clause 22 of the Counter-Terrorism Bill defines “grave exceptional terrorist threat” as “as an event or situation involving terrorism which causes or threatens serious loss of human life or serious damage to human welfare in the UK.” The Home Office gives the examples of “disruption of energy supplies or transport facilities, or serious damage to the security of the UK. The provision ... is to ensure that terrorist plots which are foiled by the authorities or which otherwise fail are included in the definition.” Home Office, *Pre-charge Detention - The Facts*, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-facts?view=Binary> (last visited Aug. 27, 2008).

<sup>35</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cls. 25 and 27, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>36</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 27, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf> and Explanatory Notes to the Counter-Terrorism Bill [HL Bill 65] 2007-8, as brought from the House of Commons on 12th June 2008, ¶ 93, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf>.

<sup>37</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 25, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>38</sup> House of Lords Select Committee on the Constitution, *10th Report of Session 2007–08: Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>39</sup> Explanatory Notes to the Counter-Terrorism Bill [HL Bill 65] 2007-8, as brought from the House of Commons on 12th June 2008, ¶ 85 at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf>.

<sup>40</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 27, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>41</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 29, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>42</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 30 and sch. 2, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>43</sup> Explanatory Notes to the Counter-Terrorism Bill [HL Bill 65] 2007-8, as brought from the House of Commons on 12th June 2008, ¶ 88 at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf>.

<sup>44</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 28, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>45</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, sch 2 and cl. 41, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>46</sup> The current reviewer of anti-terrorism legislation is Lord Carlile of Berriew, appointed under section thirty six of the Terrorism Act 2006, c. 11 at [http://www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060011\\_en\\_4#pt2-pb2-11g23](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_4#pt2-pb2-11g23) (official source).

<sup>47</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 31, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>48</sup> Counter-terrorism Bill, [HL Bill 65], 2007-08, cl. 31, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>.

<sup>49</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

<sup>50</sup> LORD CARLILE OF BERRIEW, Q.C., REPORT ON PROPOSED MEASURES FOR INCLUSION IN A COUNTER-TERRORISM BILL, 2007-08, Cm 7262, ¶ 41 at <http://www.official-documents.gov.uk/document/cm72/7262/7262.pdf>.

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- <sup>51</sup> SECRETARY OF STATE FOR THE HOME DEPARTMENT ET AL, LEGISLATION AGAINST TERRORISM, 1998-99, Cm. 4178, ¶ 7.8.
- <sup>52</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-06, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm 6906, at 3 at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.
- <sup>53</sup> LORD CARLILE OF BERRIEW, Q.C., REPORT ON PROPOSED MEASURES FOR INCLUSION IN A COUNTER-TERRORISM BILL, 2007-08, Cm 7262, ¶ 45 at <http://www.official-documents.gov.uk/document/cm72/7262/7262.pdf>.
- <sup>54</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.
- <sup>55</sup> Home Office, *Options for Pre-Charge Detention in Terrorist Cases*, July 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary> referring to the case of Dhiren Barot. See further CPS, *Terrorist Sentenced for Conspiracy to Murder*, Nov. 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/161\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/161_06.html).
- <sup>56</sup> Home Office, *Options for Pre-Charge Detention in Terrorist Cases*, July 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary> referring to the case of Dhiren Barot. See further CPS, *Terrorist Sentenced for Conspiracy to Murder*, Nov. 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/161\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/161_06.html).
- <sup>57</sup> BBC News, *Met chief warns over terror plots*, Oct. 9, 2007, [http://news.bbc.co.uk/1/hi/uk\\_politics/7035388.stm](http://news.bbc.co.uk/1/hi/uk_politics/7035388.stm).
- <sup>58</sup> House of Commons Home Affairs Committee, *Terrorism Detention Powers: Fourth Report of Session 2005-06*, H.C. 910-I, ¶ 90 at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91009.htm>.
- <sup>59</sup> Home Office, *Options for Pre-Charge Detention in Terrorist Cases*, July 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary> referring to the case of Dhiren Barot. See further CPS, *Terrorist Sentenced for Conspiracy to Murder*, Nov. 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/161\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/161_06.html).
- <sup>60</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 635.
- <sup>61</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, ¶ 22 at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.
- <sup>62</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, ¶ 22 at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.
- <sup>63</sup> House of Commons Library Research Paper, *Counter-Terrorism Bill Committee Stage Report Bill 100 of 2007-8*, Research Paper 08/52 June 2008 at <http://www.parliament.uk/commons/lib/research/rp2008/rp08-052.pdf> and LORD CARLILE OF BERRIEW, Q.C., REPORT ON PROPOSED MEASURES FOR INCLUSION IN A COUNTER-TERRORISM BILL, 2007-08, Cm 7262, ¶ 42 at <http://www.official-documents.gov.uk/document/cm72/7262/7262.pdf>.
- <sup>64</sup> Home Affairs Committee, *Fourth Report of Session 2005-06, Terrorism Detention Powers*, HC 910-I, ¶ 143 and THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-6, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm. 6906, ¶ 35, at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.
- <sup>65</sup> Home Affairs Select Committee, *First Report, The Government's Counter-Terrorism Proposals*, 2007-08, HC 43-I, at <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmhaff/43/43i.pdf>.
- <sup>66</sup> Home Affairs Select Committee, *First Report, The Government's Counter-Terrorism Proposals*, 2007-08, HC 43-I, at <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmhaff/43/43i.pdf>.
- <sup>67</sup> LORD CARLILE OF BERRIEW, Q.C., REPORT ON PROPOSED MEASURES FOR INCLUSION IN A COUNTER-TERRORISM BILL, 2007-08, Cm 7262, ¶ 42 at <http://www.official-documents.gov.uk/document/cm72/7262/7262.pdf>.
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CHARGE DETENTION, 2006-07, Cm. 6920, at <http://www.official-documents.gov.uk/document/cm69/6920/6920.pdf>.

