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Compatibility of Clauses 55 and 56 of the Terrorism Bill with the ECHR

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1. I am asked to advise Liberty as to the compatibility of Clauses 55 and 56 of the Terrorism Bill (the Bill) with the presumption of innocence contained in Article 6(2) of the European Convention on Human Rights (the Convention).
2. This advice is being provided at very short notice, due to the imminent discussion of the relevant clauses in Committee. Accordingly, whilst this advice will of course cover all the essential points, I trust I will be forgiven if it is not as full as it could be.
3. This advice is divided into a number of sections. First, the relevant provisions themselves will be analysed and their effect considered. Second, the decision of the House of Lords in *R v Director of Public Prosecutions ex parte Kebilene* will be discussed. Third, it will be necessary to look at the presumption of innocence and the caselaw relating to it. Finally, the compatibility of the provisions with the presumption of innocence will be examined.

The Provisions

4. The relevant parts of Clause 55 are in the following terms:
 - (1) *A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.*
 - (2) *It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.*
 - (3) *In proceedings for an offence under this section, if it is proved that an article (a) was on any premises at the same time as the accused, or (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.*
5. It can accordingly be seen that the provision works in a number of stages. First, the person must have an article in his or her possession. Such possession may be inferred in the circumstances set out in subsection (3). Second, the person must have the article in his or her possession in circumstances which give rise to a reasonable suspicion that s/he has it for a terrorist purpose. Once these ingredients are established, the burden is then on the defendant to show that possession was for an innocent purpose.
6. Clause 56 reads as follows:
 - (1) *A person commits an offence if-*
 - (a) *he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or*
 - (b) *he possesses a document or record containing information of that kind.*
 - (2) *In this section "record" includes a photographic or electronic record.*
 - (3) *It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.*
7. The operation of this clause is straightforward. It is an offence to collect or make a record of information likely to be useful to a person committing or preparing an act of

terrorism or possess a document containing such information unless the defendant can establish reasonable excuse for the allegedly criminal action or possession.

The Decision in *Kebilene*

8. The decision of the House of Lords in *Kebilene* is being dealt with under a separate heading since I understand it has been the subject of some discussion during the course of the Bill with various interpretations being put on it. It is accordingly important to understand precisely what the case did decide and what it did not decide. I will also have cause to return to it later in this advice when discussing reverse burden provisions in general.
9. In *Kebilene* the House of Lords was asked to rule upon the legality of the decision of the Director of Public Prosecutions to authorise prosecutions under the Prevention of Terrorism (Temporary Provisions) Act 1989. The applicants argued that the relevant provision, which is almost identical to Clause 55 of the Bill, reversed the burden of proof and therefore violated their rights under Article 6(2) of the Convention.
10. Lord Steyn identified five issues as arising on the appeal as follows:
 - a) Parliamentary sovereignty;
 - b) Legitimate expectation;
 - c) Whether judicial review could be granted in respect of a decision of the DPP to consent to prosecutions;
 - d) Whether the relevant criminal provisions reversed the legal burden of proof; and
 - e) If there was a reverse legal burden, whether this is incompatible with Article 6(2) of the European Convention.
11. Lord Steyn reached the following conclusions:
 - a) The judgment of the Divisional Court was not in conflict with the principle of parliamentary sovereignty;
 - b) The Applicants had no legitimate expectation that the DPP would not give his consent to the prosecution pending the coming into force of the Human Rights Act 1998;
 - c) The decision of the DPP to prosecute was not subject to judicial review in the absence of dishonesty, bad faith or an exceptional circumstance, none of which existed on the facts; and
 - d) It was unnecessary to express concluded views as to whether the relevant provisions reversed the burden of proof and were contrary to Article 6(2), thereby leaving the issues undecided and "entirely open at all levels in the criminal proceedings."
12. Lord Slynn, Lord Cooke and Lord Hope agreed with Lord Steyn on the question of the justiciability of the DPP's decision to prosecute. It can accordingly be seen that the majority of their House of Lords allowed the appeal on a relatively narrow basis. The logic underlying this reasoning was that it is undesirable to allow trials on indictment to be delayed by collateral challenges when the trial and appeal process are capable of giving sufficient protection.

13. Therefore, although views were expressed by some of the Law Lords as to the compatibility issue, it was expressly recognised that these were not and indeed could not be final views. It follows that the case did not decide that reverse burden provisions do not violate the presumption of innocence.

