



THE GOVERNMENT REPLY TO
THE NINETEENTH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2006-07 HL PAPER 157, HC 394

Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
September 2007**



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THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07

COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING

Pre-charge detention

- 1. We recommend that the Government makes an unequivocal public commitment to the existing international human rights law framework.**

The Government is absolutely committed to upholding the international human rights framework. It will continue to be the case that all of our anti-terrorism measures have to be set in the context of this general commitment to human rights and the protection of individual freedoms. 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.

- 2. We welcome the Government's confirmation that it has no plans to amend the Terrorism Act 2000 to include "prevention" in the statutory grounds for detention, as the Home Affairs Committee had recommended, because the Government considers that this would not be permissible under Article 5 (1) of the ECHR.**

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, legislation does not allow continued detention on this basis. Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence, or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings. We have no plans to change this.

- 3. We recommend that for all future renewals of the power of extended pre-charge detention, there be made available to Parliament in good time an independent review of the circumstances in which the power to be renewed has been used in the previous year so as to enable Parliament to make an informed decision, on the basis of independent expert advice, about whether this extraordinary power of pre-charge detention is justified.**

- 4. We recommend that, whether or not the current limit is extended, parliamentary oversight of this very significant and extraordinary power be improved by (i) the Home Secretary providing at least a month before any renewal debate a detailed annual report to Parliament on the use which has been made by the police of the power to detain without charge beyond 14 days; (ii) an independent reviewer reporting annually to Parliament at least a month before any renewal debate on the operation in practice of pre-charge detention more than 14 days, and on the necessity for the power; and (iii) an annual debate in both Houses on an affirmative resolution to renew the power. These improvements to the process of parliamentary review need not await legislation to be introduced by the Government. They could, however, be made the subject of statutory requirements in the forthcoming counter terrorism bill.**

The independent reviewer of terrorism legislation already reports annually on the operation of the Terrorism Act 2000, including on the extended period of pre-charge detention. There is already a requirement for Parliament to approve the continued extension of the pre-charge detention period from 14 to 28 days by affirmative resolution debate in both Houses. As part of the consultation on the forthcoming counter terrorism bill, we are discussing with the CPS, police, judiciary and others whether there are any changes to legislation required from lessons learned on the operation of the existing 28 day pre-charge detention limit. This will include looking to ensure that there is sufficient parliamentary oversight of the pre-charge detention period. We will consider the Committee's recommendations as part of this consultation.

5. We also recommend that an appropriate independent body undertake an in-depth scrutiny of the operation in practice by the Metropolitan Police Service of the new power of pre-charge detention beyond 14 days. The Metropolitan Police Authority, the independent statutory body charged with scrutinising the work of the Metropolitan Police Service may be well placed to do this. Although it is too late for such an independent review to inform this year's parliamentary debate on renewal of the extension to 28 days, it is highly desirable that it be available to inform the forthcoming debate in Parliament as to whether there needs to be a further extension to the 28 day limit.

The decision about whether to make an application for an extension of pre-charge detention beyond 14 days is made by the CPS. When taking that decision, they discuss the progress and expedition of the investigation and assess the necessity for the extension with the police. Crown Prosecutors make all applications to extend beyond 14 days. The decision whether or not to extend the period of detention is made by a High Court Judge. Detailed paperwork is prepared to support the application and the hearing before the High Court Judge involves him scrutinising the progress and expedition of the investigation and the further steps to be undertaken. We will consider whether there is a need for an independent body to review the operation of pre-charge detention as part of the consultation on the forthcoming counter terrorism bill.

6. We recommend that, in order to help Parliament evaluate the strength of the case for further extending pre-charge detention, the police should in future keep data in relation to this and similar questions which are central to the adequacy of the current period.

The Home Office is working with the police to review the collation and publication of statistics relating to terrorism legislation. Statistics and information available with reference to pre-charge detention will be reviewed as part of this process.

7. The case for any new legislation would convincingly have to be seen to be evidence based.

8. We are concerned by any suggestion that the extension of the period of pre-charge detention does not need to be justified by reference to clear evidence that the period which already exists has proved to be inadequate in practice. We remain of the view any extension is an interference with liberty that requires a compelling, evidence-based demonstrable case, and that the most important evidence capable of justifying such an extension would be firm statistical evidence demonstrating the number of actual cases in which the current limit had either prevented charges from being brought at all, or required the police to bring the wrong or inappropriate charges.

9. In our view, on the information currently available to us, the justification which is offered for further extending the 28 day period does not meet the strict test of necessity which must be satisfied where any new power would constitute an interference with personal liberty. A power with such a significant impact on liberty as the proposed power to detain without charge for more than 28 days should in our view be justified by clear evidence that the need for such a power already exists, not by precautionary arguments that such a need may arise at some time in the future.

