

CHARGE OR
RELEASE

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

TERRORISM PRE-CHARGE DETENTION

COMPARATIVE LAW STUDY

July 2010

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: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

Contacts

Parliamentarians may contact:

Isabella Sankey

Director of Policy

Direct Line: 020 7378 3654

Email: BellaS@liberty-human-rights.org.uk

Anita Coles

Policy Officer

Direct Line 020 7378 3659

Email: AnitaC@liberty-human-rights.org.uk

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: SophieF@liberty-human-rights.org.uk

For more information on Liberty's Charge or Release Campaign:

Website: <http://www.liberty-human-rights.org.uk/>

Acknowledgments

Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. The analysis contained and the conclusions reached are based on this advice. We would like to thank the following for providing us with their advice and assistance on a *pro bono* basis (further details are provided in **Annex 2**):

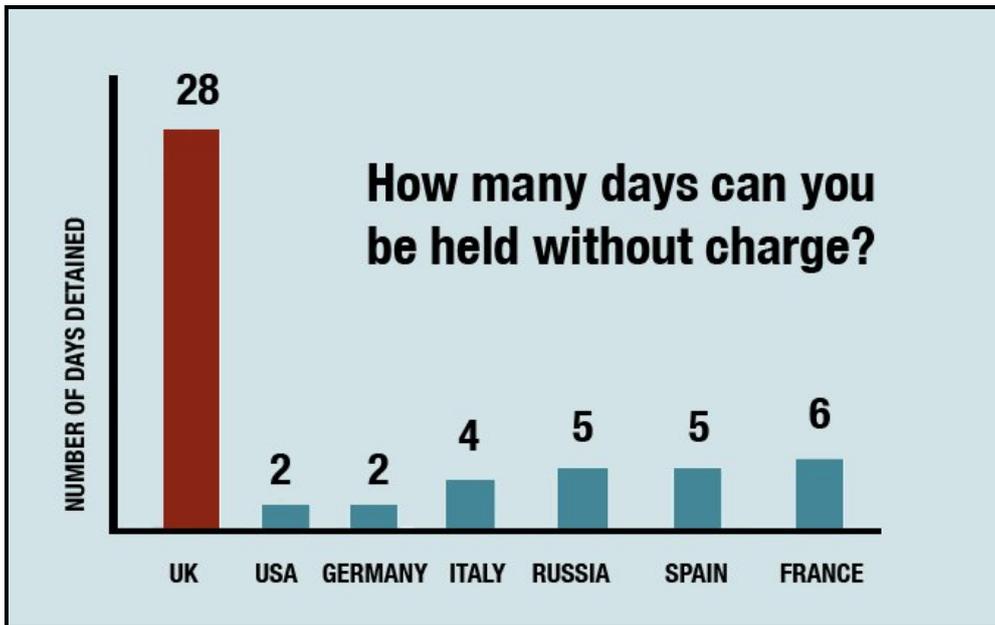
- Freshfields Bruckhaus Deringer, for providing advice on the law in the United States, France, Russia, Italy, Germany and Spain;
- Petra Butler, for advising on the law in New Zealand;
- Peter Vedel Kessing, for advising on the law in Denmark;
- Aage Borchgrevink and Gunnar Ekelove-Slydal, for advising on the law in Norway; and
- Emrah Şeyhanlıoğlu, for providing advice on the law in Turkey.

This report was originally published in 2007 ahead of the then Government's attempts to increase the temporary 28 day pre-charge detention limit to 42 days. Liberty obtained updated legal advice (from the lawyers mentioned above) in July 2010.

Sophie Farthing and Isabella Sankey, Editors of the Report

EXECUTIVE SUMMARY

- This report demonstrates that the existing 28 day limit for pre-charge detention in the United Kingdom far exceeds equivalent limits in other comparable democracies. These findings, based on advice and assistance from lawyers and academics around the world, provides further evidence that the current temporary 28 day limit needs urgently to be reduced. How can our Government and some of our police argue that the UK needs to hold people for over two weeks when so many other countries manage with pre-charge detention periods of less than one week?



- There can be no doubt about the international nature of the threat from Al-Qaida-inspired terrorism. Like the United Kingdom, Spain, the US and Turkey have all suffered from terrorist attacks in the recent past. Police in these countries must also face the same investigative challenges cited in support of extended pre-charge detention - the greater complexity of terror plots, their international dimension and the need to intervene and arrest suspects earlier. Despite this, the legal limit imposed on the pre-charge detention of terror suspects in these countries is much shorter than in the UK. The US constitution limits pre-charge detention to 48 hours, and the closest equivalent to pre-charge detention in Spain is limited to five days.
- Should Parliament approve the new Government's stated intention to renew the temporary 28 day limit, even for a six month period, the UK will remain completely out of line with comparable democracies around the world.

- No two legal systems are exactly the same and comparisons are not always simple, but this does not mean we should shut our eyes to overseas experience. The UK's counter-terror laws do not exist in a vacuum. Difficulties in drawing comparisons can, indeed, be over-played. Some countries have very similar criminal justice systems to our own, making comparisons relatively straightforward. None of these countries permits pre-charge detention for anything like 28 days. In countries that do not have the exact concept of "pre-charge detention", like France and Germany, we asked lawyers qualified in those jurisdictions to identify the equivalent. We found that the equivalent to a charge must happen within a matter of days; not months or years as Sir Ian Blair, former Commissioner of the Metropolitan Police and others have suggested in past debates on this issue.
- Detaining people for 28 days without charge inevitably leads to injustice, and undermines our ability to fight terrorism by winning hearts and minds. It also flies in the face of the British tradition of liberty and justice. This report presents comparative evidence to show that 28 day pre-charge detention is unnecessary.

INTRODUCTION

The current threat from Al-Qaida-inspired terrorism is truly international in scope. Since 2001 Islamist terrorists have taken hundreds of lives in the UK, Spain, the US, Turkey and elsewhere. Governments around the world have rightly sought to protect their citizens from these threats. Some have tried to do so while respecting the framework of basic rights and freedoms drawn up by the international community after the horrors of the Holocaust. Sadly, others have been far too willing to cast aside these basic democratic values as inconvenient "rules" of an outdated "game", in pursuit of a so-called "new normal". Examples of knee-jerk unjust and counter-productive policies from around the world abound: Guantanamo Bay, secret prisons and extraordinary rendition, and, in the UK, control orders, the internment of foreign nationals in Belmarsh prison and, ever increasing extended pre-charge detention.

Under UK law people suspected of involvement in terrorism can be detained for 28 days (increased from 14 days in 2006) before they must be either charged with an offence or released.¹ In October 2008, the Government of the day proposed that the

¹ Schedule 8 of the Terrorism Act 2000, as amended by the Terrorism Act 2006.

limit for detention without charge be extended again to 42 days.² In response, we launched our *Charge or Release* campaign which received incredible support from across the political spectrum and indeed from across the world. Narrowly passed by the House of Commons, the 42 days proposal was soundly defeated in the House of Lords, with the Upper House rejecting the measure with a majority of 191 votes. It is worth noting that since the proposal to increase the pre-charge detention limit by 42 days was defeated, no one has been held for more than 14 days in the UK.

As part of our successful campaign, we conducted comparative legal research which was published in the original version of this report. On 24 June this year the Home Secretary, the Rt Hon Theresa May MP, announced that whilst the government would undertake a wide review of counter-terrorism legislation (which would include the pre-charge detention limit) it would meanwhile seek to extend the current 28 day limit for a further six-months whilst the review takes place.³

In this report we consider how the UK law on pre-charge detention and the current proposal to renew the current limit of 28 days compares with the law in other comparable democracies. Have other countries, facing the same threat from Al-Qaida-inspired terrorism, also resorted to lengthy pre-charge detention in order to tackle this threat? Before discussing our findings, we consider two preliminary questions. First, why should we care about the law in other countries? Secondly, is it really possible to draw worthwhile comparisons when legal systems differ so much?

Relevance of Comparisons

Few would doubt that detaining people for just under a month without charge is a grave matter. It has serious implications for the individuals that are directly affected, for the ability of the UK to fight terrorism by winning hearts and minds, and, more broadly, for the tradition of liberty and justice in Britain. It is not, therefore, surprising that parliamentarians of all parties have always demanded that clear and compelling evidence is produced as to the necessity of extending and maintaining lengthy pre-charge detention periods before voting on the issue. The findings in this report are

² Cf: <http://security.homeoffice.gov.uk/news-publications/news-speeches/new-ct-strategy>

³ Secretary of State for the Home Department, Written Ministerial Statement on *Pre-charge detention*, Thursday 24 June 2010.

central to the question of whether maintaining the current temporary extension to pre-charge detention in the UK can really continue to be justified.

Other countries face similar threats to the UK from Islamist terrorism. They also face the same difficulties the UK Government has historically cited in support of continuing the extended 28 days pre-charge detention: the need to intervene early given the scale of the threat, the absence of warnings before an attack and the use of suicide bombers; and increasing complexity in terms of material seized, the use of false identities and international networks. Given these similarities, a consideration of how other comparable democracies have responded to these challenges is a useful guide to the necessity and proportionality of the UK Government's proposed response. Can the UK's police truly need the power to detain suspects for 28 days without charge when the police in other jurisdictions are managing with far shorter time limits?

The question of how UK law contrasts with the law in other comparable democracies could also have broader implications. If UK law is significantly more repressive than the law in other countries, some will use the disparity to question Britain's moral authority. One can imagine dictators like Mugabe using such a disparity to undermine British attempts to persuade the international community to condemn Zimbabwe's human rights record. One could also imagine those seeking to radicalise young Muslims pointing to this policy to argue that the UK is a country without values and whose law is unjust. Surely, established democracies like the UK should be setting a positive example, demonstrating to newly emerging democracies and non-democratic states that the best way to counter even the gravest threats should be tackled without sacrificing our basic rights and freedoms.