The European Convention and the Presumption of Innocence

14. Article 6(2) of the Convention provides that:
"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
15. This provision will of course become part of our domestic law with effect from 2nd October 2000. From that date domestic courts will be required, by virtue of section 3(1) of the Human Rights Act 1998, to construe all domestic legislation in accordance with the Convention. As is apparent from the Government's White Paper and various comments by the Lord Chancellor during the passage of the Act through Parliament, this will require the courts to search for any possible meaning which would be compatible with the Convention rather than simply examine whether the natural language of the legislation can be read consistently with the Convention. Such an approach has now been given judicial approval at the highest level.
16. In *Kebilene* itself Lord Cooke, Lord Hope and Lord Hobhouse examined, to varying degrees, the compatibility of the Convention with the domestic provisions under which the applicants had been charged.
17. Lord Cooke considered it unlikely that the domestic provisions were compatible with the presumption of innocence contained in Article 6(2). He did, however, accept that the jurisprudence of the European Court of Human Rights was such that there was the possibility of a different view taking precedence in due course. Lord Hobhouse thought that the point was "arguable."
18. Lord Hope carried out a detailed analysis of the issue and concluded that there is no absolute prohibition on reverse burden clauses. In his view, the question was whether the presumption was kept within reasonable limits. He went on to suggest that the courts should adopt a threefold test in determining whether a particular provision strikes a fair balance between the demands of the community and the fundamental rights of a defendant:
 - a) What the prosecution has to prove in order to transfer the onus onto the defence;
 - b) The nature of the burden on the accused; and
 - c) The nature of the threat faced by society which the provision is designed to combat.
19. In *AG of Hong Kong v Lee Kwong-kut* the Privy Council considered the question of reverse burden provisions within the context of the Hong Kong Bill of Rights. Lord Woolf pointed out that there ought to be some flexibility in considering such provisions and that there will be cases where it is "*clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt.*"
20. However, he went on to point out that the question of whether or not exceptions from the general principle were justified would primarily depend upon whom the primary responsibility of establishing guilt lay and whether the exception was reasonably imposed. In considering these issues, the substance and reality of the language creating the offence would be examined, rather than its form.

21. The actual result in *Lee Kwong-kut* is of significance. The provisions in that case placed a legal burden on the defendants to disprove, respectively, possession of stolen or unlawfully obtained cash and knowledge of drug trafficking. The Privy Council held that whilst it was legitimate to require a defendant to show a defence in relation to drug trafficking, given the importance of the war against drugs, the imposition of a legal burden in relation to possession of stolen cash was not justified. The main reason for this conclusion in respect of the stolen cash was that the explanation as to how the defendant came to be in possession of the money was the most significant element of the offence. Placing such a burden on the defendant meant that the reliance on presumptions of fact went outside that which would be considered reasonable in all the circumstances.
22. In *Salabiaku v France* the European Court of Human Rights was asked to rule on the presumption of criminal liability which was laid down by the French Customs Code in respect of the offence of smuggling prohibited goods. The applicant complained that the provision violated the presumption of innocence since it automatically assumed guilt once possession was established.
23. The European Court pointed out that it did not consider provisions in abstraction and found against the applicant. It held that the domestic court had not resorted automatically to the presumption of guilty and had in fact applied the relevant provision in a manner consistent with the presumption of innocence. Indeed, it appears that the domestic court construed the language of the relevant provision in such a way as to find an element of intent.
24. A similar issue arose in *Hoang v France*. The applicant again complained of a violation of Article 6(2) following a prosecution under the Customs Code. The Court held that it was important to confine presumptions of fact or law within reasonable limits in order to ensure that the rights of defence were maintained. However, since the applicant had had the opportunity to raise a defence and the domestic court had refrained from an automatic reliance on the presumption in the relevant provision, there was no breach of the Convention.
25. These European cases are of importance, particularly since they were relied upon by some members of the House of Lords in *Kebilene* to justify their conclusion that a presumption of guilt does not necessarily contravene Article 6(2). It is, however, important to remember that in both these cases the European Court was at pains to point out that the domestic courts had thoroughly weighed the evidence and given the defendants a real chance to put their case before the court. No concluded views were expressed by the European Court as to the circumstances in which presumptions of fact or law will violate Article 6(2).

