



House of Lords
House of Commons
Joint Committee on
Human Rights

Prevention of Terrorism Bill: Preliminary Report

Ninth Report of Session 2004–05

Report and formal minutes

*Ordered by The House of Lords to be printed 23 February 2005
Ordered by The House of Commons to be printed 23 February
2005*

**HL Paper 61
HC 389**

Published on 25 February 2005 by authority of the House of Lords and
the House of Commons London: The Stationery Office Limited
£0.00

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current Membership

HOUSE OF LORDS

Lord Bowness
Lord Campbell of Alloway
Baroness Falkner of Margravine
Lord Judd
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

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Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

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1 Prevention of Terrorism Bill: Preliminary Report

Background

1. This is a Government Bill, introduced in the House of Commons on 22 February 2005.¹ The Secretary of State for the Home Department, the Rt Hon Charles Clarke MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes which accompany the Bill deal with its human rights implications at paras 103–107.² The Bill received its Second Reading on 23 February 2005 and will complete its passage through the Commons on 28 February.

2. This Report aims to identify the main human rights issues which are raised by the Home Secretary's Statement to the House on 22 February 2005 and the Prevention of Terrorism Bill published on the same day. The Report is based on a preliminary consideration of both the Statement and the Bill. Its purpose is to provide a first indication for Members of human rights issues arising at the earliest opportunity in light of the very limited time available for parliamentary scrutiny of the Bill. It therefore focuses at this stage on broad points of principle. More detailed scrutiny of the Bill's provisions will follow in a further report, to be published in time to inform debate before the Bill has completed its passage through Parliament.

Aspects to be welcomed from a human rights perspective

3. The following points should be positively welcomed from a human rights perspective (albeit subject to the important qualifications set out below)—

(1) The Home Secretary's acceptance of the House of Lords judgment, his acceptance of the need to meet the concerns of the Law Lords by repealing Part 4 ATCSA 2001 and devising a new regime, and his stated desire to do so compatibly with human rights including by avoiding the need to derogate from the European Convention on Human Rights (ECHR) if possible.

(2) The decision that, although the scale of the threat is such as to amount to a public emergency threatening the life of the nation, at its current level deprivation of liberty cannot be said to be strictly required, and there is therefore no need to derogate from Article 5 ECHR (right to liberty and security) at present.

(3) The decision to replace an inflexible system of detention without trial of non-nationals suspected of being international terrorists with measures which are both generally applicable to both nationals and non-nationals and capable of being individually tailored according to the level of threat posed by the particular individual. In principle such an approach is more likely to be capable of being operated in a proportionate and non-discriminatory way.

1 HC Bill 61

2 HC Bill 61–EN

(4) The degree of judicial involvement provided for in the Bill in relation to derogating control orders (i.e. those which would breach Article 5 but for the derogation) goes *some* (but not all) of the way to meeting the important concern about the lack of judicial involvement in the making of control orders.

Human rights compatibility concerns

4. The following are the main human rights issues to which the Bill, on a very preliminary consideration, gives rise.

The necessity for “derogating control orders”

5. The Bill gives the Secretary of State power to place an individual under house arrest or place such other restrictions on their movements as amount to a deprivation of their liberty.³ These are what the Bill refers to as “derogating control orders”.

6. In light of the Home Secretary’s welcome announcement that there is currently no need to derogate from Article 5, because there are no individuals in respect of whom deprivation of liberty could be said to be strictly required, there would seem to be no need for the Government to take in this legislation the power to make derogating control orders depriving individuals of their liberty by, for example, placing them under house arrest.

7. Since it is now the Government’s position that the intelligence relating to the current detainees cannot justify the deprivation of their liberty, all the Government needs to do, in order to meet the concerns expressed by the Law Lords, is provide itself with the legal basis on which to deal with the current detainees in a way which is proportionate and non-discriminatory. If this can be done, as the Government now says, by measures short of deprivation of liberty, there is no need, in order to deal with the current threat to the nation, to take much wider powers which by the Government’s own admission are not at present strictly required.