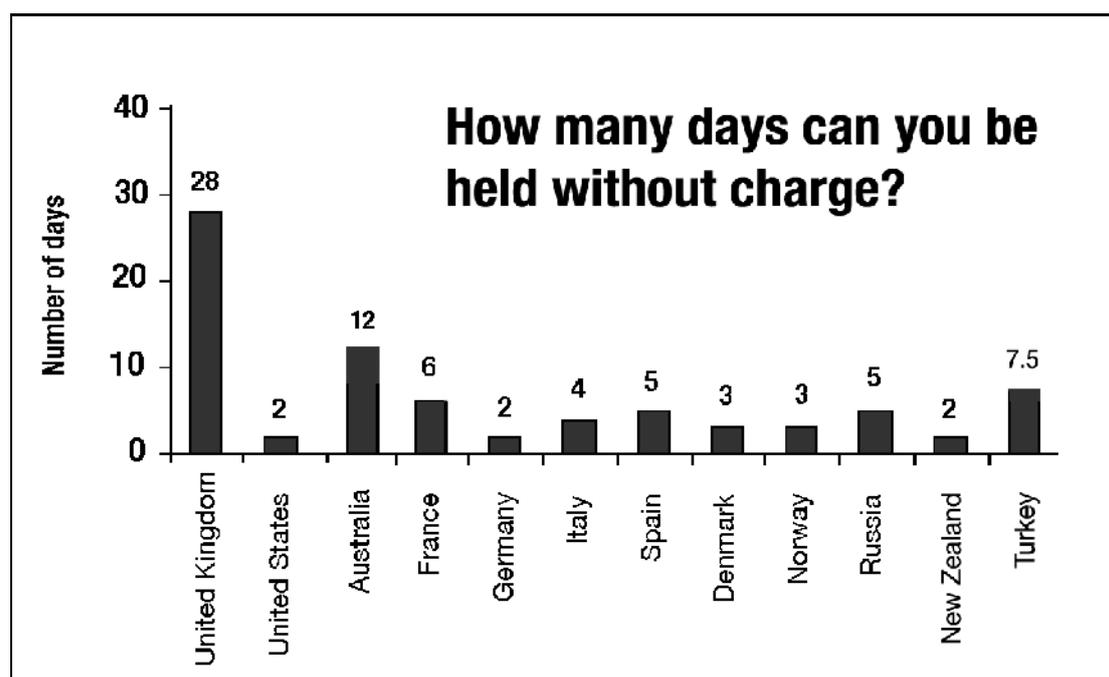
Are Worthwhile Comparisons Possible?

Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions covered in this report. In 2007 we asked for short notes of advice on how long a person suspected of committing a terrorist offence can be detained before they are either charged or released without charge. In July 2010 we obtained new legal advice to confirm whether or not respective pre-charge detention periods had changed. The analysis contained and the conclusions reached in the report are based on this advice. Details of the law firms and individual practitioners and academics that provided this advice and assistance are contained in **Annex 2**.

It is, of course, true that no two legal systems are exactly the same and drawing comparisons between the laws in different countries inevitably poses some difficulties. These difficulties can, however, be overplayed. It should for example be remembered that the British common law system has been exported around the world and forms the basis of the legal systems in a number of other countries including the United States, Canada, New Zealand and Australia. Some of these countries have exact equivalents to pre-charge detention making comparisons relatively straight-forward.

While comparisons are, however, more difficult with some of the UK's geographically closest neighbours it is possible to make some meaningful comparisons by identifying the closest equivalent to pre-charge detention in these jurisdictions. At what point does the suspect learn the precise nature of the allegations against them, when are prosecutions formally initiated, and at what point does the test for detention change from police suspicion to evidence and proof considered by a judge? Liberty did not itself seek to identify the equivalent to pre-charge detention in other countries. Instead, we asked lawyers qualified in those jurisdictions to judge this for themselves. To enable them to do this we explained the significance of "charge" in the UK system and described how this fits within the UK's criminal justice process (note reproduced in **Annex 1**).

OVERVIEW OF FINDINGS



The graph above provides a visual overview of the maximum number of days a person can be detained without charge in the eleven countries surveyed. A detailed description of our findings is contained in Part 2 of this report. The following are brief summaries of those findings:

United Kingdom

In the UK the maximum period of pre-charge detention in terrorism cases is 28 days. This is a temporary extension, renewed annually by statutory instrument, on the fixed statutory limit of 14 days.

United States

Under U.S. Federal law, the maximum period of pre-charge detention is 48 hours. This limit derives from the Fourth Amendment to the US Constitution.

Australia

In Australia the maximum period of pre-charge detention for the purposes of investigating a terrorism offence is 24 hours. "Dead time" (including time taken to transport a suspect) is not included within this 24 hour period but during "dead time" no questioning is permitted. The first and only case in which an extended period of "dead time" was authorised by a magistrate, it led to a person being detained for a total of 12 days without charge. It has previously been understood that in practice

this is likely to be the longest that would be permitted. In our earlier report on comparative pre-charge detention periods 12 days was treated as the legal maximum. However following a critical independent inquiry into this incident of 12-day detention, a Bill is currently passing through the upper house of the Australian Parliament which would limit the amount of “dead time” at seven days. If passed, this would mean that pre-charge detention could only last a maximum of eight days.

Preventative detention is also permitted in Australia for up to 14 days. These preventative detention powers have not, however, been used and differ from pre-charge detention as questioning is not allowed. Finally, although not part of the criminal justice process, the Australian Security Intelligence Organisation has the power to detain people for up to 7 days without charge for the purposes of questioning.

New Zealand

In New Zealand persons arrested must be charged “promptly”. There is no fixed definition of “prompt” but case law on this question indicates that pre-charge detention of more than 48 hours would not be considered “prompt”.

France

In France, the maximum period of pre-charge detention in terrorism cases is six days.

Germany

The closest equivalent to pre-charge detention in Germany is provisional police custody, the period prior to a formal “warrant of arrest” being issued by a court. A person held in provisional police custody must be set free at the end of the day following the day on which s/he was arrested. The longest possible period of provisional police detention would, therefore, be 48 hours.

Italy

In Italy the maximum period of pre-charge detention is four days.

Spain

The closest equivalent to pre-charge detention in Spain is preventative arrest. In relation to suspected terrorist offences, the maximum period for which a person can

be detained under these powers, before being released or handed over to the judicial authorities, is five days.

Denmark

In Denmark the maximum period of pre-charge detention in terrorism cases is three days.

Norway

In Norway the maximum period of pre-charge detention in terrorism cases is three days.

Russia

In Russia the maximum period of pre-charge detention is five days.

Turkey

The maximum period of pre-charge detention in terrorism cases in Turkey is seven days and 12 hours. The 12 hour period is the maximum that is permitted for the transfer of the suspect.

CONCLUDING OBSERVATIONS

All of the tired arguments for 28 day pre-charge detention apply equally to the other countries surveyed in this report. Many other countries around the world face real and severe threats from Al-Qaida-inspired terrorism. Other countries have, like us, suffered horrific loss of life and injury in suicide bombings. Like the 7/7 London bombers, those responsible for the 9/11 attacks on the US and the Madrid train bombings in 2004 caused mass casualties and gave no prior warning. It is not only the British police which have a duty to protect the public from these threats and to intervene early to limit the risk of attacks taking place. Neither are the UK police alone in having to deal with the challenge of increasingly complex terror plots, huge amounts of evidence, international networks and the use of false identities.

The 2006 extension to 28 day pre-charge detention was only ever intended to be temporary with Parliament having to renew the period annually. As with so much counter-terrorism legislation – despite promises of its temporary nature once enacted, repeal is difficult to achieve. There is no reason for this to be the case. We urge parliamentarians to consider carefully their duty to ensure that the case for 28

days pre-charge detention continues to be made. Arguments made in support of maintaining the current limit must be interrogated. Do the UK's police really need these powers? This report presents further evidence that they do not. None of the other countries surveyed have found lengthy pre-charge detention necessary in order to deal with the threats and challenges from international terrorism. Indeed, none allows their police to hold suspects for anywhere near the 28 days currently permitted in the UK. Despite being a major terrorist target the United States, for example, allows only two days pre-charge detention. Spain, another relatively recent target of terrorist attacks, only allows its police to detain suspects for five days before the equivalent of charge. These significantly shorter pre-charge detention periods have not prevented the successful charge and conviction of terrorists as the successful conviction of 21 individuals, involved in the 2004 Madrid train bombings, illustrates. How can our new Government sustain the argument that the UK police need just under a month when so many other countries manage with pre-charge detention periods of less than a week?

Continuing the extended limit of 28 days can no longer be justified. Indeed, the police have themselves stated that the existing limit has not hampered their investigations and that more time is not needed.⁴ Liberty has identified better ways of meeting all of the arguments for longer pre-charge detention. These include lifting the bar on the use of intercept evidence in criminal trials, giving the police greater resources and ensuring that safeguards are inserted into the chillingly broad powers contained in the Civil Contingencies Act 2004 which would already allow for a temporary extended pre-charge detention in a genuine terror emergency. These alternatives should be examined as part of the wider counter-terrorism review that the new Government has pledged to undertake. It must also be remembered that since the current 28 day limit was enacted in 2006 a number of other laws have been passed or have come into force which further undermine the need to renew the period. For example, in October 2007, the previous Government brought into force Part 3 of the Regulation of Investigatory Powers Act 2000. This criminalizes any failure to disclose an encryption key and provides an answer to police arguments that longer pre-charge detention is

⁴ Instead, it is argued by some that Parliament should agree to a period of longer than 28 days as a precautionary measure (cf Evidence by Sir Ian Blair to the Home Affairs Select Committee on 19th October 2007). After the last attempt to increase pre-charge detention in 2005, the Home Affairs Select Committee in fact noted that the police had failed to provide an evidence-based case for detention beyond 28 days (See House of Commons Home Affairs Select Committee – *Terrorism Detention Powers: Fourth Report to Session 2005-2006, Volume 1*, 20 June 2006, Section 4, pg.45, Paragraph 143).

needed because of the time taken to decrypt large amounts of electronic data.⁵ Additional “lower order” terrorism offences have also been added to the statute book which can allow appropriate charges for suspected terrorism to be laid more quickly.⁶ In addition, provisions to allow for the post-charge questioning of suspects charged with terrorism-related offences have been enacted⁷ and it is now the case that suspects can be charged on a lower evidential standard where it is believed that further evidence will come to light.⁸

Liberty has also previously shown how existing emergency powers could be used to deal with the kind of nightmare scenario, involving multiple terror plots and large numbers of suspects, sometimes used to argue for more than 28 days. The chillingly broad powers in the Civil Contingencies Act 2004 would allow longer pre-charge detention as a temporary and urgent response to a specific emergency like this. These powers could only be triggered when and if the need really arose and would be subject to parliamentary and judicial scrutiny.