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 in an area as significant as national security. As we made clear in our paper published on 25 July, entitled “Options for Pre-charge Detention in Terrorist Cases”, 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.

The principle by which the limit should be determined remains the same: the need to balance the right to individual liberty against the risk to national security – particularly against the risk that police will have to release individuals suspected of committing a terrorist offence and who might commit a terrorist offence in the future because the CPS were unable to authorise charging them within the time limit.

We are clear that it will only be necessary to extend the limit beyond 28 days in exceptional circumstances – such as where there are multiple plots, or links with multiple countries, or the investigation is highly complex. To ensure that any new limit is indeed used only in exceptional circumstances, we believe that any increase in the limit should be balanced by strengthening the judicial oversight and Parliamentary accountability.

We also believe that it is important to consult on these issues widely, and in depth, in advance of further legislation. We have identified four possible options in our paper. There may well be others and we welcome suggestions in the course of consultation.

10. We welcome any proposal to improve the current judicial safeguards, which we consider to be inadequate for reasons we explain below. We do not agree, however, that the law should authorise such judicially supervised pre-charge detention “for as long as it takes”: this risks becoming preventive detention, which, as the Government itself accepts, is not permissible under Article 5 ECHR. Nor do we agree that Parliament should leave it to the judges to decide on a case by case basis what the limit of pre-charge detention should be. In our view it is essential that there be an upper limit to the period of pre-charge detention, and that in a parliamentary democracy this limit should be clearly prescribed in a law passed by Parliament after carefully considering the evidence relied on to demonstrate the length of time which is needed.

How far the limit should be extended should be a matter for consultation and debate, but we agree that a maximum limit should be set by Parliament.

11. We recommend that the Government commission an independent comparative study of pre-charge detention periods in comparable democracies, together with an analysis of the possible reasons for any significant differences between the position in the UK and the position in such comparable countries.

International comparisons are not straightforward. Many other countries have different systems from ours and it is not always easy to take one element from those systems and compare them with what we have in the United Kingdom, as the Committee will know from its consideration of the French investigating magistrates' system. In Australia, for example, the 14 day limit can be extended by use of 'stand down time'. This is where the suspect remains in pre-charge detention but is not questioned. Where this happens, the detention does not count towards the 14 day limit so, in effect, suspects can be detained pre-charge for far longer than 14 days. However, we will take into consideration comments received on other countries' systems during the ongoing consultation process.

12. We repeat our recommendation that, in order for there to be "proper judicial scrutiny", there should be a full adversarial hearing before a judge when deciding whether further pre-charge detention is necessary, subject to the usual approach to public interest immunity at criminal trials, including when necessary the use of a special advocate procedure when determining whether a claim to public interest immunity is made out.

The hearings are already a full adversarial hearing before a High Court Judge. The CPS makes the application and the suspect has legal representation. Claims to public interest immunity do not arise as the same principles are not being considered. On occasion, at the initial applications to extend detention that are made before the 14 day period has elapsed, the judge is given sensitive information to allow him to make an informed decision. Such information is unsafe to disclose to the suspect or cannot be disclosed at this early stage of an ongoing investigation.

13. We recommend that any independent inquiry into the operation of the 28 days provision in the alleged airline bomb plot case should scrutinise carefully the basis on which the court granted warrants of further detention to the police in relation to suspects who were eventually released without charge, and in particular the three suspects who were detained for nearly the entire 28 day period before being released without charge. We also recommend that consideration be given to introducing an additional requirement that a court authorising extension of the period of detention must be satisfied that there is a sufficient basis for arresting and questioning the suspect.

We note the recommendation but consider that the acceptance of lawful and reasonable arrest is implicit by the High Court Judge granting an extension of the detention limit. It is already possible to make a judicial challenge to unlawful detention through the use of habeas corpus proceedings. We will consider the proposed additional requirement as part of the ongoing consultation process.

14. We recommend that a new facility for dealing with terrorism suspects should be established as soon as possible. Such a facility should be located in London and should strike an appropriate balance between the need for high security and the desirability of appearing accessible to the local community. It should be part of a functioning police station rather than a facility exclusively for terrorism suspects in a remote location. Accommodation and social facilities for staff must be close at hand. The new terrorism facility must be significantly larger than Paddington Green and should take account of the detailed recommendations we make in this Report about the conditions of detention and the treatment of detainees.