8. At the very least, there can be no justification for including such wide and unprecedented powers of executive detention in legislation which is being rushed through Parliament at a speed which prevents proper scrutiny, in order to be on the statute book in time to deal with those detained under provisions which are shortly to expire. Legislation passed at such speed should be confined to that which is essential to deal with the problem about to arise. The problem for the Government is what to do with the current detainees if the law under which they are currently detained lapses. The current Bill should be confined to that, which means that all of the provisions concerning derogating control orders should be taken out of the Bill, if necessary to be returned to when there is more opportunity for careful parliamentary scrutiny.

9. In any event it also appears questionable as a matter of Convention law whether creating a domestic legal framework which provides in advance for “derogating control orders” can itself be done without derogating from the Convention at the time of creating the

3 Clauses 1(3)(g), 1(4) and 2(1)

framework itself, which would require the Government to demonstrate the necessity for having such a framework at the level of threat which currently exists.

The lack of prior judicial involvement in orders depriving of liberty

10. The Bill provides for control orders to be made by the Secretary of State which have the effect of depriving individuals of their liberty, without any prior judicial involvement, and without any intention of bringing them before a court on a criminal charge. The Bill does provide for automatic consideration of such derogating control orders by the High Court within seven days, and requires the Court to quash the order if not satisfied that the matters relied on by the Secretary of State were capable of constituting reasonable grounds for him to make a control order against that person, or for imposing an obligation amounting to a deprivation of liberty.⁴ It also provides, in all other cases, for there to be a hearing by the court where it must conduct its own hearing and make its own determination of each of the matters determined by the Secretary of State.⁵ But all this is *ex post*, not *prior*, judicial involvement in the decision to deprive of liberty.

11. The degree of judicial involvement provided for in the Bill in relation to derogating control orders is unlikely in our view to be compatible with the Convention requirement that deprivations of liberty must be “in accordance with a procedure prescribed by law” in Article 5 of the Convention. Other than in the exceptional circumstances enumerated in Article 5(1)(a)–(f), deprivations of an individual’s liberty require *prior* judicial authorisation if they are to be in accordance with a procedure prescribed by law. Such prior judicial authorisation is regarded by the Court of Human Rights as an inherent feature of the rule of law, which requires safeguards against arbitrary detention.

12. The Home Secretary’s reason for refusing to countenance prior judicial authorisation of deprivation of liberty is that this would be to abdicate to the judiciary the executive’s responsibility for national security, for which it is rightly accountable to Parliament. With respect to the Home Secretary, this is an eccentric interpretation of the constitutional doctrine of the separation of powers. It is a long established principle of the British constitution that, outside of the field of immigration, the executive has no power to detain individuals without prior judicial authorisation or in circumstances where it is intended to bring the individual before a court as soon as possible for further detention to be authorised. Both Parliament and the Executive have long accepted and respected the judiciary’s responsibility for the liberty of the individual. To invoke national security to deny that role is to subvert our traditional constitutional division of powers. The Home Secretary’s argument would apply equally to criminal justice: the Home Secretary is undoubtedly responsible to the public for protecting them against crime, but nobody would suggest that it is an abdication of that role for the executive to accept that courts are the appropriate constitutional branch to decide whether particular individuals should be deprived of their liberty.

4 Clause 2(4)

5 Clause 2(5)

13. Even if there were room for argument about the proper separation of powers in the British constitution, it is unlikely that the European Court of Human Rights would regard the exclusion of prior judicial involvement in deprivations of liberty to be Convention compatible.

The use of a special advocate procedure in deprivation of liberty cases

14. The Bill envisages the devising (in rules of court) of a SIAC-type special advocate procedure to be used in control order proceedings, including proceedings in which a challenge is made to an order which has the effect of depriving of liberty. In light of the seriousness of the consequences for the individual who is made the subject of such an order, the decision is likely to be treated as the determination of a criminal charge, so that the individual concerned is entitled to a fair trial under Article 6(1). It seems to us to be unlikely that the use of a special advocate procedure, in which the individual does not get to see the material on the basis of which the order against him is made, would be compatible with the right to a fair trial in Article 6(1) ECHR.

