



THE GOVERNMENT REPLY TO THE  
TWENTY-FOURTH REPORT FROM THE  
JOINT COMMITTEE ON HUMAN RIGHTS  
SESSION 2005-06 HL PAPER 240, HC 1576

# **Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention**

**Presented to Parliament by the Secretary of State  
for the Home Department  
by Command of Her Majesty  
September 2006**

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# **THE GOVERNMENT REPLY TO THE TWENTY-FOURTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2005-06**

## **Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention**

### **The importance of prevention**

**1. We welcome the renewed emphasis on prevention in counter-terrorism policy as a mark of a more mature appreciation that human rights law not only imposes constraints on what States can do but also imposes onerous positive obligations on States to take effective steps to protect the lives and physical integrity of everyone within their jurisdiction against the threat of terrorist attack. This emphasis on the importance of the State's positive obligations has been a recurring theme in the Reports of both this Committee and its predecessor concerning counter-terrorism. We reiterate our frequently expressed view that human rights law itself requires the State to take such measures as can be shown to be necessary to provide adequate and effective protection against a real risk of terrorist attack. Appropriate preventive measures, in other words, are positively required by human rights law.**

**2. At the same time in this context we believe it is essential to avoid any counter productivity which, instead of enhancing protection, may well undermine it. Justice must be seen to be done.**

**3. We accept, however, that the gravity of the potential harm is such that any counter terrorism strategy must have prevention at its heart. Indeed, in our view, counter terrorism measures must be tested by the extent to which they can be demonstrated to enhance our ability to identify, apprehend and prosecute individuals planning terrorist attacks whilst remaining within the legal framework provided by our human rights obligations.**

We welcome the emphasis placed by the Committee on the Government's responsibility to prevent terrorist attacks. It must always be a higher priority to stop terrorist activity from taking place than dealing with its consequences. The legislative framework and operational procedures we have put in place to identify, apprehend and prosecute individuals who plan or encourage terrorist attacks, the measures we have taken to prevent radicalisation, and the preventative powers we have in control orders are designed to prevent terrorist activity from taking place. The gravity of the threat from terrorism means that specific powers are necessary. We work closely with the police and the security services to ensure that any new powers are effective and proportionate. Safeguards are in place to ensure that the human rights of individuals are protected by any new measures and the independent reviewer of terrorism legislation provides continuous scrutiny.

### **A duty to prosecute terrorist suspects?**

**4. As we interpret the Article 2 case law, States are now under a duty to prosecute those whom it suspects of being involved in terrorist activity in order to prevent future loss of life in future attacks. In our view, this emerging duty in international human rights law makes it all the more important that the Government now urgently addresses the obstacles impairing the effective prosecution of terrorism offences with a view to resorting more frequently to the criminal law in the effort to counter terrorism.**

We have legislated to ensure that the security services and police have the necessary powers at their disposal. For example, the new offences of encouragement of terrorism and preparation of terrorist acts contained in the Terrorism Act 2006 provide new tools to aid prosecution of terrorists. In addition, expert prosecutors within the Crown Prosecution Service (CPS) work closely with the police and security services to ensure an effective charging strategy. The ordinary criminal law is always used in assessing the evidence in terrorist case, and the most appropriate offences are selected from across ordinary criminal offences and terrorist offences.

Where it is not possible to prosecute, a range of other essential measures are in place to address the continuing threat posed by individuals suspected of terrorist related activity. These include control orders, which place obligations on individuals to address the specific threat that they pose to public safety and security. The system contains robust safeguards and is subject to reporting requirements and judicial oversight.

### **The rights of suspects prosecuted for terrorism offences**

**5. As with the case law concerning the right to judicial review of detention under Article 5, it is clear from the case law on Article 6 that ultimately the requirement of adversarial proceedings and equality of arms must be complied with. Anything less does not amount to effective “judicial” control by a “court”.**

We take seriously the need to protect, in particular, the Article 5 and Article 6 rights of those suspects prosecuted for terrorism offences.

