

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's evidence to the Parliamentary Home Affairs Committee enquiry into Terrorism Detention Powers

December 2005

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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Introduction

1. Liberty welcomes the opportunity to offer further comment on the proposed extension to pre charge detention time limits. Our position throughout debate on the Terrorism Bill has been to avoid making comment on the compatibility with any specific extension with the European Convention on Human Rights (ECHR). The legality of pre-charge detention is governed by Article 5(3) of the ECHR. This provides that anyone arrested or detained must be brought before a judge within a reasonable time and tried or bailed. We have little doubt that the original 90 day period would have breached the Convention. However, to determine any argument over detention simply in the context of what detention period might be permissible would necessitate predicting what extension (if any) might be justified. Instead we have focused on the justification for extension put forward by the police and suggested that other, more proportionate alternatives should be considered before *any* extension could be justified. We are extremely pleased to see the Committee are asking for further evidence on the suggestion we have put forward.

Arguments for Extension

2. Justifications for extension to pre-charge limits are set out in the letter sent by Assistant Commissioner Hayman to the Home Secretary on 6 October 2005). Before covering these we would re-iterate two points made in our original parliamentary briefing. First, other types of criminal investigation have similar problems as the type referred to in Assistant Commissioner Hayman's letter. For example, white collar fraud can involve huge amounts of material and any number of jurisdictions. Yet pre trial detention is limited to a maximum of four days, less than a third of the current time permitted for terrorism detention. Second, unless there has been an attack or attempted attack which the police and security services were not aware of¹ arrests are likely to follow months of investigation and surveillance. The difficulties described in the AC's letter seem to imply that the arrest will be from a 'standing start'. In reality, it is difficult to see how months of investigation could not mean that there was a considerable amount of evidence available at the time of arrest. The crucial point to

¹ In which case we imagine there would be a considerable amount of evidence.

be made when considering detention time limits is that detention is the time allowed in order to gather sufficient evidence to bridge the gap between what is needed to arrest and what is needed to charge. This is not a large gap.

3. This second point is countered by Andy Hayman in his letter when he differentiates the threat of terrorism today from earlier Irish terrorism by saying that ‘Public safety demands earlier intervention. And so the period of evidence gathering that used to take place pre-arrest is now denied to the investigators’. However, the earlier distinction drawn in the letter is based on the fact that ‘Irish Terrorists deliberately sought to restrict casualties for political reasons’. This is a distinction of scale. The Irish terrorism campaign did result in a series of bombings causing multiple fatalities. The letter seems to suggest that need for earlier intervention and arrest during the Irish campaign would not have been as urgent at the present as the likely number of fatalities would have been fewer than the London bombings in July. It cannot be Assistant Commissioner Hayman’s intention to argue that the number of likely casualties would be a relevant factor in deciding whether to intervene early.

4. The Committee has asked for comment on a number of specific points which we will address in turn. The international nature of terrorism is the first justification. We appreciate this could present problems but as indicated earlier other types of offending, such as international fraud, cover multiple jurisdictions and can involve incredibly complex evidence. Indeed it is the nature of complex fraud that evidence is likely to be extremely well hidden by those who may have perpetrated an offence. However, the permitted detention period for fraud is a maximum four days. Similar arguments can be made in relation to the argument that time is needed to decrypt computer files. As explained later on there are also powers available to require an individual to hand over encryption keys including a specific criminal offence under the Regulation of Investigatory Powers Act 2000. The government has countered by saying that people under arrest may not have access to encryption keys so these powers would not always help. This may be true. However, it seems likely that if the police have obtained sufficient evidence to arrest then it would be on the basis of information already gained from de-encrypted data from other computers. Once arrested it seems likely that they would hold encryption keys to any computer in their possession. Assistant Commissioner Hayman’s letter uses similar arguments in

relation to mobile phones. Powers to require retention of, and covering police access to, communication data are already considerable². We imagine that communications data is of greatest use pre arrest as an intelligence and surveillance tool.

5. We do not see how difficulties in establishing identities of terrorist suspects would present any significant hindrance. Multiple identities are not a new phenomenon in criminal investigation. People can be charged under an identity they have assumed if that is a name by which they are known. Further investigation might establish an identity to be false but this would not prevent charge. It is difficult to imagine any situation, especially if it follows any period of surveillance and investigation, where a suspect was not known by *any* identity.