28 day pre-charge detention is not only unnecessary; it is also unjust and potentially counter-productive. Continuing to allow suspects to be held for 28 days without charge flies in the face of our basic democratic principles of justice, fairness and liberty. No one has been held for more than 14 days in the UK since the previous Government dropped its proposals to extend the limit by 42 days in October 2008. Yet the very possibility that this could happen again should be excluded. Locking up an individual has significant implications for their personal life and certainly does not help to win hearts and minds. Even if that person is released without charge, after 28 days in custody the suspect may well have lost their job, home and the trust of their community. After such treatment it would be no surprise if the suspect and their friends and family were less willing to assist the police and intelligence services with their investigations. Some may even be more vulnerable to radicalisation.

⁵ Police and Justice Act 2006 also allowed suspects to be released on bail subject to potentially strict conditions.

⁶ See for example the Terrorism Act 2006

⁷ Under section 22 of the Counter-terrorism Act 2008. Liberty understands however that this section is yet to be brought into force.

⁸ This alternative threshold is known as the ‘Threshold Test’ and it requires at least reasonable suspicion on the available evidence together with the likelihood that further evidence will become available within a reasonable time to meet the Full Code Test (The Code for Crown Prosecutors, Chapter 6).

PART 2

DETAILED ANALYSIS

This section provides a more detailed explanation of the law relating to pre-charge detention in each of the countries mentioned above. This provides a more detailed description of how the final figures for each country have been calculated.

1. UNITED KINGDOM

Summary

In the United Kingdom the maximum period of pre-charge detention in terrorism cases is 28 days.⁹

The Current Law

Schedule 8 of the Terrorism Act 2000 governs the pre-charge detention of those arrested on suspicion of being a terrorist.¹⁰ Legal limitations on the period of time a terrorist suspect can be detained prior to charge run from the time of arrest.¹¹

After arrest, the suspect must be taken to a police station as soon as possible. On arrival at the police station, the detention of the suspect must be reviewed by a police officer that is not directly involved in the investigation. Reviews must also take place at 12 hourly intervals thereafter. At the review the officer may only authorise a suspect's continued detention if, inter alia, s/he is satisfied that this is necessary: (i) to obtain relevant evidence (i.e. by questioning the suspect), (ii) to preserve relevant evidence or (iii) to make a decision about the deportation or charging of the suspect.¹² Notes must be kept of the reviews and suspects and their lawyers have the right to make representations.¹³

⁹ Terrorism Act 2000 (TA), Schedule 8, para 36(3)(b)(ii) as amended by Terrorism Act 2006, S.23.

¹⁰ As amended by the Terrorism Act 2006. For other criminal investigations pre-charge detention is governed by Police and Criminal Evidence Act 1984 allowing detention of up to 96 hours.

¹¹ TA, S.41(3) and Schedule 8, para 36(3B). The police have the power to arrest anyone they suspect of being a terrorist without a judicial warrant (TA, S.41).

¹² TA, Schedule 8, para 23.

¹³ TA, Schedule 8, paras 26 & 28.

After 48 hours, a judicial warrant is required to keep a suspect in detention without charge.¹⁴ A judge can only issue a warrant if satisfied that there are reasonable grounds to believe that (a) it is necessary, *inter alia*, to obtain or preserve relevant evidence and (b) that the investigation is being conducted diligently and expeditiously.¹⁵ The first judicial warrant would normally authorise detention for up to a maximum of seven days.¹⁶ Further judicial warrants may then be issued, each extending the period by up to seven days. Warrants authorising detention beyond 14 days can only be made by a senior judge. A judicial warrant may not authorise detention for more than 28 days from the time of arrest, meaning that at this point a suspect must be either charged or released.¹⁷ Suspects have the right to be notified of the application for a warrant of extended detention and the right to make representations to the judge.¹⁸

¹⁴ TA, S.41(3).

¹⁵ TA, Schedule 8, para 32.

¹⁶ TA, Schedule 8, para 29(3).

¹⁷ TA, Schedule 8, para 36(3)(b)(ii).

¹⁸ TA, Schedule 8, paras 31 & 33. It should, however, be noted that this is not the equivalent of a true adversarial hearing as the suspect does not have any charges to answer and may well not know the evidence against them.

Background and Developments

The power to hold terror suspects for up to 28 days has only been in place since 26th July 2006.¹⁹ Parliament must vote to renew this power on an annual basis and has done so in 2007, 2008 and 2009.²⁰ 28 days detention replaced 14 days detention, which itself had been increased from 7 days by the Criminal Justice Act 2003. On 24 June 2010 the Home Secretary, the Rt Hon Theresa May MP, laid a Written Ministerial Statement which announced the Government's intention to lay a statutory instrument to renew the temporary 28 day limit for a further six months.²¹ In the meantime the Government has pledged to conduct a comprehensive review of counter-terror legislation, which will include a review of the pre-charge detention period.

In relation to any criminal offences unrelated to terrorism, four days detention remains the limit in the UK.²²

The power to hold people for over 14 days has not been used in connection with terrorist investigations since August 2007.²³ However since the power came into force, we understand that a total of 11 suspects have been detained for longer than 14 days. Eight of these were charged and three were released without charge.²⁴

The current legal regime in the United Kingdom is not subject to any challenges in the courts at present.

¹⁹ As a result of the Terrorism Act 2006, S.23(1)&(3)(a). Prior to this the maximum was 14 days.

²⁰ Terrorism Act 2006, S.25. Renewed by the Terrorism Act 2006 (Disapplication of Section 25) Order 2007, SI 2007/2181.

²¹ Secretary of State for the Home Department, Written Ministerial Statement on *Pre-charge detention*, Thursday 24 June 2010.

²² Section 44 Police and Criminal Evidence Act 1984.

²³ Joint Committee on Human Rights (2010) *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In (Sixteenth Report of Session 2009-10)* (London: TSO), at para 68.

²⁴ Oral Evidence to Home Affairs Select Committee, 19th October 2007, Q 7 (Mr Peter Clarke CVO OBE QPM).

2. UNITED STATES

Summary

Under U.S. Federal law the maximum period of pre-charge detention for criminal suspects, including those suspected of committing terrorist offences, is 48 hours.

The Current Law²⁵

The U.S. Supreme Court has held that the Fourth Amendment to the Constitution imposes certain limits on the detention of persons prior to a formal charge.²⁶ In *County of Riverside v. McLaughlin*²⁷, the Court determined that detention, without a specific charge on the basis of probable cause, was constitutionally permissible for less than 48 hours.²⁸ Thus, a judicial charge on the basis of probable cause within 48 hours of arrest would not constitute an “unreasonable” seizure period under the Fourth Amendment to the Constitution.²⁹

In addition, the Court of Appeal for the Ninth Circuit has held that detention by law enforcement authorities of individuals under the material witness statute may also be in contravention of the Fourth Amendment. In *Abdullah Al-Kidd v. John Ashcroft*,³⁰ the Ninth Circuit ruled that the use of the material witness statute for the purpose of conducting a criminal investigation, in this case to investigate a suspected terrorist, without probable cause is a violation of the Fourth Amendment. Prior to this decision, critics such as Human Rights Watch had alleged that the executive branch had

²⁵ We have provided an overview of key U.S. laws and statutes pertinent to this question. However, for a more detailed comparative analysis of U.S. law concerning pre-charge detention periods, see Ari D. MacKinnon, *Counterterrorism and Checks and Balances: the Spanish and American Examples*, 82 N.Y.U. L. Rev. 602 (May 2007).

²⁶ See *Gerstein v. Pugh*, 420 U.S. 103, 125 (holding that States “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty...by a judicial officer either before or promptly after arrest.”).

²⁷ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

²⁸ *Ibid* at 56.

²⁹ *Ibid*.

³⁰ *Abdullah Al-Kidd v. John Ashcroft*, 580 F.3d 949, 970 (2009).

employed the material witness statute to detain suspects in order to conduct criminal investigations on less than probable cause.³¹

As a general rule, a person brought in for questioning may therefore leave custody after 48 hours if that person is not charged within that period. The delineation of 48 hours was made to provide a degree of certainty for law enforcement officers and state courts desiring to establish procedures safely within constitutional bounds.³² However, the Constitution does not expressly compel a specific time limit and the Court recognized that a probable cause hearing may be permissible after 48 hours due to “bona fide emergency or other extraordinary circumstance”.³³

Other Powers

In the wake of the terrorist attacks on 9/11 the U.S. Congress granted the US Executive specific statutory authority to extend pre-charge detention periods for aliens suspected of terrorism. The USA PATRIOT Act allows the U.S. Attorney General to detain such aliens without charge for a period of seven days.³⁴ At the expiration of the seven days, the person must be either charged or removal proceedings must be commenced.³⁵ We do not consider detention under these powers to be equivalent to pre-charge detention in the UK as it is restricted to foreign nationals.

Executive authorities have also detained persons suspected of terrorism under the auspices of immigration law and executive “war powers” privilege.³⁶ These powers are not, however, equivalent to pre-charge detention in the UK as they are not part of the criminal justice system. Under the material witness statute law enforcement authorities may detain persons, without a criminal charge, who possess information

³¹ 97 Cal. L. Rev. 693, 704, *citing* HUMAN RIGHTS WATCH, WITNESS TO ABUSE 1 (2005), *available at* <http://hrw.org/reports/2005/us0605/>.

³² *Ibid.*

³³ *Id.* at 56-57.

³⁴ 8 U.S.C. § 1226(a)(5).

³⁵ 8 U.S.C. § 1226(a) (6)-(7). (Sup. III 2003) However, the Attorney General's decision is reviewable every six months.