The MPS has embarked upon a strategy of building custody blocks for the housing and processing of prisoners arrested across London. These will be aligned with current policing boundaries and will be managed by local police resources. The units will increase the capacity to hold and process large numbers of prisoners across London who have been arrested in connection with conventional policing investigations. It is possible that facilities for handling terrorist suspects could be incorporated into the design and build of one of these facilities. Equally, opportunities to replace Paddington Green Police Station, which are currently being explored, may provide an opportunity to improve and increase the MPS's capacity to process terrorist suspects in a secure environment. The ideal solution has not yet been identified.

15. We think it undesirable in principle that suspects be transferred out of police and into prison custody during the period of pre-charge detention. We recommend that the new purpose-built facility which replaces Paddington Green should be designed so as to be suitable for pre-charge detention of suspects for up to the maximum of 28 days.

Those subject to a warrant of further detention beyond 14 days are required by Code H of the Police and Criminal Evidence Act 1984 to be transferred to a designated prison. Code H was subject to consultation before coming into force and was approved by Parliament in July 2006. We believe that transferring suspects to prison is to their benefit because it provides the detainee access to facilities beyond that available at a police station. Transfer to prison also allows for an effective use of police resources engaged in the investigation and those required to support it. Any new facility which is constructed will have to take account of the possibility of persons detained spending protracted periods in police detention.

16. We recommend that suspects should be formally notified of their right to appear physically before the judge at the hearing of applications by the police for extended detention, and required formally, in writing, to waive their right to do so if they choose to have the hearing conducted by video-link. Code H should be amended to make this explicit.

The MPS make the application for extension of pre-charge detention for the first 14 days. However, detainees are already served with a notice which sets out their rights. There is no right to a 'physical' appearance before the District Judge. The decision to undertake a hearing by way of video-link is made by the District Judge who has the right to have the detained person brought before him. Additionally, there is an option for detainees, or those acting on their behalf of them, to make representation to the District/Circuit judge for a physical appearance. If the right to 'appear' before the District Judge was requested in each case, it would significantly slow down the investigation. The use of the video is cost effective and expeditious and removes the disruption to London traffic and to the court caused by the necessary security convoys and special arrangements around court buildings.

17. Even where a suspect waives their right to appear physically before the judge, it is unacceptable to hold judicial hearings into the extension of a period of detention by video-conference from the entrance hall at Paddington Green, the same room which provides access to the staff toilets. At the very least a dedicated room, sufficiently large for the purpose, is required, if needs be in the police station proper.

The MPS notes the recommendation and accepts that the area used for the video link is not ideal. However the area is not an entrance hall as such and is the only area within the secure unit large enough for this purpose. The toilets are not used during applications and any signage on the doors is covered up in advance of their use. There is no alternative suitable accommodation within the main police station.

18. We have written to the Home Secretary to ask for the reasons for not authorising the videoing of interviews with those suspected of terrorism in Great Britain. In the absence of good reasons, we recommend that the Home Office consider the case for making an order under the Terrorism Act 2000 to require the video-recording of interviews of terrorism suspects, to supplement audio recording, and provide reasons for its decision.

We are reviewing with the police the issue of video-recording interviews with terrorism suspects and have already consulted officers at Paddington Green on this issue. Subject to the outcome of these discussions, we are minded to make an order under the Terrorism Act 2000 which would make the video recording of interviews with suspects compulsory.

19. Although we formed the view that the current system for medical assessment of detainees generally seems to work well, we think there is scope for improvement in the system of recording medical examinations of detainees at Paddington Green by FMEs. In order to ensure that there is a full record of the information required to make medical examinations an effective safeguard against ill treatment, we recommend that, in addition to Form 83, a new standardised form be used which includes:

- a full account of statements made by the detainee which are relevant to the medical examination, including the detainee's description of his or her state of health and any allegations of mistreatment
- the doctor's assessment of the extent to which any allegations of ill-treatment are supported by objective medical findings.

20. The form should be made available to the detainee and his or her lawyer, but not to the police. We also recommend that section 9 of Code H should be amended to make clear that an FME is expected to report any signs and symptoms indicative of ill-treatment to an appropriate independent authority.

21. We also urge the Medical Ethics Committee of the British Medical Association and the General Medical Council to consider whether the medical examination of terrorism suspects in detention, and the keeping of records of those examinations, should be the subject of specific guidance to practitioners, in order to achieve greater consistency of practice.

We note the recommendations but consider that the current level of record keeping is sufficient and that Code H already sets out FMEs' duties and responsibilities.

22. We recommend that both the Standard Operating Procedures and section 9 of PACE Code H (concerning the care and treatment of detained persons) be amended to ensure that the medical examination of a suspect is always carried out in conditions which guarantee confidentiality, for example by requiring that medical examinations are always conducted out of the hearing of police officers and, unless the doctor concerned requests otherwise, out of the sight of such officers.