### **Balancing liberty and security?**

**6. We reiterate the importance of not seeing liberty and security as being in an inverse relationship with each other. Less liberty does not necessarily mean more security, nor vice versa. The “balance” metaphor does not seem apt for this reason. We agree with the view expressed by the European Commission for Democracy through Law (the Venice Commission), that “State security and fundamental rights are not competitive values; they are each other’s precondition.”**

We recognise that security and liberty are related in a more complex way than a simple inverse relationship. However, the European Convention on Human Rights (ECHR) is framed in such a way as to make the ‘balancing’ analogy valid and the proportionality of any new counter-terrorism measures is a crucial consideration.

### **Using closed evidence and special advocates in criminal trials**

**7. We agree with the view of the special advocates who wrote to the *Times* that to introduce the system of special advocates into the criminal trial would be incompatible with many of the most basic principles of a fair trial. We made essentially the same point in our earlier report in which we said that it would in our view be incompatible with the requirements of Article 5(4) ECHR and Article 6 if special advocates were to be used in control order proceedings involving deprivation of liberty.**

We do not agree that it would be incompatible with the requirements of Article 5(4) and Article 6 ECHR if special advocates were to be used in control order proceedings involving deprivation of liberty.

As the Court of Appeal in the case of *MB* stated, “both Strasbourg and domestic authorities have accepted that there are circumstances where the use of closed material is permissible” and that “in appropriate cases, the European Court of Human Rights is prepared to accept that the use of a special advocate to deal with

closed material is not incompatible with the requirements of Articles 5(4), 6 and 13”.

In the case of *MB*, the Court of Appeal went on to conclude that closed material was permissible in reviews of non-derogating control orders and that the provisions in the Prevention of Terrorism Act 2005 allowing for the use of a special advocate constituted appropriate safeguards. This conclusion was based on the fact that the obligations were imposed on preventative grounds, and that as the risk of terrorism may justify measures interfering with Convention rights, Article 6 cannot automatically require disclosure of the evidence of the grounds of suspicion. These same factors arise in the case of derogating control orders.

Furthermore, the use of closed evidence and special advocates in cases involving deprivations of liberty has been validated by the Court of Appeal in 2002. The Court of Appeal upheld the procedures before the Special Immigration Appeals Commission pursuant to Part 4 of the Anti-Terrorism, Crime and Security Act 2001, under which persons certified as suspected international terrorists were detained in custody pending deportation. In *MB*, Sullivan J at first instance accepted that no relevant distinction could be drawn between proceedings for the imposition of control orders and detention under the 2001 Act. Neither proceeding involved a specific criminal “charge”: rather, there is an assessment of risk and the need for measures to counter that risk. Both measures were also preventative rather than penal in nature. Again, it is our view that the same reasoning applies to derogating control orders.

We do not accept that there is no role for special advocates in certain aspects of a criminal trial. For example, special advocates are currently used in Public Interest Immunity applications as the Committee highlights later in its Report.

#### **“Investigative hearings” and “disclosure judges” in Canada**

**8. We therefore found that neither investigative hearings nor disclosure judges operate in practice so as to permit the use of intelligence-derived material in a criminal trial without the defendant having the opportunity to contest it.**

#### **Investigating magistrates in England and Wales?**

**9. After careful examination of real intelligence relating to terrorist cases, the Government had concluded that it would not be possible to withhold such material from the defendant or the public in such a way that it might influence the outcome of the trial without infringing the defendant’s human rights. We agree.**

The Government review was limited to the possible use of judges in a pre-trial sift procedure. The review concluded that there was no obvious benefit in creating such a procedure for terrorist cases and we note the Committee’s conclusions on this issue.

**10. We are firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements. Nor do we think that there is anything in the investigative approach which might be borrowed or grafted on to our more adversarial, common law tradition.**

We note the Committee’s conclusions that the investigating magistrates model should not be imported wholesale. We are currently looking at how the investigating magistrates model works and whether there are any lessons to be learnt from it for our own system of dealing with terrorist suspects. We will report back to Parliament on the outcome of this work in due course.

