OPTIONS FOR PRE-CHARGE DETENTION IN TERRORIST CASES

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PRE-CHARGE DETENTION IN COMPLEX TERRORIST CASES

The threat

- The threat from international terrorism is real and severe and shows no sign of diminishing. In fact, the reverse.

- The police and Security Service are currently working to contend with around 30 known plots, over 200 groupings or networks, totalling around 2,000 individuals. This figure is the highest it has been. It is not a spike, but a new and sustained level of activity.

- In this year alone, so far a total of 30 individuals have been convicted of terrorist offences in 9 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.

- Since the late 1990s it has been clear that this new terrorist threat is not just quantitatively different but qualitatively different from previous threats. It is aimed at causing mass casualties with no warning, and with no limits on method – including the use of suicide attacks, and a clear intent (if not necessarily capability) to use chemical and biological attacks.

- So as well as monitoring a wide range of threats, the Police and Security Services have a duty to intervene early, to protect the public, at a point when much work remains to be done to put together a case for suspects to be charged. In the 2004 Barot case, for example, Deputy Assistant Commissioner Peter Clarke, the National Co-ordinator of Terrorist Investigations said that, “there was not one shred of admissible evidence” at the point of arrest. Barot subsequently pleaded guilty and was sentenced to 40 years.

The complexity of cases

Experience of recent terrorist cases shows that they can be very complex – indeed, their complexity is increasing, in terms of material seized, use of false identities and international links.

Material seized: the amount of evidence that needs to be sifted during terrorist investigations has been growing. There is a greater use of encrypted computers and multiple mobile phones – in part as terrorists deliberately seek to use multiple media to cover their tracks. Where there is suspicion of Chemical, Biological, Radiological or Nuclear (CBRN) material in a site which needs investigating, this can introduce further delay.

It has been suggested that this first factor can be solved by the application of additional resources. But investigation is inherently a sequential process. Greater resources can be deployed in the initial stages of a large enquiry, for example, the gathering of data from computers. But the material and statements recovered have to be sifted, assessed and then synthesised into relevant and applicable evidence. This is extremely time consuming and can only be done by methodical police work. We must accept that as the material becomes more complex and the number of sites for investigation more numerous, that will add to the length of time before charges can be brought.

Use of false identities: establishing the identity of suspects takes time given the frequent use of false identities. One of the 21/7 suspects only actually gave his real identity at the trial. In other cases suspects have had as many as 10 identities.

International links: these are common in recent terrorist cases and not always immediately obvious. The Ricin plot involved 26 countries. In relation to the 2004 fertiliser plot, Peter Clarke commented that: “At the time, it was the largest counter-terrorism operation ever seen in the United Kingdom. The success was achieved through close cooperation and sharing of intelligence between the United Kingdom, the USA, Canada and Pakistan.” Since then we have seen even more complex cases. The most recent operation in Glasgow and London involved a mix of nationalities and an arrest in Australia. The pace of the investigation can therefore sometimes be dictated by the pace of response from other countries, coupled with difficulties

experienced in reconciling different legal or evidential practices and procedures in foreign countries.

Case studies illustrating the complexity of cases

The Dhiren Barot case (August 2004)
274 computers seized / examined
591 floppy discs seized / examined
920 CDs / DVDs / mini discs seized / examined
274 zip discs seized / examined
397 videos seized / examined
2,894 statements taken
8,224 exhibits
5,800 documents
59 premises searched and officers carried out enquiries in the USA, Pakistan, Malaysia, Philippines, Indonesia, France, Spain and Sweden

The attempted bombings on 21/7 (July 2005)
10,490 actions
405 interview tapes, 303 hours of interviews
10,711 statements
16,319 telephone records created
28,000 CCTV tapes seized
7,500 tapes viewed (18,000 hours of viewing)
25,000 forensic exhibits seized
34 premises searched
12 other searches (eg bins, scenes of crime)
49 computers, laptops or hard drives seized and interrogated
2,500 items submitted for forensic analysis
103 mobile phones and 126 sim cards seized and interrogated
48 phone numbers attributed and used in the trial
3,500 individual calls analysed
5,193 phone and internet enquiries

The alleged airline plot (August 2006)
200 mobile phones, 400 computers and a total of 8,000 CDs, DVDs and computer disks, containing 6,000 gigabytes of data, were seized.
Nearly 70 homes, businesses and open spaces were searched.

How the law has changed

The Terrorism Act 2006 amended Schedule 8 of the Terrorism Act 2000 to increase the maximum period of detention without charge of terrorist suspects from 14 days to 28 days, with the following safeguards:

- Those arrested can be detained for 48 hours, after which the police or Crown Prosecution Service may apply to a judicial authority for an extension of detention warrant.
- Applications to extend the detention period may be made for 7 days at a time up to a maximum of 28 days.
- Up to 14 days the application is to a designated magistrate; between 14 and 28 days it is to a High Court judge.
- Between 14 and 28 days, all applications to extend are considered and made by the CPS.