Consultations are already confidential and held without the police being present unless the FME is concerned about their own safety.

23. We consider that female detainees should be offered the option of examination by a female doctor as a matter of routine, and we recommend that this should be done and both the Standard Operating Procedures and section 9 of PACE Code H amended to make this explicit.

The FMEs already have a system whereby female doctors can be called upon. Consultations rarely involve intimate examinations and no female Islamic or non-Islamic detainee has asked to see a female doctor in the custody suite at Paddington Green.

24. We recommend that the Home Office consider alternative options for the payment of forensic medical experts in order to demonstrate more clearly that they are independent of the police service. In our view they should be paid by the NHS.

The Home Office and the Department of Health are working in partnership with key stakeholders on the scope for the National Health Service (NHS) commissioning/ NHS-led commissioning of healthcare provision for people who come into contact with the police. The focus of this work is to help reduce deaths and adverse incidents in police custody; and to raise professional standards of physical and mental healthcare in custody through the application of the NHS Knowledge and Skills Framework to healthcare professionals working in police custody. The initial scoping work is expected to be completed by spring 2008 and consideration will then be given to method, format and implementation programme

25. We recommend that in future detailed records be kept of the number of times that the power to delay access to legal advice is used and the precise grounds on which "safety interviews" are used so as to enable independent scrutiny of the use of this power to delay access to one of the most important safeguards against ill treatment. We also recommend that efforts are always made to secure the presence of a duty solicitor from the outset of a suspect's deprivation of liberty, unless the need to interview the suspect is so urgent that one would be unable to get there in time.

The MPS notes the recommendation and will look at ways in which this information can be captured for review purposes.

26. We recommend that the Government draw the attention of relevant police officers, forensic medical experts and other staff to these Reports, and subsequent reports on the detention of terrorism suspects by parliamentary committees and other bodies, and ensure that their views are taken into account in formulating the Government's reply to all such reports.

The Government consults all relevant bodies in formulating our responses to reports such as these.

27. We recommend that consideration be given to replacing the blanket prohibition on family visits and correspondence during detention at Paddington Green with discretion to allow supervised family visits and monitored correspondence in circumstances where not to do so would be disproportionate.

There is no blanket ban and each request for visits or correspondence is considered, taking account of security and practicality given that no facilities exist to accommodate such visits. New Standard Operating Procedures at Paddington Green are being prepared and this subject is being addressed within that.

28. We recommend that the area within the cell which is obscured from view be extended so as to ensure that a detainee is not visible at all when using the toilet.

The MPS notes the recommendation, but considers that it could result in prisoners using this area to self harm either for the purpose of making allegations about their treatment, an attempt to be removed from secure facilities to hospital or suicide. The present screening meets the 'Safer Cells' project guidelines which put into place the visual monitoring of cells. This is considered to be an appropriate balance between security and a right to privacy.

29. We recommend that the conditions in which suspects are detained at Paddington Green are improved immediately, beginning with more systematic arrangements for exercise and the provision of basic facilities for leisure. Any replacement for Paddington Green must have considerably improved facilities for detaining suspects for long periods.

The MPS accept that the facilities available at Paddington Green may, in certain circumstances, be inadequate and require improvement. The current facilities do provide for an exercise regime for those detained and the MPS believes that it is currently the best that they can provide given the physical environment. Any future development will have to be designed with appropriate consideration given to the detention of persons for a longer time frame.

Intercept as evidence

30. We expect the newly announced review by Privy Counsellors to take place as expeditiously as possible and look forward to the Government announcing the proposed structure and timescale of the review at the earliest opportunity. We particularly welcome the fact that the review will be conducted on a cross-party basis. We also expect the composition of the panel of Privy Counsellors to reflect the importance of public confidence in its independence from Government. We understand that the nature of the subject matter of the review is such that it may be necessary for the Privy Counsellors to consider highly sensitive information which cannot be publicly disclosed. However, whilst recognising this reality, we recommend that the proposed review result in a published report containing the detailed reasoning of the Privy Counsellors conducting the review. In the meantime, we recommend that the Government publish its most recent report of its consideration of a "Public Interest Immunity Plus" model in order to inform public and parliamentary debate.

31. We recommend that the Government addresses in its response to us the arguments in favour of the use of intercept provided by the former Attorney General, the DPP and the Commissioner.