## Developing the role of the CPS

**11. We welcome the recent developments in the CPS's role whereby the CPS takes a more proactive role in relation to investigation of offences. While the CPS is clearly not a judicial body, and can therefore never be the equivalent of investigating judges, it does have a constitutional status which is independent of the Government, and also has a legal professional expertise on which to draw when advising the police about the conduct of investigations. We regard the growing role of the CPS in relation to the investigation of terrorist offences as going some way towards securing some of the advantages which are claimed for the system of investigating magistrates. We recommend that the CPS's growing specialisation in terrorist cases be supported and strengthened.**

We welcome the Committee's recommendation and will consider ways in which this might be taken forward. During the recent operation regarding an alleged plot to cause explosions on transatlantic aeroplanes, prosecutors have been based in the police station advising as the investigation developed. The 14 and 21 day warrant applications were made by a crown prosecutor and were all granted. Two further such applications have been made in another case; these were also successful. The Counter Terrorism Division within the CPS is recruiting a deputy Head of Division, and the staffing of the Division is being increased from this month both in terms of prosecutors and caseworkers.

## Specialisation, centralisation and co-ordination

**12. If protection of the public through criminal prosecution is genuinely to be the first objective of counter-terrorism policy, then turning information into evidence should be uppermost in the minds of all those involved in acquiring intelligence at the earliest possible stage in that process. Intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court. Investigations generally should be structured so as to maximise the prospects of information obtained being capable of being used as evidence in a criminal trial.**

**13. In our view, public confidence in the adequacy of inter-agency arrangements for the sharing of intelligence would be greatly increased if such protocols not only existed in the UK but were also publicly available and subject to independent scrutiny.**

The Committee recognises that intelligence is not the same as evidence. In many circumstances, intelligence simply cannot be turned into evidence of the rightly high standard required to adduce in court. Intelligence is inevitably fragmentary rather than giving a complete picture; it often is inferential rather than explicit and consists of hearsay rather than first person admissions of guilt. We accept, however, that turning information into evidence should be a key part of any investigation. Intelligence and law enforcement agencies have well established and effective arrangements for sharing counter-terrorism information and both are alive to the opportunities that intelligence provides to gather evidence. The intelligence agencies, police and CPS work closely together with the joint aim of securing successful prosecutions. As such, the development of evidence from intelligence is fundamental and consideration is always given to whether intelligence can be turned into admissible evidence for use in prosecutions. Whilst the criminal investigation is led and directed by the police, significant input is sought from both the CPS and the Security Service to ensure that the strongest possible prosecution is brought.

The first priority in relation to terrorism must be the safety of the public. Sometimes intelligence can lead to the disruption of terrorist attacks before serious offences have been committed. In such cases, there is not always an established investigation and the urgency of the situation may mean that action needs to be taken before a structured investigation can be set up.

### Offence of “association of wrongdoers”

**14. We are concerned by the Home Affairs Committee’s finding that the power of pre-charge detention in Terrorism Act cases is used mainly for the purposes of prevention and disruption rather than for the purposes of investigation. We are also concerned by the Home Affairs Committee’s suggestion that preventive detention be specifically included in the statutory grounds for detention. The reason for our concerns is that preventive detention is not permissible under Article 5(1) ECHR and such an amendment to the Act therefore could not be made without derogation from that Article. We do not consider such a derogation to be necessary. In any event, now that the wider offence of acts preparatory to terrorism is available, the police should only use the power of extended pre-charge detention for the purpose for which it was sought, namely to investigate the possible commission of offences with a view to criminal prosecution.**

The characterisation of arrest and detention of terrorist suspects being carried out solely as a “preventative” measure is misleading. 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 in the first instance, the 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, where the nature of suspicion against a person has necessitated an arrest at a point at which such evidence was not available to the authorities.

We have no plans to amend the Terrorism Act 2000 to include ‘prevention’ in the statutory grounds for detention. As noted by the Committee, we consider that this would not be permissible under Article 5(1) of the ECHR. A range of new offences was introduced by the Terrorism Act 2006, which included acts preparatory to terrorism. This has already provided more options for police and CPS in deciding on a charging strategy as recent events have demonstrated.