How it has worked in practice

The 28 day limit has been in operation since 25 July 2006.

It has enabled suspects to be charged who may otherwise have had to be released. In the alleged airline plot, for example, 9 people were detained for between 14 and 28 days. 3 were released without charge at the end of that period and 6 were charged, 2 on the 27th day. In an operation led by Greater Manchester police in September 2006, an individual was charged on the 28th day of his detention. Most recently, in relation to Glasgow, where 3 have been charged and 3 released, one of those charged was charged on the 19th day of detention.

The safeguards have been rigorously applied:

- A CPS lawyer makes the application for extension and the Senior Investigating Officer is present. In advance of each application, defence solicitors are provided with a written document setting out the grounds for the application.
- The applications are usually strenuously contested and consideration can last many hours. The officer may be questioned by the defence solicitor about all aspects of the case.

- The judiciary examine every application very carefully and not all have been granted for the length of time requested. In the alleged airline plot, for example, one application was granted for less than the time requested.

Ways of reducing the pressure on investigation teams

A number of measures have been either enacted or proposed, which can reduce the pressure on investigation teams. They are listed below. The Government accepts that they either have improved, or may improve, our ability to deal with terrorism cases through the ordinary criminal process, including by introducing more flexibility in charging, and therefore reduce the risk that investigation teams will come up against the limit of pre-charge detention. But they cannot do more than reduce that risk – they cannot eliminate it entirely. They therefore do not remove the need for a debate on whether the limit on pre-charge detention needs to be reviewed.

The existence of a new offence since 2005 of acts preparatory to terrorism

The Terrorism Act 2006 created a new offence of Acts Preparatory to Terrorism. This is where a person commits an offence if he or she prepares to commit an act of terrorism, or assist another to commit such acts. This new offence broadens the charges available to the CPS and has proved effective in a number of cases. But it will not be applicable in all cases; where it is applicable, it will not always reduce the length of time required.

Post charge questioning

This is a proposal currently under consideration as part of the consultation on the forthcoming counter-terrorism legislation. It would help the team to continue to build the case against the accused after he or she had been charged, whether or not bail had been granted, and would allow adverse inferences to be drawn in the case of refusal to answer questions. However, we agree with the Home Affairs Select Committee that while this will reduce the pressure on investigation teams, it will not eliminate it: the time limit would still be a serious factor in complex cases.

Intercept as Evidence

Intercept is a highly effective intelligence gathering tool that has proved vital in preventing terrorist attacks. Because of the serious nature of the threat, it may be necessary to act on intelligence rather than waiting for further information, admissible as evidence, to be gathered. Many commentators have raised the question of whether, if intercept could be used as evidence, this would reduce the pressure on investigation teams to gather further information. There are substantial difficulties in using intercept as evidence. The Government has announced a review of this issue on privy councillor terms, to assess the difficulties and whether they can be mitigated, and whether the potential benefits of using intercept as evidence outweigh the costs. But even if we do reach a stage when intercept can be used as evidence, while this may reduce the pressures on investigation teams, again it will not eliminate it: the time limit would still be a serious factor in complex cases.

Use of supergrasses

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. It clarifies and strengthens the common law provisions that provided for immunity from prosecution, undertakings on the use of evidence and sentence reductions for defendants who co-operate in the investigation and prosecution of other offenders. This option can now be used in terrorist cases, but there is no evidence to date that it will result in a substantial increase in prosecutions in these difficult cases.

Making full use of the threshold test

The threshold test is designed for use in cases where, at the very early stages of an investigation, there is a reasonable suspicion that the persons in custody have committed a crime and there is reasonable expectation that the evidence needed for prosecution will become available, for example from abroad. Where these conditions are satisfied and the individuals detained present a threat either to other individuals or to the public if released pending the outcome of the investigation, the CPS may bring charges against him/her. The test is available now in terrorism cases as for other crimes. But the conditions will not always be satisfied in all

terrorist cases. The police will rarely have the necessary certainty that sufficient evidence will come to light to sustain particular charges. So while the threshold test is useful in some cases, again it is not the whole answer to this question.

The case for going further

The scale and nature of the current terrorist threat, the increasing complexity of cases, and the fact that other measures, while they may help reduce the pressure on investigation teams, cannot eliminate it, 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. In particular, against the risk that police will have to release individuals suspected of committing a terrorist offence, who might then be free to commit a terrorist offence in the future, because the police were unable to charge them within the time limit.

In the year since the 2006 legislation came into effect, there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge.

At the same time, there has been further, clear evidence that the threat is increasing, and that cases are becoming more complex in the ways described above – thereby increasing the pressure on investigation teams to put together charges within a given time limit. The Government believes that there will be cases in the future, possibly quite soon, in which more than 28 days will be needed for charges to be brought.

This view is supported by senior figures in the Police – including the Commissioner of the Metropolitan Police, Sir Ian Blair, and Chief Constable Ken Jones, President of the Association of Chief Police Officers as well as by Lord Carlile, the independent reviewer of the Government's terrorism legislation.