32. We are satisfied that the evidence of the DPP and the former Attorney General puts the matter beyond doubt: that the ability to use intercept as evidence would be of enormous benefit in bringing prosecutions against terrorists in circumstances where prosecutions cannot currently be brought, and

that the current prohibition is the single biggest obstacle to bringing more prosecutions for terrorism. We recommend that this be taken as the premise of the forthcoming review by the Privy Council. The difficult question is not whether the current ban on the evidential use of intercept should be relaxed, but how to overcome the practical obstacles to such a relaxation.

33. We recommend that the Privy Counsellors who review the use of intercept as evidence give serious consideration to whether the current public interest immunity procedure contains sufficient independent safeguards for the accused in light of the prosecution's power to decide whether material in its possession is likely to assist the case of the accused.

34. In our view it ought to be possible to devise such a practically workable mechanism to prevent defence claims for disclosure becoming unmanageable. The question is how to circumscribe the prosecution's disclosure obligation at the same time as upholding the right of the accused.

35. We recommend that any Bill providing for the use of intercept of evidence should clearly define the obligations on the prosecution to retain and disclose material on which it does not intend to rely and should restrict those obligations to material which might reasonably be considered capable of undermining the prosecution case or of assisting the accused, subject to a court ordering that disclosure of such material would be against the public interest. We also recommend that consideration be given by the Privy Council review to requiring that a disclosure judge, rather than the prosecution, decide whether the test for disclosure to the accused is met.

36. In our view, although we do not underestimate the significance of technological developments, we do not consider them to present any obstacle to devising a scheme providing for the evidential use of intercept. We do not consider it to be beyond the ability of the parliamentary draftsman to accommodate future changes in technology.

37. Although we do not think that the agreement of the telephone companies should be a pre-condition to relaxing the ban on the use of intercept as evidence, we understand why, in practical terms, their co-operation is important. We were therefore pleased to learn that the service providers do not have an objection in principle to the use of intercept as evidence provided their staff will be protected. We were reassured on this score by the DPP's complete confidence that, in the rare event that it would be necessary for any such member of staff to give evidence, they would be protected by various witness protection measures in the same way that informants receive protection when they have to give evidence. We therefore conclude that this should no longer be regarded as constituting an obstacle to relaxation of the ban on intercept.

38. We recommend that RIPA be amended to provide for judicial rather than ministerial authorisation of interceptions, or subsequent judicial authorisation in urgent cases.

The Committee has made a number of observations on the use of intercept as evidence. In particular, it welcomes the cross-party Review now underway on Privy Counsellor terms. The terms of reference for the Review were announced in Parliament by the Prime Minister on 25 July. This included the intention to produce a report that will be available to the public.

As the Committee recognises, there are sensitivities to this work. Although it not appropriate to publish the progress report on the PII Plus model for intercept evidence, this and all other relevant papers will be before the Review. Until the Review has finished its work it would be unhelpful for the Government to attempt to justify or refute the value of any particular evidential model or argument advanced in this area. In addition, it is not for us to arbitrate on the various views expressed by individuals on the subject.

Detailed comment on any other related area, including the impact intercept evidence might have, how disclosure might be managed, what protections and guidance might be available, how to factor in technological change and the question of judicial rather than executive authorisation, would be inappropriate at this stage.

Post-charge questioning and other alternatives to pre-charge detention

39. We welcome the Government’s positive response and the relative speed with which it has consulted on the introduction of this change. (postcharge questioning)

40. We welcome the Minister’s implicit acceptance that such a measure should in principle lessen the need for extending pre-charge detention.

Whilst post-charge questioning might, in some cases, help the police and CPS to strengthen their case against terrorist suspects, any introduction of post charge questioning will not remove the need for pre-charge detention because the CPS still needs to have sufficient evidence to authorise charging a suspect before the pre-charge detention period expires.

41. We recommend that post-charge questioning with adverse inferences be introduced by amending the relevant PACE Code, along with specific safeguards against its abuse, and without the restriction that questioning be confined to aspects of the offence with which the suspect has already been charged. We look forward to an opportunity to scrutinise the safeguards which the Government proposes should accompany this power in due course.

Our proposals for post-charge questioning were published in the consultation document entitled “Possible Measures for Inclusion in a Future Counter-Terrorism Bill”. We will consider the Committee’s specific recommendations on this issue as part of the ongoing consultation process.

42. Introducing the possibility of bail for the less serious terrorism offences would enable the police to continue their investigation of the person while at the same time maintaining some control over them through bail conditions. We agree that this seems in principle a very sensible proposal and we recommend that the Government give it serious consideration.

We are considering this recommendation as part of the ongoing consultation process.

43. We recommend that the Home Office make a formal assessment of the feasibility of GPS tagging for terrorism suspects and provide us with the results of its assessment.

We are considering this recommendation as part of the ongoing consultation process.