### Relaxing the ban on admissibility of intercept

**15. In our view, the ban on the use of intercept evidence in court should now be removed, and attention should be turned urgently to ways of relaxing the ban. This is a matter to which we may well return in a future report.**

### Public interest immunity and national security confidentiality claims

**16. In our view, the application of the ordinary law of public interest immunity, together with the appropriate use of special advocates, as envisaged by the European Court of Human Rights and the House of Lords, should be sufficient to meet the legitimate concerns of the security and intelligence services about disclosure of material damaging to the public interest, at the same time as safeguarding the right to a fair trial.**

There is ongoing work to re-examine the case for, and the likely benefits of, using intercept as evidence to secure more convictions, primarily against organised criminals and terrorists, particularly those liable to removal from the United Kingdom.

The debate on intercept as evidence is not new. It has been considered on a number of occasions over the last decade. A comprehensive review of intercept as evidence was conducted in 2003/4 following a request from the Prime Minister in 2003. Following the review’s completion in 2004, we concluded that was not the right time to change the law and that the impact of new technology needed to be properly considered and factored into the decision making process.

There is a clear commitment to this work but also recognition of the need to protect our intercept capability. We are committed to find, if possible, a legal model that would provide the necessary safeguards to allow intercept to be used as evidence. In addition to the work on examining magistrates, we are looking at a PII (Public Interest Immunity) plus model. This work is due to report to Ministers in due course.

### **More judicial control over procedure in terrorism cases**

**17. We believe that there is scope for more proactive case management of terrorism trials, without judges becoming either investigators or prosecutors, and we urge the relevant judicial authorities to encourage such an approach.**

The judicial approach to proactive case-management should be supported. The judicial authorities are taking steps to manage terrorism cases as expeditiously and effectively as possible. For example, the President of the Queen's Bench Division, in January 2006, issued a protocol for the management of terrorism cases. This requires:

- All terrorism cases to be managed in a list, with a case progression officer in charge of all cases on the list;
- A CPS representative to notify Westminster Magistrates' Court immediately after a person has been charged in a terrorism case;
- The prosecution to serve a case summary and provisional timetable to the defence three days prior to the preliminary hearing;
- The defence to serve observations on the timetable and an indication of the general nature of the defence to the prosecution one day prior to the preliminary hearing;
- The judge at the preliminary hearing to give directions setting the provisional timetable; and
- Compulsory mandatory hearings in terrorist cases.

### **Incentives to give evidence**

**18. We recommend that the Government should urgently consider ways of enhancing incentives to give evidence and the safeguards which must accompany such incentives.**

Part 2, Chapter 2, of the Serious Organised Crime and Police Act 2005 places the common law practice of 'Queen's Evidence' on a statutory footing in England, Wales and Northern Ireland for certain specified organised crime and terrorist investigations. It clarifies and strengthens the common law provisions that provided for immunity and sentence reductions for defendants who co-operate in the investigation and prosecution of their criminal colleagues.

### **Conclusion on overcoming obstacles to prosecution**

**19. We have sought to canvass in this Report a number of different ways in which to overcome what are currently perceived to be obstacles to prosecuting for terrorist offences. In our view, a combination of the measures canvassed above should help to overcome many of the main obstacles to prosecuting for terrorist offences, without sacrificing the essence of the important due process guarantees which make up the fundamental rights of access to a court to challenge the legality of detention and to a fair trial, which are as fundamental to the common law as they are in the scheme of the European Convention on Human Rights.**

## The “Threshold Test” in England and Wales

**20. We welcome the flexibility introduced by the Threshold Test in the Code for Crown Prosecutors. In our view it introduces a threshold for charging which is higher than the threshold for an arrest, in the crucial sense that it must be based on evidence which will be admissible at trial and not merely intelligence information, but lower than the demanding standard of a realistic prospect of conviction, which we accept may be more difficult to reach in terrorism cases. In our view the Threshold Test is a sensible practical response to the dilemma facing the law enforcement agencies in relation to pre-trial detention.**

**21. In our view, however, lowering the charging threshold, which is essentially what the Threshold Test does, must reduce the force of the case for extending the period of pre-charge detention further beyond the current limit of 28 days.**

The Threshold Test could apply in some terrorism cases. However, it is not a solution to cases where the nature of evidence and the possible charges are unclear; it requires more certainty than that and cannot operate simply on the ‘reasonable suspicion’ element of the test. Therefore, although it may be a useful tool in appropriate cases, it will not apply in all cases. As such, it is not a relevant factor in considering the appropriate time limit for pre-charge detention.