In a speech last year, Sir Ian Blair said: "The risk of what these people are planning is so horrific that the police have to move in early, with the result that arrests provide huge amounts of information but not necessarily immediately available evidence". In

relation to how that might impact on the period of detention beyond 28 days, Sir Ian said: “In the recent alleged airline plot, we needed all the 28 days in respect of some of the 24 suspects: if there had been more people, we would probably have run out of time. I believe that an extension to the 28 days time for detention will have to be examined again in the near future”.

On 15 July 2007, Chief Constable Ken Jones said that “investigators are facing an unprecedented international dimension in terrorism cases and the necessary enquiries to ensure public safety have a time dimension to them that is not catered for within the existing timescales”.

In June 2007, Lord Carlile, in his report on the operation in 2006 of the Terrorism Act 2000, said that “I expect in the course of time to see cases in which the maximum of 28 days will be proved inadequate”.

On the basis of discussions with these and other senior practitioners, and on the basis of the evidence of the level of the threat and the increasing complexity of cases, the Government believes that it would be prudent and right to prepare for that now, by revising the limit on pre-charge detention.

The Government is clear that it will only be necessary to go beyond 28 days in exceptional circumstances – where there are multiple plots, or links with multiple countries, or exceptional levels of complexity. 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 accompanying judicial oversight and Parliamentary accountability.

The options

The Government also believes that it is important to consult on these issues widely, and in depth, in advance of further legislation.

We have identified four possible options. There may well be others and we welcome suggestions in the course of consultation.

Option (i)

This is the Government's preferred option: to legislate to extend the current limit on pre-charge detention, while at the same time introducing additional safeguards for any period of pre-charge detention over 28 days, including:

- Any application for each period of 7 days beyond 28 days to be approved by the Director of Public Prosecutions before being decided by a High Court Judge.
- The Home Secretary to notify Parliament of any extension beyond 28 days as soon as practicable after the extension has been granted, with a requirement to provide a further statement to Parliament on the individual case, and an option for the House to scrutinise and debate this.
- The Independent Reviewer of Terrorism Legislation to report on the operation of the pre-charge detention powers in any case going beyond 28 days as an individual case, in addition to his general annual review – to inform the Parliamentary debate.
- An annual Parliamentary debate, with the powers being subject to annual renewal, as now.

How far the limit should be extended should be a matter for consultation and debate, but the Government takes the view that a maximum limit would have to be set down by Parliament.

Option (ii)

Take a power now, similar to Option (i), with similar safeguards, but which would be triggered later, subject to an affirmative resolution in Parliament (i.e. a vote in both houses).

The Government believes this is significantly less practical than Option (i), because it would require a debate in Parliament in the middle of what might be a national emergency in the wake of major foiled or actual attacks. The uncertainty could also cause operational difficulties for the police.

Option (iii)

It has been suggested by the organisation Liberty that the Civil Contingencies Act might provide an alternative to extending pre-charge detention beyond the current limit of 28 days.

The Civil Contingencies Act 2004 allows the Government to take emergency powers with immediate effect if a series of criteria are satisfied. These cover where an emergency, including a terrorist attack has occurred, is occurring or is about to occur. Where the conditions are satisfied, the government can make regulations that could cover extended detention pre-charge. The powers would have to be approved by Parliament within 7 days. They could last for up to 30 days – although they could be renewed at any time.

Under this proposal, pre-charge detention could last for 28 days plus 30 days, but it would require the declaration of a state of emergency.

Also, this would again effectively require a debate in Parliament in the middle of what might be a national emergency in the wake of major foiled or actual attacks. Moreover, it is not obvious that all terrorist cases where the police might want to hold one or more individuals for more than 28 days would meet the relevant criteria.

Option (iv)

The fourth option is to introduce judge-managed investigations. This might involve specialist circuit judges assigned to cases after 48 hours detention. They would oversee the investigation to its conclusion and would reflect the rights of the suspect as well as the needs of the investigation. This would be similar to the examining magistrates' model in some other countries, such as France and Spain. This would require a major shift in the way in which cases are investigated and in the adversarial system of prosecution used in this country. But given the scale of the challenge we face, we believe it is right to consider this option alongside the others.

A preliminary assessment of the options

The Government believes that Option (i) is the most practicable and proportionate to the threat and the challenges we face, while

maintaining the balance between individual liberty and national security.

In particular, we believe it is right and prudent to legislate now to create a regime that would be effective for the full range of terrorist cases, without the need for a Parliamentary debate in the middle of what could be a major operational emergency – but while carefully ensuring full Parliamentary oversight at a later stage.

Nevertheless, we believe all four are serious options that should be considered and we welcome all those who have engaged with us so constructively thus far.

We therefore invite comment, debate and discussion throughout society, with a view to building a consensus among all our citizens, communities and political parties, on the right measures to protect the public.

Comments on this paper may be emailed to:

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