44. We remain of the view that the use of the threshold test should lessen the need for a further extension of the period of pre-charge detention. In our view, however, more information is required about the operation of the threshold test in practice. We recommend that an appropriate body, such as the CPS Inspectorate, conduct a review and report on the operation of the threshold test in terrorism cases.

We agree that the use of threshold test does lessen the need for further detention. The Code for Crown Prosecutors sets out the key tests to be applied in each case and those tests, the evidential sufficiency test and the public interest test, apply as much to terrorism cases as any other. The threshold test appeared for the first time in the 5th (and current) edition of the Code in November 2004 to support the CPS charging initiative.

The CPS makes charging decisions in accordance with the full Code test other than when the threshold test applies. The threshold test requires Crown Prosecutors to decide whether there is at least reasonable suspicion that the suspect has committed an offence and if there is, whether it is in the public interest to charge the suspect. It is applied in those cases in which it would not be appropriate to release the suspect on bail after charge as the suspect presents a threat to individuals or the public and although the evidence to apply the full Code test is not yet available there is a reasonable expectation that it will become available.

The CPS applies the Director of Public Prosecution's Guidance on charging in terrorism cases in the same way as it does to all other offences. The threshold test is used in terrorist cases as, due to public safety issues, terrorist arrests are often made at an early stage in the investigation when examination of evidence obtained by the investigation is at an early stage and further evidence is continuing to emerge. In such cases, charging is already overseen and authorised by the two most senior lawyers in the CPS Counter Terrorism Division. The Director of Public Prosecutions is briefed in the most serious cases and always in cases that go beyond the 14 days detention.

Special advocates

45. We were concerned to find that the Special Advocates from whom we heard had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent. Indeed, we found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving special advocates, as currently conducted, fail to afford a "substantial measure of procedural justice".

The domestic special advocate regime has been considered by the UK's courts and, to date, found to provide a substantial measure of procedural justice. For example, in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324 (March 2004), the Court of Appeal concluded (in the context of an appeal to SIAC against certification under Part 4 of the Anti-terrorism, Crime and Security Act 2001 and the Secretary of State's decision to make a deportation order) that 'While the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process.' A similar conclusion was reached by the Court of Appeal in *MT (Algeria) & Ors v Secretary of State for the Home Department* [2007] EWCA Civ 808 (July 2007): 'A number of points of principle were taken to the effect that

SIAC had made inappropriate use of closed material. We have concluded that none of those points of principle is sound...'

As far as the control order context is concerned, in August 2006, the Court of Appeal ruled that control order review proceedings were compatible with Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR). As the JCHR itself acknowledges in its second report on renewal of the Prevention of Terrorism Act 2005 (March 2007), 'the Court of Appeal in MB has upheld the compatibility of the control order regime with the right to a fair hearing in Article 6(1) ECHR and has considered and dismissed many of the due process concerns raised in our first renewal report [on the 2005 Act]'. We await judgment from the House of Lords on control order issues, including the compatibility of control order proceedings with Article 6.

The approach taken by domestic courts is consistent with the European Court of Human Rights' express recognition (see *Chahal v UK* (1997) 23 EHRR 413, *Tinnelly & McDuff v UK* (1998) 27 EHRR 249 and *Al Nashif v Bulgaria* (2003) 36 EHRR 37) that the use of confidential material by the courts is acceptable where there are adequate safeguards (including judicial scrutiny of the procedure adopted and special advocates).

The Government's position remains as outlined in the House of Lords hearing and as the Minister for Security, Counter Terrorism and Police, Tony McNulty, explained to the JCHR in his evidence session on 18 April 2007. The Government believes that the special advocate procedure accords individuals a substantial measure of procedural justice whilst also accommodating security concerns. Lord Carlile, the independent reviewer of terrorism legislation, found that 'the provisions maintain a reasonable balance between fair proceedings and the reality of life-threatening risk to the public and to law enforcement agencies.'

46. Our consideration of the way in which the Special Advocates system operates in practice has confirmed our concerns about the difficulty a controlled person may have contesting the allegations made against him. In the absence of any requirement to provide the individual with even the gist of the case against him in the closed material, he is at the enormous disadvantage of not knowing what is alleged against him and therefore not only unable to provide explanations himself in the open hearing, but unable to provide any explanations to the Special Advocate whose task it is to represent his interests in the closed proceedings. We recommend that there be a clear statutory obligation on the Secretary of State always to provide a statement of the gist of the closed material. We also recommend that consideration be given urgently to allowing the court or Commission to carry out a balancing between the interests of justice and the risk to the public interest when deciding whether closed material should be disclosed.