³⁶ 82 N.Y.U. L. Rev. 602, 623, fns 99 and 100 (citing the Bail Reform Act of 1984 § 203(a), 18 U.S.C. § 3144(a) (2000)). Both immigration law and executive “war powers” privilege were used prior to 9/11 conflict to detain persons for periods longer than 48 hours (e.g. Supreme Court Hears Arguments in Indefinite Detention Cases, 78 Interpreter Releases 397, 397. (2001) (noting that 3000 no citizens were in indefinite preventative detention in 2001 prior to 9/11)).

material to criminal proceedings and who may otherwise flee the country.³⁷ The detention period under this statute is ten days.

³⁷ 18 U.S.C. § 3144 (2000).

3. AUSTRALIA

Summary

In Australia the maximum period of pre-charge detention for the purposes of investigating a terrorism offence is 24 hours. 'Dead time' (discussed below) is not, however, included within this 24 hour period. During "dead time" no questioning is permitted. The first and only case in which an extended period of dead time was authorised by a magistrate led to a person being detained for a total of 12 days without charge. While the 'dead time' provisions mean the 24 hour period of pre-charge detention can be spread over an undefined number of days, we consider 12 days would be the maximum period of pre-charge detention that would in practice be allowed in Australia.

The situation in Australia may, however, be on the brink of change. The National Security Legislation Amendment Bill 2010 currently before the Australian Parliament,³⁸ if passed by the Senate, would cap 'dead time' at seven days, meaning that the maximum period a person could be held without charge would be a total of eight days.

Pre-Charge Detention under Criminal Law

A person arrested for a terrorism offence can be detained for no more than four hours from the time of arrest for the purpose of investigation.³⁹ The detainee must be released within the period or brought before a judicial officer.

In terrorism cases the pre-charge detention period can be extended a number of times to a total of 24 hours on application by the investigating official to a judicial officer, normally a magistrate.⁴⁰ The application can be made by telephone and the detainee or their lawyer can make representations to the judicial officer. The judicial officer can extend the period if satisfied that:

³⁸ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=alphaDes;page=6;query=Dataset%3AbillsCurBef%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billhome%22;querytype=:rec=8;resCount=Default

³⁹ s23CA, Crimes Act 1914. Two hours for a minor or Aboriginal person or Torres Strait Islander.

⁴⁰ s23DA Crimes Act 1914. The limit 12 hours for other serious offences: s23D Crimes Act 1914.

- the offence is a terrorism offence;
- further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence;
- the investigation into the offence is being conducted properly and without delay; and
- the person or their lawyer has been given the opportunity to make representations about the application.

“Dead time” is not included in the periods referred to above. Accordingly, dead time can allow a person to be detained longer than 24 hours but the total amount of time spent questioning the person cannot be longer than 24 hours.⁴¹ There is currently no statutory cap on the maximum amount of “dead time” that can be authorised. Such “dead time” includes time:

- for reasonable transportation time from place of arrest to investigation place;
- for the detainee to communicate with a lawyer, friend, relative, interpreter, or to allow the time for such a person to arrive at the investigation place;
- for medical attention, because the detainee is intoxicated or to allow reasonable time for detainee to rest or recuperate;
- for an ID parade;
- taken to determine the person’s age;
- for applying to a magistrate for extensions of questioning time ;
- for applying to a magistrate and taking DNA, fingerprints etc; and
- that is reasonable time:
 - during which the questioning of the person is reasonably suspended or delayed; and
 - that is approved by a magistrate, that is where the magistrate is satisfied that:
 - it is appropriate to do so, and
 - the same four points for extension of period set out above apply (i.e. it is a terrorism offence, it is necessary to preserve or obtain evidence etc).

To our knowledge there has only been one case in which “dead time” was authorised by a magistrate under s 23CB: Dr Mohamed Haneef was detained for a total of 12

⁴¹ s 23CA Crimes Act 1914.

days without charge using this provision.⁴² This period was far greater than the maximum anticipated by the Australian Government during the passage of the relevant legislation. In response to calls for an absolute limit of 48 hours when this legislation was going through Parliament in 2004, the Attorney-General's Department assured a Senate inquiry that such a limit was not necessary and it would be surprising if the powers were used to detain anybody for even a period of that duration.⁴³ In Parliament, the Minister for Justice and Customs indicated that the provision would also be limited by case law interpreting a "reasonable time" to be a "limited time".⁴⁴ Given these statements of intention in the Australian Parliament and relevant case-law, the fact that "dead time" has only been authorised in a single case (for 12 days), and the controversy surrounding that case, we have taken the 12 day period authorised in that case to be the maximum period of pre-charge detention that would in practice be allowed in Australia.

Change afoot? The National Security Legislation Amendment Bill 2010

Following an independent inquiry into the circumstances surrounding the arrest and detention of Dr Haneef,⁴⁵ the Federal Government introduced the National Security Legislation Amendment Bill.⁴⁶ Should this Bill be passed in its current form, a magistrate, in determining an application to extend the time the detainee may be held to complete the investigation, will not be able to disregard "dead time" beyond a seven day period. Including the initial 24-hour maximum investigation period, this would mean that the maximum number of days a detainee could be held without charge is eight days, bar any specified and reasonable time which also does not form

⁴² Dr Haneef was arrested on 2 July 2007 in connection with the failed bomb attacks in the UK. He was charged 12 days later with supporting a terrorist organisation but the Director of Public Prosecutions withdrew the charges on 27 July 2007 because there was insufficient evidence to establish the elements of the offence.

⁴³ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25.

⁴⁴ *Pollard v R* (1992) 176 CLR 177 cited in Commonwealth, *Parliamentary Debates*, Senate, 18 June 2004, 24228-29 (Chris Ellison, Minister for Justice and Customs).

⁴⁵ The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008), accessible at <http://www.haneefcaseinquiry.gov.au>.

⁴⁶ The Bill had its third reading in the House of Representatives on 25 May 2010 and passed to the Senate. The Bill was introduced and read a first time in the Senate on 15 June 2010, with the second reading moved on the same day. The Senate Legal and Constitutional Affairs Legislation Committee reported back to the house on 17 June 2010. For the text of the Bill see http://parlinfo.aph.gov.au/parlInfo/search/display/display_w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=alphaDes;page=6;query=Dataset%3AbillsCurBef%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billhome%22;querytype=:rec=8;resCount=Default.

part of the investigatory period (e.g. time the detainee speaks with their lawyer or has medical treatment).⁴⁷

Other Powers

The Australian Federal Police may obtain a “preventative detention order” to substantially assist in preventing an imminent terrorist attack or to preserve related evidence after a terrorist attack.⁴⁸ This allows preventative detention for an initial period of 24 hours, extendable by a further 24 hours. This time can be augmented by State law so that, for instance, the New South Wales Terrorism (Police Powers) Act 2002 enables detention for a maximum of 14 days. In practice no preventative detention orders have been issued.

Under a preventative detention order the detained person may not be questioned other than to verify his/her identity or to ensure his/her well-being. Indeed, it is an offence for a police officer to question a detainee under a preventative detention order.⁴⁹ If the police or intelligence agency wishes to question the detainee under other questioning powers⁵⁰ the police must release the person from preventative detention. After questioning the person could then be taken back into detention under the same order but the 14 day period would not be extended and would include any time taken for questioning under other powers.⁵¹

Separate powers for the Australian Security Intelligence Organisation provide for a maximum of 7 days pre-charge detention to enable questioning (though no more than 24 hours may be used for questioning, 48 hours if an interpreter is used).⁵²

⁴⁷ The proposed new s 23DB in Part 1C of the *Crimes Act 1914* (as set out in clause 16 of Schedule 3 of the 2010 Bill) outlines the mechanism for establishing the period of investigation when a person is arrested for a terrorism offence. The investigation period is initially 4 hours, which can be extended by a magistrate by a total of 20 hours under proposed s 23DF. The “dead time” which is not included in the 24-hour investigation period, is made up of a number of specified events listed in proposed s 23DB(9)(a) to (l) similar to those set out in the existing law (e.g. allowing a person to be conveyed from their place of arrest to the place of detention; allowing the person to communicate with a legal practitioner or receive medical treatment; etc), and an unspecified time of suspension or delay in the questioning of a person if that is “reasonable”. This latter limb of unspecified “dead time” will now be capped under the proposed ss 23DB(9)(m) and (11)(a) at seven days.

⁴⁸ Cf Criminal Code s 105.4 and, eg, Terrorism (Police Powers) Act 2002 (NSW) s 26D.

⁴⁹ Criminal Code, sections 105.42 and 105.45 and, eg, Terrorism (Police Powers) Act s 26ZK.

⁵⁰ Such as the pre-charge questioning powers in the Crimes Act 1914 (Cth).

⁵¹ Criminal Code section 105.26 and e.g. Terrorism (Police Powers) Act 2002 (NSW) s 26W.

⁵² Australian Security Intelligence Organisation Act 1979.

These powers are not, however, used as part of the criminal justice process and are not, therefore, equivalent to pre-charge detention.

4. NEW ZEALAND

Summary

In New Zealand persons arrested must be charged “promptly” – there is no fixed time limit for pre-charge detention. The New Zealand courts have held that spending five hours in a holding cell after arrest and prior to charge was not “prompt” and so was unlawful. It is therefore unlikely that, whatever the circumstances, any period of pre-charge detention of more than 48 hours would be considered “prompt”.

The Current Law

New Zealand does not have an equivalent of the UK law (Schedule 8 PACE) allowing terrorism suspects to be detained without charge for an extended period of time. Neither the Terrorism Suppression Act 2002 nor the amendments made to various Acts by the Counter-Terrorism Bill 2003 allow for extended detention as allowed under the UK legislation. Thus, any person suspected of terrorism in New Zealand has the same rights as any other crime suspect. That is, to be either charged promptly or released.⁵³

There is no definition of “charge” in New Zealand legislation. However, Goddard J in *R v Gibbons* defined “charge” as “an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that s/he is to be prosecuted and gives him/her particulars of the charges s/he will face.”⁵⁴

The police have no common law power of arrest.⁵⁵ A person can be arrested without a warrant only pursuant to the provision of the Crimes Act 1961 or some other enactment expressly giving power to arrest without warrant. Section 32 of the Crimes Act 1961 gives the police the power to arrest any person they believe has committed an offence. Furthermore, for example, section 40(2) of the Arms Act 1983 allows arrest without warrant if a person persistently fails to give his/her details.