<sup>70</sup> THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, ¶ 22 at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

<sup>71</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 640.

<sup>72</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 636.

<sup>73</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>74</sup> Joint Committee on Human Rights, *Twenty First Report, Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, 2007-08, H.L. 116/H.C. 635 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/116/11605.htm#a2>.

<sup>75</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 32 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> Joint Committee on Human Rights, *Ninth Report, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, 2007-8, H.L. 50/H.C. 199 ¶ 13 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf>.

<sup>78</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 637.

<sup>79</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>80</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>81</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>82</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>83</sup> Joint Committee on Human Rights, *Ninth Report, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, 2007-8, H.L. 50/H.C. 199 ¶ 13 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf>.

<sup>84</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 43 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>85</sup> Joint Committee on Human Rights, *Ninth Report, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, 2007-8, H.L. 50/H.C. 199 ¶ 20 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf>.

<sup>86</sup> Explanatory Notes to the Counter-Terrorism Bill [HL Bill 65] 2007-8, as brought from the House of Commons on 12th June 2008, ¶ 306, at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/en/2008065en.pdf>.

<sup>87</sup> In another government report on pre-charge detention the use of habeas corpus was considered to be insignificant “to the debate about judicial control over extensions of detention time” as the judicial review mechanisms provided in Part fifty four of the Civil Procedure Rules are considered to be a “more effective means of challenging detention.” House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 47 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>88</sup> Saadi v UK, Application no. 13229/03, 29 January 2008,

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<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=788396&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>89</sup> Joint Committee on Human Rights, *Twenty First Report, Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, 2007-08, H.L. 116/H.C. 635, ¶ 55 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/116/11605.htm#a2>.

<sup>90</sup> Code for Crown Prosecutions (the Code) First issued June 2004, Part 6, <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (last visited Aug. 26, 2008). House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, appendix 3 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>91</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 644.

<sup>92</sup> Code for Crown Prosecutions (the Code) First issued June 2004, Part 6, <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (last visited Aug. 26, 2008). House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, appendix 3 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>93</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, appendix 3 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>94</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-06, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm 6906, 28 at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

<sup>95</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 222, Article 15(1) at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>96</sup> Joint Committee on Human Rights, *Twenty First Report, Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, 2007-08, H.L. 116/H.C. 635, ¶ 55 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/116/11605.htm#a2>.

<sup>97</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 635.

<sup>98</sup> Regulation of Investigatory Powers Act 2000, c. 23, at [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000023\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en_1) (official source).

<sup>99</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-06, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm 6906, ¶ 28 at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

<sup>100</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-06, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm 6906, ¶ 28 at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

<sup>101</sup> THE GOVERNMENT REPLY TO THE FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE SESSION 2005-06, H.C. 910, TERRORISM DETENTION POWERS, 2006-07, Cm 6906, ¶ 28 at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

<sup>102</sup> BBC News, *Anti-Terror Proposals, quoting Paul Wilkinson*, Feb. 28, 2005, at [http://news.bbc.co.uk/1/hi/uk\\_politics/4291565.stm#Jones](http://news.bbc.co.uk/1/hi/uk_politics/4291565.stm#Jones).

<sup>103</sup> 430 Parl. Deb., H.C. (6th ser.) (2005) 675.

<sup>104</sup> 430 Parl. Deb., H.C. (6th ser.) (2005) 307.

<sup>105</sup> House of Commons Library Research Paper, *The Prevention of Terrorism Bill, Bill 61 of 2004-05*, Research Paper 05/14, Feb. 2005 citing Sir Stephen Lander, *Tapping and Terror*, INDEPENDENT (London), Feb. 7, 2005.

<sup>106</sup> House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

<sup>107</sup> 8 July 2008, PARL. DEB., H.L. (5th ser.) (2008) 635 and see also Nicholas Watt, *Impractical and wrong in principle: former MI5 chief's verdict on Brown's 42-day plan: Peers round on anti-terror detention legislation: PM's former cabinet colleagues join critics*, July 9 2008 at 4, GUARDIAN (London) at <http://www.guardian.co.uk/politics/2008/jul/09/terrorism.police>.