SIAC and control order proceedings are civil procedures with civil procedure rules. Evidence which would not otherwise be admissible in criminal proceedings is admissible in SIAC and control order proceedings.

It is a reality of both SIAC and control order proceedings that disclosure of material that tends to establish that an individual has engaged in terrorism-related activity and poses a risk to the public may also be contrary to the public interest. Under the relevant legislation and procedural rules, material that it would be contrary to the public interest to disclose must be withheld from the individual concerned – if necessary, including even a summary of the withheld material.

However, the starting point is that the individual concerned is given as much material as possible, subject only to legitimate public interest concerns. Moreover, it is for SIAC or the High Court to determine whether material should be withheld from the individual in the public interest – not the Secretary of State. If SIAC or the High Court concludes that material should be withheld, it must consider whether a summary – or gist – of that material should be provided to the individual. However, where SIAC or the High Court concludes that it would be contrary to the public interest to disclose even a summary of that material, the individual does not receive a summary. In taking those decisions SIAC or the High Court has all relevant material before it, and if the matter is disputed by the special advocate, the question is determined following an oral hearing. If SIAC or the High Court concludes that material or a summary of material should be disclosed to the individual, it is open to the Secretary of State not to disclose that material or summary. However, in those circumstances, SIAC or the High Court can direct that the Secretary of State can no longer rely upon that material or that which is required to be summarised in the proceedings, or that any matter to which the material or summary was relevant should no longer be considered by SIAC / the High Court.

All the material that the Government relies upon in its case is before SIAC or the High Court. The Government takes its disclosure obligations for exculpatory material seriously. In addition, the Government always strives to ensure that information is not designated as “closed” if it is already available in the public domain. Special advocates have access to the complete case against the individual, including the material not disclosed to the individual. Part of the function of special advocates is to ensure that the closed material is subject to independent scrutiny and adversarial challenge – including making submissions (in closed session) on whether or not the closed material should in fact be disclosed to the individual. Special advocates can and have successfully argued that closed material should be disclosed in this way.

The Government cannot and does not accept the argument that the individual’s right to disclosure must trump the right of the community to be protected against acts of terrorism. The implication of such an argument would be that, in circumstances where SIAC or the High Court had decided that in the public interest no information could be disclosed to the individual, the Secretary of State would not be able to take preventative measures to protect the public from a risk of terrorism, even if she were fully satisfied that the individual was reasonably suspected of involvement in terrorism-related activity and that those measures were necessary to protect the public.

The difficult balance in such circumstances between the rights of individuals and the duty of the state to protect the public against the risk of terrorism has been struck by Parliament – in the legislation governing SIAC and control order proceedings. The rules governing SIAC and control order proceedings are designed to ensure the public interest is properly safeguarded, including by seeking to prevent the accidental disclosure of sensitive intelligence information. This is particularly important in the field of national security. In this context, introducing either a requirement always to provide a summary or to undertake a balancing test would not be appropriate.

The Government maintains its view that the current rules are appropriate, and provide individuals concerned with a substantial measure of procedural justice. As the Government argued in the House of Lords, caselaw in both the European Court of Human Rights and in the UK courts (see references above) supports the position

that closed material can be relied on, including to the extent that provision of a summary of the material is not necessary to meet Article 6 requirements. In the control order case of *AF*, where no summary of the closed material was provided, the High Court nonetheless concluded ‘there is nothing in *Chahal* to suggest that there is a point at which the suggested special advocate procedure for legitimately withheld material becomes unfair. There is no clear basis for a holding of incompatibility... I do not regard the process as one in which AF has been without a substantial and sufficient measure of procedural protection.’ AF’s control order is one of those under consideration as part of the House of Lords hearing.

47. In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person. We were impressed by the preparedness of the Special Advocates to take responsibility for using their professional judgment to decide what they could or could not safely ask the controlled person after seeing the closed material. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.

A special advocate may take instructions from the individual before he has seen the closed material.

The special advocate may receive written instructions from the individual after he has seen the closed material. A special advocate can also communicate with the individual after he has seen the material, provided it is with the permission of SIAC or the High Court. As outlined in the Government’s formal response to the Constitutional Affairs Select Committee report into the operation of SIAC and the use of special advocates, in a number of cases the special advocate has obtained permission to communicate legal points and factual matters that have emerged from cross-examination in a closed hearing but can be disclosed without damaging national security.

Nick Blake QC, one of the special advocates who gave evidence to the JCHR, acknowledged that changing the rules to allow communication after service of the closed material would put ‘enormous responsibilities’ on special advocates not to disclose classified information inadvertently, and that a ‘difficult problem’ would be ‘how far you could engage in a conversation which directs someone’s mind to a topic or an area without crossing the line that would give something away which might endanger the public interest or public security. That is a very difficult judgement for a Special Advocate to be called upon to be made...’