6. A lack of interpreters is also cited as a justification for extension. Anyone arrested will either be a UK or EU/non EU national³. Any non British national arrested on suspicion of terrorism is likely to be detained in any event as we presume the Home Secretary would determine that their presence is non conducive to the public good. A UK national is likely to speak English. If they do not then it is difficult to imagine a situation where they do not speak at least one relatively commonly spoken national language. Difficulties in obtaining interpreters demonstrate why it is important that the goodwill of differing racial and religious groups within the UK is vital. Liberty has expressed concerns on numerous occasions that the some of the legislative and policy excesses in anti terrorism policy will proved counterproductive as they will alienate sections of society.

7. The need for time for forensic analysis would appear to be one of the more persuasive arguments justifying detention extension. However, it is quite common in criminal cases for the majority of forensic evidence to be accumulated post charge as it will often take weeks of analysis. We imagine forensic evidence is likely to be one of several sources of evidence in terrorism cases. Even in situations where the only evidence is based on forensic analysis (such as when suspected drugs are sent for assessment) it is common to bail suspects back to the police station. As we explain

² Covered by Part 11 Anti Terrorism Crime and Security Act and Part 1 Chapter 2 of the Regulation of Investigatory Powers Act respectively

³ Powers to deport EU nationals who are suspected of involvement in terrorist activity are roughly similar to those relating to non EU nationals.

later, this might be coupled with powers similar to those used in the Control Order regime under the Prevention of Terrorism Act 2005.

8. The last two justifications relate to detention conditions. We do not believe the need for religious observance should create any significant problem. The need to pray should not have any particular impact as the Police and Criminal Evidence Act 1984 (PACE) specifies the need for regular breaks anyway. Similarly delays arising from the same firm. Any delays caused by solicitors acting for several clients are unlikely to be overly problematic as more than one representative from a firm is likely to be involved in taking instructions. We note that there do not seem to have been any suggestions of a more proportionate approach if there is indeed a problem here. One thing that might be considered is to look at PACE code rules about interview timings to consider whether detainees who insist on speaking to a particular solicitor to the exclusion of others might have the ‘clock stopped’ for a period if that representative is temporarily unavailable. We are hesitant to suggest this as a possibility as there would be considerable potential for abuse. We therefore mention it here in the spirit of offering more proportionate alternatives as requested by the Committee and raise it simply as a matter for consideration. We would also re-emphasise that terrorism suspects can already be delayed far longer than normally permitted and do not accept that having to wait for a few hours in itself justifies any extension.

Alternatives

9. Liberty has publicly stated on many occasions that we believe that the most effective way of combating terrorism is to ensure that the police and security services have the appropriate resources and powers to investigate and deal with those who are planning terrorist acts. Many of the justifications for increasing the pre-charge detention limits referred to in Andy Hayman’s letter can be attributed to a lack of resources. One area of huge public spending in the coming years will be the Government’s ID card scheme. It is estimated that the cost of introducing ID cards could cost anywhere between £6 billion (the Government’s estimate) to £18 billion (the estimate given by the LSE in a study carried out in June 2005). Whatever the final cost, Liberty believes that the money would be better spent directly on police and security services resources. It is hard to see how an ID card could help with

intelligence gathering against suspected terrorists. It is safe to assume that British intelligence agencies have gathered information on anyone that they believe could constitute a risk to national security. We cannot imagine what information held on the National Identity Register would add to that possessed by the Security Services. For the vast majority of people who are not involved in terrorist activity, their entry is irrelevant in combating terrorism.

10. The next proposal is to review the way in which people that have already been charged can be re-interviewed and recharged as further evidence is uncovered. In most terrorism investigations there is likely to be investigation and evidence gathering prior to arrest, followed by fourteen days for questioning. In this time it must be possible to bridge the small gap between the evidence needed to arrest and the evidence needed to charge. Once an initial charge has been brought the police and Crown Prosecution Service, they can apply to the Court to remand in custody as they feel appropriate.

11. It is necessary to look at the existing powers there are to re-question and recharge both to appreciate the scope of what is currently allowed, and to identify any amendments that might be appropriate. Under current legislation the police can arrest a terrorist suspect, question him for up to 14 days and then charge him. Normally once the suspect is charged, the police do not re-interview him. However, there is an exception provided under Paragraph 16.5 of Code C of the Police and Criminal Evidence Act 1984 which allows for re interview i) to prevent or minimise harm or loss to some other person, or the public ii) to clear up an ambiguity in a previous answer or statement or iii) in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted. It is not clear that all cases involving terrorism suspects would fall into one of these categories. Therefore it might be appropriate to widen the list of exceptions. For example, an amendment to this provision could allow for re-interviewing in cases in which the Secretary of State considers it to be in the interests of national security or if the person is arrested in connection with terrorism.