⁵³ New Zealand Bill of Rights Act 1990, s 23(2).

⁵⁴ *R v Gibbons* [1997] 2 NZLR 585, 595 (HC).

⁵⁵ *Blundell v Attorney-General* [1968] NZLR 341 (CA); *Taka v Police* [1996] 2 NZLR 449.

Section 23(2) of the New Zealand Bill of Rights Act 1990 states that everyone who is arrested for an offence has the right to be charged promptly or to be released. “Prompt” implies urgency without requiring immediate action by the police.⁵⁶ Some time may necessarily elapse between arrest and the decision to charge.⁵⁷ For example, a person arrested by police may be searched by the police.⁵⁸ However, the right will be contravened if charging is delayed in order to obtain sufficient evidence of the arrested/suspect’s involvement in the offence.⁵⁹ In *R v Rogers*,⁶⁰ five hours spent detained in a holding cell after arrest and prior to charge was found to be a breach of the appellant’s right to be charged promptly. An arrested person must be brought before a court as soon as possible.⁶¹

Some legislation allows for extended periods of detention by police. For example, police may detain intoxicated persons in a police station for up to 12 hours if other options are not reasonably practicable.⁶² The police also have the power to detain a person up to four hours under the Customs and Excise Act 1996 for the purpose of various inquiries under that Act.⁶³

As in the UK the police are under a continuing obligation to determine whether there is enough evidence to charge a person that has been arrested.⁶⁴ Section 24(a) of the New Zealand Bill of Rights Act 1990 stipulates that everyone who is charged with an offence shall be informed promptly and in detail of the nature and cause of the charge. The level of detail required will vary with the circumstances of the case and the state of the prosecutorial process.⁶⁵

As in the UK a person who is arrested for an offence and is not released must be brought as soon as possible before a court. Section 24(b) of the New Zealand Bill of Rights Act 1990 demands that a person charged with an offence shall be released on

⁵⁶ *R v Gibbons* [1997] 2 NZLR 585 (HC).

⁵⁷ *R v Te Kira* [1993] 3 NZLR 257 (CA).

⁵⁸ Police Act 1958, s 57A(1) and (4).

⁵⁹ *R v Rogers* (1993) 1 HRNZ 282 (CA).

⁶⁰ (1993) 1 HRNZ 282 (CA).

⁶¹ Crimes Act 1961, s 316(5).

⁶² Alcoholism and Drug Addiction Act 1966, s 37A.

⁶³ Customs and Excise Act 1996, s 148.

⁶⁴ *Wiltshire v Barrett* [1966] 1 QB 312 (CA).

⁶⁵ *R v Gibbons* [1997] 2 NZLR 585, 596 (HC).

reasonable terms and conditions unless there is just cause for continued detention. “Unless” has been held by the Court of Appeal to place an onus on the state to demonstrate why it is that the person that has been charged should be denied release.⁶⁶ At common law⁶⁷ and under section 8(1) of the Bail Act 2000 there are three principal grounds for the denial of bail at the pre-trial phase:

- to ensure the attendance of a defendant at trial when there is a genuine and specific flight risk;
- to avert interference with witnesses or evidence when there is a genuine and specific risk of such; or
- to prevent the commission of further offences.

The complainant’s potential fear of the offender⁶⁸ and the seriousness of the offence⁶⁹ are not a legitimate basis to deny bail on their own.

However, where an immigrant is deemed to be a threat to national security or a suspected terrorist and has been arrested the case is referred to the Minister of Immigration who then has to determine whether or not to make a deportation order.⁷⁰ Every person who is arrested must be brought before a District Court Judge as soon as possible, and must in no case be detained for more than 48 hours unless, within that period, a District Court Judge issues a warrant of commitment under section 79 of that Act for the detention of that person in custody.⁷¹ If in respect of any person who is so placed in custody and in respect of whom no warrant of commitment has been issued, the Minister decides not to make a deportation order, the person must be released from custody immediately.⁷² If the Minister of Immigration either decides not to make a deportation order or fails to make such an order within 14 days of the arrest, the person has to be released from custody immediately.⁷³

⁶⁶ *B v Police (No 2)* [2000] 1 NZLR 31, 34 para 8 (CA).

⁶⁷ *Hubbard v Police* [1986] 2 NZIR 738 (HC); *Police v Simeon* [1990] 2 NZLR 116 (HC).

⁶⁸ *P v Superintendent Rimutaka Prison Trentham* (High Court Wellington, CP 258/99, 5 November 1999, Durie J), [2000] BCL 74.

⁶⁹ *B v Police (No 2)* [2000] 1 NZLR 31, 34 (CA).

⁷⁰ Immigration Act 1987, s 75(1).

⁷¹ Immigration Act 1987, s 75(2).

⁷² *Ibid*, s 75(3).

⁷³ *Ibid*, s 79(9)(a).

5. FRANCE

Summary

In France the maximum period of pre-charge detention in terrorism cases is six days.

The Current Law

The normal time limit for ordinary pre-charge detention cannot exceed two days. A judicial police officer may detain a person “against whom there is one or more plausible reasons to suspect that s/he has committed or attempted to commit an offence”.⁷⁴ The initial time-limit for pre-charge detention is 24 hours. It may be extended by another 24 hours under the written authorisation of a District Prosecutor.

The time limit for pre-charge detention for a person suspected to have committed or attempted to commit a terrorist offence cannot exceed four days. There is no general definition of a terrorist offence. Offences which constitute acts of terrorism are listed in article 421-1 to 421-6 of the French Criminal Code. These offences are characterized as acts of terrorism when “they are committed intentionally in connection with an individual or collective undertaking and aim to seriously disturb public order through intimidation or terror”.⁷⁵ When a person is suspected of having committed or having attempted to commit a terrorist offence, the ordinary 48 hour pre-charge detention time-limit (discussed above) may be extended twice, by 24 hours each time.⁷⁶ However, the liberty and detention judge or the investigating judge may directly require an additional extension of 48 hours if justified by the foreseeable length of the investigation.⁷⁷

⁷⁴ Articles 63 (*enquête de flagrance*), 77 (*enquête préliminaire*) and 154 (*commission rogatoire*) of the French Code of Criminal Procedure.

⁷⁵ E.g: wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also the hijacking of planes, vessels or any other means of transport, theft, extortion, and also computer offences, offences committed by combat organisations and disbanded movements.

⁷⁶ Article 706-88 al 2 provides that “these extensions are authorised by a written and reasoned decision, at the request of the District Prosecutor, by either the liberty and detention judge or the investigating judge”; article 706-88 al 3 provides that “the person so held must be brought before the judge ruling on the extension before this decision is taken. The second extension may however, in exceptional cases, be authorised without the person’s prior appearance”.

⁷⁷ Article 706-88 al 5 of the French Code of Criminal Procedure.

The time limit for pre-charge detention for a person suspected to be involved in the organization of an imminent terrorist attack cannot exceed six days.⁷⁸ When “the first elements of the investigation or of the detention itself show that there is a serious risk of an imminent terrorist attack in France or abroad or that the necessities of international cooperation require it imperatively”⁷⁹ the ordinary time-limit for detention (i.e. 48 hours) can be extended:

- by four days, based on the rules expressed above on terrorist offence pre-charge detention; and
- by two days (an initial 24 hours renewable by a further 24 hours) based on the liberty and detention judge’s exceptional decision.⁸⁰

⁷⁸ Minors aged under 18 benefit from a waiver provision in accordance with the Order of 2 February 1945 relating to delinquency of minors. Pre-charge detention time-limits are shortened for minors. However, it seems that minors above 16 could be held in detention for a period not exceeding six days in case of the imminence of a terrorist attack.

⁷⁹ Article 706-88 al 7 of the French Code of Criminal Procedure, implemented by the 23 January 2006 Statute on measures to fight against terrorism.

⁸⁰ Article 706-88 al 7 of the French Code of Criminal Procedure states that the guarantees provided for by article 706-88 al 2, above mentioned, should be respected.

6. GERMANY

Summary

There is no exact equivalent of “charge” in Germany and therefore no exact equivalent of “pre-charge detention”. The closest equivalent is provisional police custody prior to a formal judicial “warrant of arrest” being issued. A person held in provisional police custody must be set free at the end of the day following the day s/he was arrested. A person could therefore be held in provisional police detention for up to 48 hours.

Analysis

When comparing the way suspected terrorists are dealt with in Germany and in the UK one has to bear in mind that the legal proceedings generally differ. There are no exact equivalents to terms such as “charge” in Germany.⁸¹

Article 104 of the German Constitution constitutes the essential prerequisite for any detention and safeguards the fundamental right of personal freedom.⁸² Accordingly, personal freedom of a suspect may be restricted solely on the basis of a formal law. Formal laws for these purposes would include the German Criminal Procedure Act (*Strafprozessordnung*, StPO) as well as the laws of the different Federal States of Germany on public safety and the protection of the public.

The powers to detain a suspect prior to his/her conviction are:

- provisional police custody, pending a judicial hearing;
- detention upon remand, following the issue of an arrest warrant by a judge and pending the trial; and
- detention for public safety reasons under laws of the Federal States of Germany.

These detention powers are considered below. As we explain, provisional police detention is the closest equivalent to pre-charge detention.

⁸¹ After the preliminary investigations which are conducted by the state prosecutor and assisted by police there is either an indictment in court or the proceedings are suspended. The German rules on the detention upon remand do not distinguish between “before and after indictment”, but cover the whole period up until the final conviction by a criminal court.

⁸² Art. 2 para. 2 GG.