The Government maintains its view that the ban on communication after service of the closed material (without prior permission being granted by SIAC or the High Court) is an appropriate safeguard to ensure that sensitive sources are protected and the security of the UK is not compromised. The risk of accidental disclosure is not one that needs to be taken in order to achieve procedural fairness.

48. We recommend raising the standard of proof required in SIAC proceedings in light of the fundamental fairness concerns highlighted by the special advocates.

As above, SIAC and control order proceedings are civil proceedings so it is not appropriate to compare them with criminal proceedings. Neither involves a specific criminal charge against the individual concerned; rather, in each set of proceedings there is an assessment of risk and of the need for measures to counter that risk; that assessment may be based in part on past conduct. The measures imposed are preventive rather than penal in nature, in that the measures imposed are aimed at protecting the public from future harm, and not at punishing the individual for past actions. This has been recognised by the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 (October 2001), in which the Lords ruled that consideration of an appeal against a deportation order made on the ground that deportation would be conducive to the public good in the interests of national security does not involve testing facts to a particular standard of proof:

‘The question of whether the risk to national security is sufficient to justify the appellant’s deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.’

Similarly, as the Court of Appeal acknowledged in the control order case of MB, the determination whether there are reasonable grounds for suspicion that a person has been engaged in terrorism-related activity also involves considering a “matrix” of alleged facts which may be established to different standards, an exercise which ‘differs from that of deciding whether a fact has been established according to a specified standard of proof.’

The Government’s view remains that current tests in both SIAC and control order proceedings are appropriate. In *A & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123 (August 2004), the Court of Appeal acknowledged ‘a requirement of proof will frustrate the policy and objects of the Anti-terrorism, Crime and Security Act 2001.’ Such considerations apply to control order and SIAC proceedings.

49. The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them. In our view, the seriousness of the consequences of control order proceedings is such that the individuals concerned are entitled to a fair hearing according to objective and well established standards of due process. We regard the recommendations we have made above as the bare minimum that is required in order for the Special Advocate system to command the public confidence that is required.

As outlined above, the Government believes that the existing special advocate procedure provides individuals with a substantial measure of procedural justice, and that the recommendations of the Committee are not required to achieve this – indeed, that the recommendations of the Committee, if implemented, could potentially be

damaging to the public interest, including to the extent of endangering the lives of members of the public.

50. In the then Home Secretary's statement to the House of Commons on 24 May 2007 he indicated that if the Government does not succeed in persuading the House of Lords to overturn the lower courts' interpretation of the requirements of the right to liberty in Article 5 ECHR, the Government will consider other options, including derogation. He also referred to "the fact that the threat to the life and liberties of the people of this country is higher than ever before, and is at the level of a national emergency."

51. It has been the Government's consistent position since introducing the Bill which became the Prevention of Terrorism Act 2005, establishing the control order regime, that the UK does not face a "public emergency threatening the life of the nation" within the meaning of Article 15 ECHR and that the UK Government is therefore not entitled to derogate from the right to liberty in Article 5 ECHR. This was the premise of the Prevention of Terrorism Act 2005, which contains what is essentially an enabling power allowing the Government to derogate swiftly if conditions change in future. At no time during the two annual renewals of the control orders regime, in March 2006 and March 2007, did the Government suggest that the level of the threat had changed so that the UK now faced a public emergency threatening the life of the nation.

52. We therefore wrote on 25 May 2007 to the then Home Secretary asking whether it is now the Government's position that the threat from terrorism is such that there is a public emergency threatening the life of the nation; if so, what precisely has changed since the Government renewed the control order regime in March of this year; and on what material the Government relies to demonstrate that the level of the threat has changed.

To date we have received no response.

On 3 August 2007, the current Home Secretary sent a reply to the Committee's letter to the previous Home Secretary.

The Government derogated from Article 5 ECHR for the purpose of the detention powers under the Anti-Terrorism Crime and Security Act 2001. At that time, we judged it to be the case both that the UK faced a public emergency threatening the life of the nation – an assessment which was subsequently upheld by the House of Lords – and that it was necessary to derogate from Article 5 in order to address the risk posed by foreign nationals in the UK who could not be deported to their country of origin.

Contrary to the Committee's understanding, the Government's position on whether or not we face a public emergency has never changed in the intervening period. Our decision not to derogate from Article 5 for the purposes of control orders does not reflect an assessment that we no longer face a public emergency threatening the life of the nation. Indeed, it is clear that the threat from international terrorism to the UK has increased since 2001.



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