12. It has never been the case that all the evidence to mount a trial must be in place before the suspect can be charged. All that is required is for the officer in charge of the investigation to reasonably believe there is sufficient evidence to provide a realistic prospect of conviction for the offence. If that is the case, then the officer in charge of the investigation informs the custody officer who is then responsible for considering whether the detainee should be charged.⁴ Once the suspect has been charged there is nothing to stop the police from continuing their investigations in order to gather more evidence. They police will have ample opportunity to make enquiries into international terrorist networks, decrypt and analyse data held on computers, carry out forensic investigations and so on between charge and trial.

13. The point has been made by the Government that there is the potential for abuse as the police could bring an essentially frivolous charge, seek to remand in custody and therefore assure months of detention while seeking evidence for further charges. This might be true but misses the point that the potential for abuse is not in itself justification for not considering later questioning and recharge where appropriate. We would hope that the police would not seek to abuse their powers and trust that magistrates considering bail will give proper consideration to the police case put before them. We raised the scope for re-interview and recharge not as a device which would allow easier detention of terrorism suspects but to demonstrate the range of options available.

14. Section 47 of PACE already allows for people to be bailed to reappear back at a police station while the police continue investigations. This is a commonly used technique to allow time for forensic examination (for example, the testing of a substance to see if it is a narcotic). We presume that section 47 powers would not usually be used in terrorism cases due to a concern that the suspect would abscond. This problem could be addressed by attaching conditions to section 47 bail. Conditions could include curfew, reporting, or the surrender of a passport. Defendants in criminal cases will frequently have restrictions placed on their bail. Similarly, section 1 of the Prevention of Terrorism Act 2005 (PTA) suggests a range of restrictions. Part of our objection and opposition to the provisions of Section 1 PTA

⁴ Police and Criminal Evidence Act 1984 Code C 16.1

was that they were applied as a punishment in themselves, were not made in anticipation of any criminal proceedings, and were potentially indefinite. If conditions were time limited and made part of criminal process by being imposed in conjunction with Section 47 PACE we do not imagine the same concerns arising.

15. We presume that one of the principle reasons why the police might have difficulty bridging the gap between the evidential standard required for arrest and that required for charge is the inadmissibility of intercept evidence in criminal proceedings. Liberty has never supported an absolute bar on the admissibility. The imperative for introduction seemed to be the protection of the Security Services' sources and methods rather than any obvious concerns for the fairness of the trial process. Legally the bar is an anomaly. The UK is the only country in the world, apart from Ireland, to have a ban. The Regulation of Investigatory Powers Act 2000 forbids the use of domestic intercepts in UK court proceedings. However, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised and interfere with privacy rights. There is no fundamental civil liberty or human rights objection to the use of intercept material, properly authorised by judicial warrant, in criminal proceedings.

16. If intercept evidence is admitted, existing rules of criminal evidence will apply to ensure that the case will not be unfairly prejudiced. Section 78 of PACE gives the court a discretion to exclude evidence if 'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission... would have such an adverse effect on the fairness of proceedings that the court ought not to admit it'. At common law a judge has discretion "*to exclude evidence if it is necessary in order to secure a fair trial for the accused.*"⁵

17. In addition, the doctrine of public interest immunity (PII) prevents material from being disclosed and adduced in the normal way, whenever it is held that the public interest in non-disclosure outweighs the public interest of full disclosure. Thus,

⁵ Per Lord Griffiths in *Scott v R*. [1989] AC 1242 at 1256. Since the enactment of PACE, this common law power is now rarely used.

if there are concerns over protection of the state's sources then the Crown Prosecution Service can make a PII application to the court to allow disclosure of certain evidence to be withheld from the defence and the public. This is particularly applicable when there are state interests that require protection or when informers and undercover sources have been used. There may be further practical issues to overcome, although these do not appear to have presented a problem in any of the countries where evidence is admissible. The Government has stated that it is not a magic bullet solution. This may or may not be true. Removal would, however, remove the primary obstacle to bringing trials in criminal cases.

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