Provisional police custody

Under Art. 104 of the German Constitution a person may exceptionally be held in provisional custody by the police during a criminal investigation against the person detained. A judicial hearing must, however, be held without delay and, in any case, no later than the day following the day of the arrest. At the hearing the judge has to either issue an arrest warrant (discussed below) or order the release of the detainee. If no warrant is issued, the person must be released without delay, i.e. immediately, unless there are imperative reasons for suspension. Without a judicial warrant of arrest, a suspect cannot therefore be held for more than a maximum of 48 hours from the point of arrest under the German Constitution.⁸³

Judicial Arrest Warrant

In order to keep a person in detention under the StPO for longer period than the period described above, a judicial arrest warrant is required. An “arrest warrant” (permitting detention in remand) may only be issued if there is:

- a ground for detention in remand;
- no violation of the principle of proportionality; and
- strong suspicion that the person in custody has committed an offence.⁸⁴

Grounds for detaining a person in remand are the risk of flight, an actual flight by the suspect or the risk that evidence would be suppressed.⁸⁵ For some criminal offences (e.g. severe cases of criminal assault, rioting or sexual abuse) there is an additional ground for detention in remand: the danger of repetition.⁸⁶ All of these grounds for detention in remand must be evidenced to the satisfaction of the judge.

The requirement of proportionality will be satisfied if the court decides that the intrusion into personal freedom does not outweigh the severity of the offence in question. The requirement of “strong suspicion” means that the court must find it highly likely that the suspect has committed the crime in question.

⁸³ As an example, a suspect arrested on 1 November 2007 at 00:01 a.m. as well as a suspect arrested on 1 November 2007 at 11:59 p.m. will have to be released on 2 November at 12:00 p.m. at the latest if the arrest has not been confirmed by a judge after an oral hearing.

⁸⁴ According to Sec. 112 para. 2 StPO.

⁸⁵ Sec. 112 para. 2 StPO.

⁸⁶ Sec. 112a StPO.

In cases of severe offences (e.g. preparation of a terrorist act) one needs only establish the “possibility” of a ground for arrest.⁸⁷ However, the prerequisites of strong suspicion and the compliance with the principle of proportionality have to be fulfilled in any case. Beyond this, there is no difference between the prerequisites for arrest and detention on remand with regard to terror suspects and other criminal suspects in Germany.

The following factors suggest that the issue of a judicial “arrest warrant” in Germany is the closest equivalent to “charge” in the UK: the level of suspicion that is needed and the requirement that evidence to support this suspicion is presented to a court. Accordingly, provisional police custody, prior to the issue of an “arrest warrant”, is the closest equivalent to pre-charge detention.

Detention in Remand

Following the issue of an arrest warrant by a judge a person can be detained in remand pending the trial.⁸⁸ Detention in remand is generally limited to 6 months. However, in cases in which the detention is based on the danger of repeated specific severe offences, such as offences against the sexual or physical integrity of the victims or riots, the detention period is generally limited to one year.⁸⁹

A competent Court of Appeal may exceptionally extend a suspect’s detention in remand beyond these periods if it is satisfied that grounds for detention in remand (discussed above) persist.⁹⁰ The German courts apply strict standards when reviewing this. They will not, for example, extend the detention period if they find that the investigation was delayed in any way by the fault of the prosecution. Due to the strict standards of review applied by the courts a detention of more than six months is exceptional.

⁸⁷ Sec. 112 para. 3 StPO.

⁸⁸ Detention upon remand does not require that the prosecution has already decided to initiate a trial on the merits. Instead, a detention is possible, and frequently ordered, during the fact-finding phase of the investigation.

⁸⁹ The offences contained in section 112a StPO.

⁹⁰ Section 121 StPO.

During the detention period the prosecution has to monitor the situation and to release the suspect if the grounds for detention in remand no longer exist. The suspect may also request a judicial investigation and a judge automatically reviews detention after 3 months. In these proceedings the judge verifies whether the detention has to be continued or not.

Detention for Public Safety Reasons

The laws in the German Federal States allow suspects to be detained for public safety reasons, irrespective of whether formal criminal investigations are pending. In these cases, suspects may be detained if there is an imminent risk that a crime will be committed (including a terrorist offence).⁹¹ Different states permit different periods of this kind of detention for public safety reasons. The State of Hessen, for example, has provided for a detention period of up to six days with a court order. The longest period that is permitted is two weeks, e.g. in Bavaria.

⁹¹ Section 32 (1) no. 2 of the Act on Public Safety and Public Order of Hessen.

7. ITALY

Summary

In Italy the maximum period of pre-charge detention is four days.

The Current Law

The freedom of a person is a constitutional principle set out in article 13, paragraph 2 of the Italian Constitution and can be limited only in exceptional cases of necessity and urgency expressly provided by law.⁹²

In this respect, it should be noted that the Italian code of criminal procedure specifies that the freedom of a person can be limited only by provisional measures (*"misure cautelari"*). Such measures can be taken if there is serious evidence of guilt and only in order:

- a) to prevent the person under investigation from interfering with the evidence and the investigation of the offence;
- b) to prevent the person under investigation from running away;
- c) to prevent the person under investigation from committing an offence.⁹³

The police have the power to arrest anyone they suspect of having committed a crime for which a sentence of five years or more can be imposed⁹⁴ (so including terrorist offences).⁹⁵

In doing so, the authorities have to comply with the provisions guaranteeing the freedom of a person, contained in Article 13, paragraph 2 of Italian Constitution⁹⁶ and also in the Italian Code of Criminal Law, as described below.

⁹² Italian Constitution Law, entered into force 1 January 1948.

⁹³ Art. 274, Italian Code of criminal procedure.

⁹⁴ Art. 380-381, Italian Code of criminal procedure.

⁹⁵ It should be noted that Law no. 438, 15 December 2001, has amended the Italian Code of criminal procedure with the introduction of art. 270 bis "terrorist offence" which provides that:

"Anybody who promotes, creates, organizes, leads or finances an association that aim to carry out acts of violence with terrorist finalities (...) is punished with the detention from 7 to 15 years.

Anybody who participate to these associations is punished with the detention from 5 to 10 years (...)".

⁹⁶ Art. 13, paragraph 2 of the Italian Constitution states that, as a guarantee for the individual, each provisional measure shall be communicated within 48 hours to the judicial authority which within 48

The police must take the suspect to a police station as soon as possible, must immediately inform the public prosecutor (*Pubblico Ministero*, hereinafter the “PM”) and within 24 hours must put the person arrested at the PM’s disposal.⁹⁷

The PM can question the detainee. During the police interrogation the prosecuting authority must inform the suspect of the reason and grounds why s/he is being prosecuted and the criminal allegations which s/he faces.⁹⁸

Within 48 hours (measured from the initial time of the arrest) the PM should either: release the person if the person was mistakenly arrested or the arrest was not included in the exceptional cases indicated in Art. 13, Italian Constitution (see above); or ask the judge for the preliminary investigations (*Giudice per le indagini preliminary*, hereinafter the “GIP”) to validate the arrest.⁹⁹

The GIP must fix the hearing for the validation of the arrest as soon as possible, and in any case, within 48 hours.¹⁰⁰ It is at the point that the arrest is validated in the hearing in front of the GIP that the suspect formally knows the charges against him, and the decision is formally made to prosecute the suspect. Therefore under Italian law a person suspected of committing a crime for which an arrest is mandatory, such as is the case for “terrorist offences”, can be detained for no more than four days (48+48) before either being charged or released without charge.

Following the hearing to validate the arrest, the GIP may in addition, if the criteria for the application of provisional measures are met,¹⁰¹ adopt coercive measures, such as pre-trial detention.

Pre-trial detention can be adopted only for crimes for which a sentence of four years or more can be imposed (and therefore can be adopted for “terrorist offences”).¹⁰²

more hours shall validate it. If the deadlines above are not complied with, the measure is intended to be revoked and therefore without effects.

⁹⁷ Art. 386, Italian Code of criminal procedure.

⁹⁸ Ibid Art. 388.

⁹⁹ Ibid Art. 390.

¹⁰⁰ Ibid, paragraph 2.

¹⁰¹ See Art. 273 and 274, Italian Code of criminal procedure as described above.

¹⁰² Art. 280, Italian Code of criminal procedure.

The aim of the detention is to allow the prosecuting authority to gather sufficient evidence during the preliminary investigation phase (which can last for no more than two years).

Article 303, paragraph 1(a), point 3 in conjunction with article 407, paragraph 2(a), point 4 of the Italian Code of Criminal Procedure states that the maximum period for pre-trial detention is one year. This one year period runs from the hearing in which the GIP decides to order pre-trial detention in order to safeguard the investigation and the course of the criminal trial. However, the judge has the authority to grant an extension to the above mentioned period if so requested by the PM under certain circumstances, most notably when there are serious precautionary needs.¹⁰³

¹⁰³ Art. 305, Italian Code of criminal procedure.

8. SPAIN

Summary

The closest equivalent to pre-charge detention in Spain is preventative arrest. In general, the maximum period for which a person can be detained under these preventative arrest powers, before being released or handed over to the judicial authorities, is three days. In relation to suspected terrorist offences, the maximum is five days.

The Current Law

The purpose of preventative arrest is to investigate events that could be considered as a criminal offence. Section 17.2 of the Spanish Constitution¹⁰⁴ provides that preventative arrest cannot last longer than the time necessary to investigate the events that may result in a criminal offence. In any event, the person arrested must be set free or handed over to the judicial authorities within three days. Section 55 does, however, permit longer preventative arrest if the Government declares a “state of emergency” or “siege” or if the activities of armed gangs or terrorist groups are under investigation.¹⁰⁵

According to section 16 of the Spanish Law 4/1981 on the State of Alarm, Emergency and Siege (*Estados de Alarma, Excepción y Sitio*), when the “state of emergency” or “siege” is declared, the preventative arrest can last a maximum of 10 days. However, the judicial authorities must be informed of the arrest within the first 24 hours.

¹⁰⁴ Preventative arrest may last no longer than the time strictly necessary to carry out the relevant investigations; in any event the person arrested must be set free or handed over to the judicial authorities within a maximum period of 72 hours.

¹⁰⁵ The rights recognized in sections 17 and 18, subsections 2 and 3, sections 19 and 20, subsection 1, paragraphs a) and d), and subsection 5; sections 21 and 28, subsection 2, and section 37, subsection 2, may be suspended when a state of emergency or siege (martial law) is declared under the terms provided in the Constitution. Subsection 3 of section 17 is excepted from the foregoing provisions in the event of the declaration of a state of emergency.