The limited judicial control of non-derogating control orders

15. Control orders which impose obligations falling short of deprivation of liberty⁶ will not engage Article 5 ECHR but are likely to interfere with a number of other Convention rights, including the right to respect for private and family life under Article 8, freedom of expression under Article 10 and freedom of association under Article 11. Interferences with such rights are capable of justification. One of the factors relevant to an assessment of the proportionality of interferences with such rights is the degree of procedural protection provided in the legislative scheme against unjustified interference.

16. The Bill provides for a right of “appeal” against such non-derogating control orders.⁷ It provides that the court’s function on such appeals is to determine whether the Secretary of State’s decision was “flawed”, but the Bill expressly provides that in determining such matters the court “must apply the principles applicable on an application for judicial review”.⁸ A supervisory jurisdiction over a decision based on “reasonable grounds for suspicion”⁹ is not a very strong measure of judicial control, and this is likely to affect the assessment of the proportionality of the interference with Convention rights, particularly where the obligation imposed by the Home Secretary has a severe impact on the right in question.

17. Some obligations imposed by the Home Secretary may also amount to the determination of a civil right within the meaning of Article 6(1) ECHR, for example a restriction in respect of his work or other occupation or in respect of his business,¹⁰ and in such cases the limited degree of judicial control available may not be sufficient to satisfy the Convention requirement that there be a right of access to a court with full jurisdiction.

6 Clause 1

7 Clause 7

8 Clause 7(7)

9 Clause 1(1)(a)

10 Clause 1(3)(c)

Miscellaneous

18. The Bill contains a number of other provisions which raise more detailed Convention compatibility questions. For example, the open-ended nature of the discretion to impose obligations (the Bill authorises the Home Secretary to impose *any* obligation on an individual, and contains an “illustrative list” of the sorts of obligations which can be imposed)¹¹ raises an issue as to whether this provision satisfies the requirement that interferences with Convention rights be “prescribed by law.” The provision giving only the Secretary of State a right of appeal against a decision of a court on an automatic reference of a derogating control order raises an issue as to whether the Convention requirement of “equality of arms” is respected. These and other more detailed compatibility concerns will be dealt with in a further report.

11 Clause 1(2) and (3)

Formal minutes

Wednesday 23 February 2005

Members present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Baroness Falkner of Margravine	
Lord Judd	
Lord Plant of Highfield	
Baroness Stern	

The Committee deliberated.

* * * * *

Draft Report [Prevention of Terrorism Bill: Preliminary Report], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 18 read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee to each House.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Stern do make the Report to the House of Lords.

[Adjourned till Wednesday 2 March at Four o'clock.]

Public Bills Reported on by the Committee (Session 2004–05)

* indicates a Government Bill

Bills which engage human rights and on which the Committee has commented substantively are in bold

<i>BILL TITLE</i>	<i>REPORT NO</i>
Charities [<i>Lords</i>]*	6 th
Child Benefit*	8 th
Clean Neighbourhoods and Environment Bill *	7 th
Commissioners for Revenue and Customs*	6 th
Constitutional Reform [<i>Lords</i>]* ¹	7 th
Criminal Defence Service*	6 th
Disability Discrimination [<i>Lords</i>]*	6 th
Drugs *	7 th
Electoral Registration (Northern Ireland) [<i>Lords</i>]*	8 th
Gambling ^{*2}	7 th
Identity Cards*	5 th & 8 th
Inquiries [<i>Lords</i>] *	4 th & 8 th
International Organisations [<i>Lords</i>] *	4 th & 7 th
Mental Capacity ^{*3}	4 th
Prevention of Terrorism*	9 th
Railways	8 th
Road Safety*	8 th
School Transport ^{*4}	4 th
Serious Organised Crime and Police *	4 th & 8 th

1 Bill carried over from previous Session. Previously reported in 23rd Report of 2003–04.

2 Bill carried over from previous Session.

3 Bill carried over from previous Session. Previously reported in 15th Report of Session 2002–03 (on the draft bill) and 23rd Report of Session 2003–04

4 Bill carried over from previous Session. Previously reported in 17th and 20th Reports of Session 2003–04 on the draft Bill