### Active judicial oversight of the timetable in terrorism cases

**22. We regard the combination of the Threshold Test and active judicial management of the post-charge timetable to be far preferable to lengthy pre-charge detention. In particular it has the virtue of enabling prosecutions to be brought, thereby pursuing the objective of protection and prevention at the same time as giving the defendant the full benefit of the ordinary procedures which govern criminal prosecutions. In our view, if the actual process in terrorism cases is properly understood, further extensions in the maximum period of pre-charge detention should not be necessary.**

We agree that cases should be handled as expeditiously as possible, so that charges may be brought as quickly as possible. However, given the very complex nature of some investigations, the police and CPS may on occasion need to use more of the time available to them in order to bring appropriate charges. The 28 day period of pre-charge detention has only been in place since the end of July and we will be monitoring its use closely. It has been used successfully in the recent investigation into an alleged plot to blow up aircraft.

### Post-charge interviews

**23. We therefore recommend that the Home Office amend PACE Code of Practice C so as to permit post-charge questioning and the drawing of adverse inferences from a refusal to answer questions at such an interview. We would expect an opportunity to scrutinise the adequacy of the safeguards proposed. We consider that this measure on its own will go some way towards reducing the need for a further extension of the period of pre-charge detention.**

The Home Secretary announced a review of the criminal justice system on 20 July. This includes a review of the Police and Criminal Evidence legislation (PACE). We intend to publish a public consultation document this autumn on taking forward the review of PACE. This will include a range of proposals on modernising police powers, including proposals on amending PACE to provide for questioning after charge where considered necessary.

### Adequacy of judicial controls

**24. We agree with the Home Affairs Committee's concern about the adequacy of current judicial oversight of pre-charge detention. However, we do not agree that the enhanced judicial oversight which is envisaged should be carried out on the basis of an investigative approach. Such an approach, in our view, takes away the very essence of the detained person's right of access to a court to challenge the legality of his detention, by withholding from him the information on the basis of which he is being held. The Home Affairs Committee Report does not address the question of judges having access to sensitive material not disclosed to the detainee. Article 5 ECHR guarantees the right of access to a court to challenge the legality of detention. In our view, the Home Affairs Committee's proposed system of judicial control does not provide this. We remain of the view expressed in our previous report, that Article 5 requires there to be judicial control in the full sense of an adversarial hearing.**

We are aware that a number of suggestions have been made concerning the role of the judiciary in issuing extension of detention warrants. At present, this process is thorough and detailed and both the investigating team and the detainee's legal representative are able to make representations to the judicial authority about any application for an extension of detention. We will consider carefully the proposals of Lord Carlile and others concerning further judicial oversight.

We agree that the role of the judiciary in agreeing extension of detention is an important one. The legislation concerning judicial oversight of extension of detention is applied strictly by the courts and applications are heavily scrutinised. It is in the interest of the investigation that the judicial authority has access to as much information as possible to enable him to make a decision on applications for extension of detention. Given the extremely sensitive nature of some cases, it is essential that some hearings for extended detention may be held *ex parte* to ensure that as much information as possible can be presented to the judicial authority.

### Holding charges

**25. We agree that the use of holding charges should not be regarded as an acceptable alternative to extended pre-charge detention, for the reasons given by the DPP.**

We agree that it would not be appropriate to bring lesser charges to enable suspects to be held while more serious charges were investigated.

### Compensation and support

**26. We make two further recommendations concerning pre-charge detention. First, that there ought to be an enforceable right to compensation for those held in pre-charge detention but not charged, as there is in France.**

Compensation for wrongful conviction is available under section 133 of the Criminal Justice Act 1988. The possibility of pre-charge detention and then release without charge is one of the incidents of the investigation of criminal offences. If a person wishes to seek redress, it is possible through the civil courts. The Committee will appreciate that the arrangements for the detention of terrorist suspects in France are substantially different from those in operation in the UK.