2. An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed gangs or terrorist groups. Unwarranted or abusive use of the powers recognized in the foregoing organic act shall give rise to criminal liability as a violation of the rights and freedoms recognized by the laws.

If it is suspected that the person in custody is a member of an armed gang or terrorist group section 520 bis of the Spanish Law on Criminal Procedure allows a 48-hour extension of the preventative arrest. This, therefore, extends the maximum total period of detention to five days in relation to individuals suspected of terrorist offences. However, in order to be effective, this must be immediately communicated to the judicial authorities and authorised by them.

Therefore, according to the relevant Spanish Law, the preventative arrest cannot last more than the period required to clarify the events that are being investigated. As a general rule, three days is the maximum period of the provisional arrest, unless either there is a declaration of “state of emergency” or “siege” (in which case provisional arrest could last a maximum of 10 days) or a member of an armed gang or terrorist group is arrested (in which case provisional arrest could last a maximum of five days).

The power for terror suspects to be held in *incomunicado* detention for up to 13 days has been subject to particular criticism.¹⁰⁶ This should not, however, be confused with pre-charge detention.

¹⁰⁶ Cf Human Rights Watch, “Setting and Example? Counter-Terrorism Measures in Spain”, January 2005, Vol. 17 No. 1(D), p.31. The JCHR has referred to this power in a recent report and, in Liberty’s view, mistakenly confused this issue with the question of pre-charge detention (Twenty-Fourth Report: Counter-Terrorism Policy and Human Rights – 1 August 2006, HL 240/HC 1586, Section 2, Paras 45-76).

9. DENMARK

Summary:

In Denmark the maximum period of pre-charge detention in terrorism cases is three days – as in other criminal cases.

The Current Law:

There is no specific legislation in Denmark on the detention of terrorism suspects. Thus, the normal criminal procedure code on arrest and detention on remand of persons suspected of having committed a crime would be used for terror suspects.¹⁰⁷

Anyone who is arrested by the police must be released as soon as the grounds for the arrest are no longer present. The arrested person shall be brought before a judge within 24 hours after the arrest.¹⁰⁸

If the arrest has been made for an offence for which detention on remand cannot take place, the arrestee shall be released immediately.

If the arrest has been made for an offence for which detention on remand can take place and it is found that the arrestee cannot be released immediately (i.e. due to insufficient information), the court can authorise that the arrest is continued for a further two days, renewed at 24 hour intervals. This, therefore, allows a total period of pre-charge detention of three days.

A terrorism suspect can be detained on remand (i.e. after the person has been charged) when there is a substantiated suspicion that s/he has committed an offence if the offence can result in imprisonment for one year and six months or more, and:

- There are specific reasons to presume that s/he will abscond from the prosecution or the enforcement,
- There are specific reasons to fear that, if at large, s/he will commit another offence of the above described kind, or

¹⁰⁷ Administration of Justice Act (AJA), chapter 69 and chapter 70.

¹⁰⁸ AJA, para. 760.

- There are specific reasons to presume that the accused will impede the prosecution of the case, particularly by removing evidence or warning or influencing others.¹⁰⁹

¹⁰⁹ AJA, para. 762.

10. NORWAY

Summary

In Norway the maximum period of pre-charge detention in terrorism cases is three days.

The Current Law

Pre-charge detention in terrorism cases is regulated by the Criminal Procedure Act of 22 May 1981¹¹⁰ with subsequent amendments. This states that arrested persons must appear before the district court no later than the third day after their detention (i.e. a maximum time limit of three days), at which point the police must present the charge(s) and the reason(s) for keeping the person in custody.

The presiding judge will decide whether there is just cause for keeping the person in custody and may normally order a person be kept in custody for no longer than four weeks before a new court order is needed. However, the time limit may be extended if “the nature of the investigation or other special circumstances indicate that a review of the order after four weeks will be pointless”.

Section 222d of the Criminal Procedure Act, which regulates the “use of coercive measures to prevent serious crimes”, stipulates that the prosecuting authority may in extraordinary circumstances issue an order enabling the police to employ coercive measures in order to prevent serious crime.

Normally, the court will issue an order empowering the police. An order from the prosecuting authority “shall be submitted to a court approval as soon as possible and no later than 24 hours after the coercive measure has been applied”. However, the “coercive measures” listed in 222d do not include making arrests or detaining persons as investigative tools or in order to prevent serious crimes.

A chapter in the Penal Code related to punishing terrorist acts was adopted 7 March 2008 (Penal Code, Chapter 18, *Acts of terrorism or terrorism related acts*). The

¹¹⁰ The Criminal Procedure Act of 22. May 1981, <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf>. See chapters 14 and 17B, especially sections 183 – 185.

chapter does not deal with investigative tools, preventative measures or other procedural matters.

11. RUSSIA

Summary

In Russia the maximum period of pre-charge detention is five days.

The Current Law

The Criminal Procedure Code of the Russian Federation No. 174-FZ of 18 December 2001 (the Code) establishes the general terms of detention.¹¹¹ In accordance with the Code, detention of a suspect by the interrogation body, the interrogator or the investigator is permitted for no more than 48 hours from the moment of the actual detention of the suspect (criminal or terrorist).¹¹² The moment of the actual detention is the moment when the suspect is actually deprived of his/her freedom of movement.¹¹³

The interrogation body, the interrogator or the investigator have the right to detain a person on suspicion of him/her having committed a crime which is punishable by deprivation of freedom if one of the following grounds exists:

- the person is caught red-handed when committing a crime or immediately after having committed it;
- the victims or the witnesses point to the person as the perpetrator of the crime;
- on this person or his/her clothes, near him/her or in his/her premises undoubted traces of the crime are found; and
- if there are other grounds for suspecting the person of having committed a crime s/he may be detained if attempting to flee; if s/he does not have a permanent place of residence; if his/her identity has not been identified; or if the interrogator with the consent of the head of the investigation body, has asked the Court to order the suspect to be remanded in custody.¹¹⁴

The suspect must be released by a decision of the interrogator or the investigator if:

¹¹¹ The assumption for the purposes of this note is that the term pre-charge detention that is used in your request is analogous to the term detention of a suspect under the Russian laws.

¹¹² Item 11 of Article 5 of the Russian Criminal Procedure Code.

¹¹³ Item 15 of Article 5 of the Russian Criminal Procedure Code.

¹¹⁴ Article 91 of the Russian Criminal Procedure Code.

- the suspicion of criminality has not been confirmed;
- there are no grounds for taking him/her into custody; or
- the suspect was detained in violation of the requirements of Article 91 of the Code (described above).

After 48 hours from the moment the suspect was initially detained s/he shall be released unless the Court has remanded him/her in custody pending trial or has extended the term of his/her detention.¹¹⁵

The Court may extend the term of detention for a maximum of a further three days. The Court's decision to do so must be based on additional evidence presented by the interrogation body, the interrogator, the investigator or the prosecutor, establishing that the detention is rightful and reasoned.¹¹⁶ The date and time up to which the term of detention is extended shall be indicated in the Court's writ. The term of detention shall not, therefore, exceed five days.

¹¹⁵ Article 94 of the Russian Criminal Procedure Code.

¹¹⁶ Item 7 of Article 108 of the Russian Criminal Procedure Code.

12. TURKEY

Summary

The maximum period of pre-charge detention in terrorism cases in Turkey is seven days and 12 hours. The 12 hour period is the maximum that is permitted for the transfer of the suspect.¹¹⁷

The Current Law

The Code of Criminal Procedure (“CMK”) governs the pre-charge detention of those arrested on suspicion of being a terrorist or of committing an act of terrorism.¹¹⁸ Legal limitations on the period of time a terrorist suspect can be detained prior to charge run from the time of arrest.

In accordance with article 91.1 CMK¹¹⁹ the period of pre-charge detention is 24 hours with an additional 12 hours permitted for the transfer of the suspect. Under article 91.3 CMK, where a number of people were suspected of involvement in the offence, this 36 hour period can be extended by further periods of 24 hours, up to a maximum of an additional three days (i.e. four days in total with 12 hours for transfer). The detained person has to be notified each time the detention period is extended.¹²⁰

Proceedings for certain offences are instigated in a special criminal court, established in accordance with article 250 CMK. In such cases, the initial pre-charge detention period of 24 hours can be prolonged to 48 hours under article 251.5 CMK. The same powers to extend the period of detention by up to three further days could also apply in this context. Accordingly, in cases before the special criminal court, the maximum period of pre-charge detention is five days and 12 hours for transfer.¹²¹

The CMK includes different rules for “emergency regions” (article 251.5). The same basic limit of one day and 12 hours for the transfer of suspects applies. Under these rules the periods specified under article 91.3 CMK (i.e. the additional time permitted where a number of people are suspect of involvement in the offence) can, however,

¹¹⁷ <http://www.egm.gov.tr/temuh/insanhaklari4.htm>

¹¹⁸ The CMK was amended in June 2005 but no changes were made regarding pre-charge detention.

¹¹⁹ <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm>

¹²⁰ <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm>

¹²¹ <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm>

allow pre-charge detention to be extended for 24 hour periods, up to a maximum of six additional days (i.e. not the normal three days). In such cases, the maximum period of pre-charge detention would, therefore, be a total of seven days and 12 hours for the transfer of the suspect.¹²²

Related Issues

From 1987 to 2002 under the State of Emergency, authorities in the Southeast Region of Turkey had the power to issue circulars which were considered to have the force of law. Under these emergency circulars pre-charge detention periods could be prolonged for as long as required by the security forces. The State of Emergency is no longer in force. Similar state of emergency circulars do, however, remain in place in limited areas in the Southeast Region of Turkey. For example; the Siirt, Hakkari and Şırnak provinces were announced as Temporary High Security Zones (*Geçici Güvenlik Bölgesi*) by the General Staff of Turkey.

¹²² One day under CMK Art 91/1, six days under CMK Art 251/5, and 12 hours for transfer of the suspect .