The Applicability of the case law on the relevant clauses

26. As the above cases show, the question must always be whether or not the provision in question offends against the presumption of innocence when all the circumstances are considered. As the domestic and European jurisprudence currently stands, there is no question of every reverse burden provision being declared unlawful. Rather, the issue is one of fact and degree and must be assessed by reference to the particular statutory and social context in which the offence arises.
27. This does lead to some difficulties in deciding exactly what result will obtain in any particular case since ordinary principles of legal interpretation will not be determinative of the result. Indeed, evidence as to how the provisions under consideration have worked in practice, the extent to which they have been used and the effect they have had on reducing crime may become significant in assisting in determining where the appropriate balance should be struck. I understand that there

is some evidence to suggest that provisions comparable to those being considered in this advice have not been of particular benefit, although this is not a matter which can fully be discussed at this stage..

28. Although it is accordingly necessarily to leave this issue to one side for the moment, an attempt to analyse Clause 55 in terms of Lord Hope's threefold test can nevertheless be made. First, insofar as the burden on the prosecution is concerned, this is relatively light, particularly bearing in mind the heavy penalties for the offence. A presumption can be used to establish possession and then it is only necessary to establish that the circumstances of possession were such as to give rise to a reasonable suspicion that possession was for terrorist purposes.
29. Dealing next with the nature of the burden on the defendant, the usual justification for placing such a burden is that the relevant matter which constitutes the defence is likely to be exclusively within the knowledge of the defendant. However, given that the prosecution have to establish circumstances giving rise to reasonable suspicion as part of its case, there are also likely to be a number of cases in which such knowledge will not be exclusively within the defendant's knowledge. Further, as in *Lee Kwong-kut*, the reason for possession is not only an essential element of the offence but also the most significant element and the one which is most likely to be in dispute in a trial situation.
30. There is no doubt that the burden on the defendant is fairly onerous. Nevertheless, as the caselaw above indicates, this is not necessarily objectionable, particularly in the context of terrorism. It is accordingly necessary to consider whether, having regard to all the circumstances and the statutory language as a whole, the onus on the defendant is a fair one, bearing in mind the need to strike a proper balance between the rights of the individual and the interests of society as a whole.
31. It is at this stage that the definition of terrorism in Clause 1 of the Bill is crucial. If it had been restricted to cover threats to government, as I understand was suggested by those instructing me, the jurisprudence of the European Court of Human Rights would seem to suggest that there would be scope for arguing that the provision did not contravene Article 6(2). However, the width of the provision and the persons potentially affected by it are such that it is difficult to see how, in the language of the European Court, the relevant presumption of guilt can be confined within reasonable limits. Of particular importance is the fact that the provision criminalises conduct which, as has been pointed out in various briefings by those instructing me, could be dealt with under other, more conventional, provisions of the criminal law.
32. A similar argument applies to Clause 56, although with even greater force. This provision criminalises the possession of information which is likely to assist a terrorist if the defendant is unable to show that the possession was for a lawful purpose. Again, whilst there may be no violation of Article 6(2) where such an offence places the burden of proof upon the defendant in respect of information which is clearly defined and plainly is intended to assist a terrorist, the wide-ranging nature of the Clause renders it highly vulnerable to challenge. Paraphrasing the language of Lord Hope in *Kebilene*, I consider that the presumption of guilt does not strike a proper balance between the rights of the individual and the interests of society.

Conclusion

33. I would accordingly advise that neither Clauses 55 or 56 are compatible with the presumption of innocence as set out in Article 6(2) of the Convention. The consequence of this is that if a challenge is brought under the Human Rights Act 1998 a court would be likely to issue a declaration of incompatibility, therefore requiring Parliament to amend the legislation. It is important to note that the main

reason for my conclusion is the wide-ranging definition of terrorism in Clause 1 of the Bill which means that the offences created by the relevant clauses constitute a disproportionate response to the genuine threat posed by what most people would regard as terrorist activity.

34. Furthermore, whilst, as suggested by some of the members of the House of Lords in *Kebilene*, the jurisprudence of the European Court of Human Rights may be developing in this field, our domestic courts are not of course obliged to slavishly follow the decisions of the European Court once the Human Rights Act 1998 comes fully into force. Section 2 only enjoins them to take decisions of the Court into account. In my view, given the views of the Privy Council in *Lee Kwong-kut*, it is likely that our domestic courts are more likely than the European Court to come to the conclusion that the relevant provisions do in fact contravene the presumption of innocence laid down in Article 6(2).
35. I hope those instructing me will not hesitate to contact me if there are any matters arising out of this advice which they wish to discuss.

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27th January 2000