**Second, that the Code of Practice should make provision for counselling support for those who are detained beyond 14 days, in view of the severe effect on the mental health of those who were detained in Belmarsh and subjected to control orders.**

There are extensive provisions in the Code of Practice relating to the care and treatment of detained persons, including provision for clinical treatment and attention. The Code of Practice also permits transfer of those detained beyond 14 days to a prison, where the facilities are more appropriate for extended periods of detention. The Code of Practice requires the investigating team and custody officer to provide as much information as possible to the prison authorities, so that they may provide appropriate facilities. This should include medical and risk assessments. Once in prison, extensive support is available under Prison Rules.

### **Conclusion on alternatives to lengthy pre-charge detention**

**27. In our view, a combination of the flexibility introduced by the threshold test developed by the CPS, active judicial oversight of the application of the post-charge timetable, and the possibility of drawing adverse inferences from a refusal to answer questions at a post-charge interview should make it unnecessary to contemplate any further extensions to the maximum period of pre-charge detention of 28 days.**

We agree that cases should be managed proactively to ensure that the appropriate charges are brought as early as possible. The maximum period of 28 days has only been in place since the end of July and we will wish to see how this is working in practice. However, we will be keeping the situation under review.

### **Parliamentary accountability**

**28. While we welcome the Director General's willingness to provide information to parliamentary committees about the nature and level of the threat from terrorism, we regret that we did not have the opportunity to ask her a number of important questions of concern to us in connection with this inquiry. We have no desire to obtain access to State secrets, but we do consider it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights.**

As the correspondence, reproduced at Appendix 7 of the report, makes clear, the Committee asked the Director General to give evidence on issues which were matters of government policy rather than specifically relevant to the functions of the Security Service. These issues had been the subject of Ministerial statements to the House. It would therefore have been inappropriate for her to offer comment. As the Committee is aware the Director General has, with the agreement of the Home Secretary, briefed other Parliamentary Committees on threats to UK national security.

**29. In our view, there is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government's claims based on intelligence information. In addition to more direct parliamentary accountability, we consider that in principle the idea of an "arms length" monitoring body charged with oversight of the security and intelligence agencies, independent of the Government and those agencies, and reporting to Parliament, merits consideration in this country.**

The Home Secretary is accountable for the Security Service and the Foreign Secretary is accountable for the Secret Intelligence Service and the Government Communications Headquarters. In addition to Ministerial oversight – carried out directly through personal action including consideration of warrant applications and indirectly through Home and Foreign Office officials – the intelligence and security Agencies are subject to independent oversight by the parliamentarians of the Intelligence and Security Committee (ISC), by the Intelligence Services Commissioner, by the Interception of Communications Commissioner and by the

National Audit Office. The ISC's reports and those of the Commissioners are laid before Parliament. The terms of reference of the ISC are effectively the same as for a departmental select committee. While the ISC operates within a "ring of secrecy", its powers exceed in some respects those of select committees given its statutory right of access to information from the Heads of Agencies and ability to investigate. Anyone aggrieved by conduct they believe has been undertaken by the Agencies in relation to themselves or their property can complain to the independent Investigatory Powers Tribunal which has full powers to investigate and order such remedial actions as it sees fit.

We consider that the arrangements described above represent a rigorous, robust and independent oversight regime which provides effective safeguards and accountability for the Agencies' activities while at the same time enabling them to operate in secret and thereby maintain effectiveness.

### **Sunset clauses, reporting requirements and annual review**

**30. We recommend that in future all terrorism legislation should have a life limited to five years maximum, and require renewal by primary legislation not ministerial order.**

**31. We recommend that, in addition to review by the Government-appointed independent reviewer, in future terrorism legislation provision also be made for parliamentary review of the operation of that legislation.**

We welcome any suggestions relating to existing or future terrorism legislation. These proposals will be considered as part of the current review of terrorism legislation.



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