Annex 1
Original Note Requesting Advice

PRE-CHARGE DETENTION TERRORISM CASES
COMPARATIVE LAW¹²³

Advice Required

A short note of advice on how long a person suspected of committing a terrorist offence can be detained before they are either charged or released without charge. If the concept of “charge” (discussed below) does not exist in your jurisdiction, please describe the closest equivalent and explain any applicable time limits.

The note should ideally be no longer than one page of A4 and should fully cite all sources. The advice is to be used by Liberty (one of the UK’s leading human rights and civil liberties organisations) in its campaign against proposals to further extend the maximum period of pre-charge detention in terrorism cases.

Background

Under UK law persons suspected of committing terrorist offences can be detained for 28 days (increased from 14 days in 2006) before they must be either charged or released without charge.¹²⁴ The Government has recently announced its intention to extend the maximum period of detention beyond 28 days.¹²⁵

Liberty is opposed to further extensions to the maximum time limit of pre-charge detention. In outline, we have three major concerns:

- 1) the injustice of detaining a person for more than a month on the basis of mere suspicion and without providing details of the case against them;
- 2) the fact that the proposals are not necessary as the reasons cited for longer periods of pre-charge detention can be met in more proportionate ways;¹²⁶ and

¹²³ As originally sent to comparative lawyers in each of the countries contained in this report. Each lawyer has provided an update in order for the report to be re-released in June 2010.

¹²⁴ Terrorism Act 2000.

¹²⁵ Cf: <http://security.homeoffice.gov.uk/news-publications/news-speeches/new-ct-strategy>

¹²⁶ For more information on Liberty’s position on the proposals, please see: <http://www.liberty-human-rights.org.uk/pdfs/policy06/hac-terrorism-detention-powers.PDF>

- 3) the fear that the proposals could make us less safe because the injustice will be used to radicalise young Muslims.

The purpose of this research is to demonstrate that the current time-limit in the United Kingdom is already significantly longer than in many other jurisdictions.

Charge

In outline, “charge” is the point between arrest and criminal trial when the prosecuting authority formally advises the suspect that s/he is to be prosecuted and gives him/her the particulars of the criminal allegations s/he will face.

If the concept of charge does not exist in your jurisdiction, we hope that the following brief overview of the point in the UK’s criminal justice process when “charge” occurs will assist you in identifying the closest equivalent.

Arrest:

The police have the power to arrest anyone they suspect of having committing a serious crime including terrorist offences.¹²⁷ Judicial authorisation is not required for the arrest. The arrest can be made for a number of reasons, most notably to allow the prompt and effective investigation of the offence.¹²⁸ At the point of arrest the suspect must be told in very broad terms of the reason for the arrest.¹²⁹ The suspect must be taken to a police station as soon as possible.

Detention at the police station prior to charge:

A suspect may only be detained at the police station without being charged if the police have reason to believe that this is necessary: (a) to secure or preserve

¹²⁷ Section 24 Police and Criminal Evidence Act 1984 (PACE). There is also the power to arrest someone who the police suspect of being in the act of committing or about to commit an offence.

¹²⁸ Section 24 Police and Criminal Evidence Act 1984.

¹²⁹ Code G: Code of Practice for the Statutory Power of Arrest by Police Officers i.e. the relevant circumstances of the arrest in relation to that person's involvement, suspected involvement or attempted involvement in the commission of an offence and in relation to the reasonable grounds for believing that that person's arrest is necessary.

relevant evidence; or (b) to obtain such evidence by questioning him/her.¹³⁰ This is the stage at which the suspect is usually questioned by the police.

In general a person cannot be detained for more than 24 hours without being charged.¹³¹ A senior police officer may, however, authorise the suspect's continued detention without charge for up to a further 12 hours if s/he has reason to believe that this is still necessary to preserve or obtain relevant evidence and the investigation is being conducted diligently and expeditiously.¹³²

A judicial warrant is required to continue to hold the suspect without charge for longer than 36 hours. In most cases a judicial warrant can only authorise a person to be detained for up to a total of 96 hours¹³³ but in terrorism cases the maximum is a total of 28 days.¹³⁴ The court may only issue a warrant if it is satisfied that (i) detention without charge is necessary to preserve relevant evidence or to obtain evidence by questioning the suspect and (ii) that the investigation is being conducted diligently and expeditiously.¹³⁵ In general the suspect has the right to attend the hearings for warrants of detention and has the right to make representation.

Charge:

The police are under a continuing obligation to determine whether there is enough evidence to charge a person in detention.¹³⁶ If they decide they have enough evidence (i.e. sufficient evidence to provide a realistic prospect of the detainee's conviction) they must pass the evidence to the state's prosecution service (the CPS).¹³⁷ The CPS then makes its own assessment of the evidence, decides whether it is in the public interest to charge the person and determines the most appropriate offence with which to charge the suspect.

¹³⁰ Section 37(2) PACE.

¹³¹ Section 41(7) PACE.

¹³² Section 42 PACE.

¹³³ Section 44 PACE.

¹³⁴ Schedule 8 PACE.

¹³⁵ Section 43 PACE.

¹³⁶ Section 37 PACE.

¹³⁷ The Crown Prosecution Service.

When a detainee is charged with an offence s/he must be given a written notice showing particulars of the specific offence(s) with which s/he is charged and including the name of the officer in the case. So far as is possible, the charge must be stated in simple terms and must show the precise offence in law with which the detainee is charged. The notice must begin: "you are charged with the offence(s) shown below". A record must be made of anything a detained person says when charged.

After-Charge:

A person must be released from custody after s/he has been charged unless, inter alia, the officer has reason to believe that continued detention is necessary:

- (a) to prevent him/her from committing an offence;
- (b) to prevent him/her from interfering with the administration of justice or with the investigation of offences or of a particular offence; or
- (c) for his/her own protection.¹³⁸

If a person is not released from custody after charge s/he must be taken to court as soon as possible.¹³⁹ At the initial hearing the court sends the case to trial (in terrorism cases will also involve committing the case to the Crown Court) and decides whether to remand the defendant in custody (i.e. keep them in detention pending the trial) or release the defendant on bail (with or without conditions).¹⁴⁰ In terrorism cases it would not be unusual for a person to be detained for the entire period between charge and the conclusion of the trial.

The need to obtain more evidence, for example by questioning the suspect, is not a valid reason for detention post-charge. Indeed suspects are not in general interviewed by the police after charge.¹⁴¹ Nevertheless, the police can and do

¹³⁸ Section 38 PACE.

¹³⁹ Section 46 PACE.

¹⁴⁰ Section 50(3) Crime and Disorder Act 1998.

¹⁴¹ Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, para 16.5. There are limited exceptions i.e. where necessary for the purpose of preventing or minimising harm or loss to some other person or to the public, for clearing up an ambiguity in a previous answer or statement; or where it is in the interests of justice that the detainee should have put to him, and have an opportunity to comment on, information concerning the offence which has come to light since he was charged.

continue to gather evidence between charge and trial. During this period prosecution and defence lawyers prepare for the trial.

Annex 2

Acknowledgments

Liberty has obtained legal advice from qualified lawyers and academics in all of the jurisdictions¹⁴² covered in this report. The analysis contained and the conclusions reached are based on this advice. We would like to thank the following for providing us with their advice and assistance on a *pro bono* basis:

- Freshfields Bruckhaus Deringer, for providing advice on the law in the United States, France, Russia, Italy, Germany and Spain. Two trainee solicitors from Freshfields (David Howe and Ashley Dunford) also assisted with the compilation of this research. Freshfields Bruckhaus Deringer is a leading international law firm with over 2,400 lawyers in 27 offices around the world.
- Petra Butler, for advising on the law in New Zealand. Dr Butler is a Senior Lecturer and Associate Director of the NZ Centre for Public Law at Victoria University of Wellington, New Zealand. Petra is a member of the New Zealand Association for Comparative Law; Wellington Women Lawyers Association; German-Australasian Lawyers Association; Deutscher Juristinnenbund; Deutsche Gesellschaft fuer Rechtsvergleichung; and Freundeskreis des Deutschen Akademischen Austauschdienstes.
- Peter Vedel Kessing, of the Faculty of Law (Copenhagen University) and the Danish Institute for Human Rights, for advising on the law in Denmark. He is currently working on a project on terrorism and human rights with a specific focus on the right to freedom from torture and arbitrary detention. He has been working with international cooperation on prevention of torture for several years; in the Ministry of the interior and as a deputy judge in a district court in Copenhagen.
- Aage Borchgrevink and Gunnar Ekelove-Slydal, for advising on the position in Norway. Aage is an adviser to and Gunnar the Deputy Secretary General of the Norwegian Helsinki Committee for Human Rights (NHC), Oslo. The NHC monitors and reports on human rights issues in the area covered by the

¹⁴² Legal advice on the law in Australia was originally provided by Edwina MacDonald, formerly the Senior Research Director at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. This advice was updated in July 2010 by Anita Coles, solicitor admitted to practise in Victoria, Australia, and Policy Officer of Liberty; and Sophie Farthing, solicitor admitted to practise in New South Wales, Australia, and Policy Officer of Liberty.

Organization for Security and Cooperation in Europe (OSCE) -- North America, Europe and the former Soviet Union. Aage has been affiliated with the NHC since 1992 as a researcher. Areas of responsibility have included the election observation program, the Balkan program and currently the Russia program.

- Emrah Şeyhanlıođlu, for providing advice on the law in Turkey. Emrah Şeyhanlıođlu is a lawyer and one of the executive board members of the Turkish Human Rights Association (IHD). He is currently doing an MA on the Turkish Criminal Code and graduated from the law faculty in Ankara University, one of the leading universities of Turkey.

Annex 3

An Overview of Alternatives to Longer Pre-Charge Detention

Liberty has consistently suggested better ways of meeting all the Government's arguments for longer pre-charge detention. We are urging the Government to consider these measures as alternatives to extending detention without charge – not in addition to it:

- Lifting the ban on intercept evidence in criminal trials.
- Providing the police and intelligence services with more resources
- Emergency powers in the Civil Contingencies Act 2004 already provide the Government with the option to temporarily extend pre-charge detention for suspects in a genuine terror emergency.